

**Refugee Flow:
A Law and Economics approach**

**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 supranational 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 interpretations⁴ 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 *Ibid.*

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, Germany⁵ and the Netherlands⁶ suspended the application of the “Dublin transfer” (Dublin III Regulation 604/2013) to Greece due to the risk of chain refoulement 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&acname=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 countries¹¹ 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 term¹³ 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 law¹⁵ 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 approach²¹ based on the main case-law of the ECtHR²² 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 2000 Fifty 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 economic³⁰ and HRs³¹ 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 *Ibid.*

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. Roche, 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 Becker³³ 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 community³⁶ (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 issue² 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' bias⁵ – 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 positive⁹ 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 *Ibid.*

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 “owing 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.

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 “owing 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 fled 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 Convention³³ 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.

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 analyzing 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 1989³⁶ 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 uncr 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

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). IIS 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 authors⁵⁰ 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

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' bias⁵⁶ 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 permits⁵⁸ 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,

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 *Ibid.*

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 *Ibid.*

⁶⁹ *Ibid.*

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).

Chapter II

The Geneva Convention of 1951

This chapter analyzes the main Articles of the 1951 Convention Relating to the Status of Refugees through the application of a case-law study and human rights approach in the background of law and economics literature. In addition, concrete examples taken from national constitutions of 27 EU Member States demonstrate the different approaches taken by various national law-makers regarding the crystallization of the right to asylum. Moreover, after exposing some of the reasons for the “refugee market failure” and outlining the cases of State intervention in order to reach a quasi-stable outcome, this chapter presents the refugee burden-sharing through a scheme that can also avoid the Coasean bargaining between countries. In the conclusion, it is shown that the human rights approach and law and economics methods can coexist together. Additionally, this chapter demonstrates that facing the refugee crisis through a regionally-structured system is closer to Pareto optimality compared to the State individual approach or to a global one.

Key words: economic migrant, game theory, human rights approach, massive influx, refugees.

1. Introduction

This chapter examines the main Articles of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) through the application of a case-law study while considering relevant L&E literature. The focus is on interpretations of Article 1 [Definition of the term “refugee”] and Article 33 [Prohibition of expulsion or return (“refoulement”)] of the 1951 Convention. Particular attention is paid to the difference between the terms “economic migrant” and “refugee,” in addition to highlighting the importance of the notion of “safe country” in the case of massive refugee flows.

Moreover, concrete examples taken from national constitutions of 27 EU Member States demonstrate the different approaches taken by various law-makers regarding the constitutional crystallization of the right to asylum. A possible reason for this diversity could be related to the economic effects of accepting refugees since the implementation of refugee rights entails, in short and medium terms, high costs for national budgets.

The 1951 Convention has been the main object of a significant number of writings that have focused on HRs. The HRs interpretation of the 1951 Convention is generally the prevalent approach,¹

¹ Vanheule, Dirk. *Europe and refugees*. Kluwer Law International, 1997

which is also supported by the UNHCR,² the European Council on Refugees and Exile and Amnesty International,³ as well as various scholars.⁴ However, part of the policies taken with regard to the 1951 Convention could also be explained through some insights of the L&E perspective.

The L&E interpretation of historical events of the twentieth century reveals a “market failure” in the refugee management (see Chap. I). As it is well-known, the concept of market failure gives a normative justification to the State’s intervention in the market,⁵ as well as the scope and nature of it,⁶ in order to establish mutually beneficial exchanges for the parties involved.⁷ In other words, the State’s intervention is important the moment that the fulfillment of the “private interest does not lead to efficient use of society’s resources or a fair distribution of society’s goods,”⁸ or when it inadvertently produces externalities, or when it disenfranchises parties through information asymmetries.⁹

These three cases of “market failure” occur in the case of refugee influx. First, the acceptance of all applications of asylum seekers would impact national security and the job market (see Chap. V). This is the circumstance where the full fulfilling the private interest of refugees will negatively impact the resources of the host countries. Second, the individual State behavior toward refugees will create externalities for other countries (see Chap. III). Third, while refugees might have some information regarding the final destination host country (see Chap. IV), in the grand majority of cases, they enter the host countries with false or fraudulent documentation (Point A Conclusion No. 58 (XL) – 1989) (see Chap. I). This is the case of a strategy-proof mechanism,¹⁰ where one party, refugees, has more information than the other party, host countries. As a result, fulfilling refugee interests by also considering the priorities of host countries may still create welfare losses. However, the market

² UNHCR. 2004. Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees; UNHCR. 1993. Executive Committee, General Conclusion on International Protection; UNHCR. 1998. Executive Committee, Conclusion on International Protection; UNHCR. 1979. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

³ European Council on Refugees and Exile and Amnesty International: see European Council on Refugees and Exile, Position on the Interpretation of Article 1 of the Refugee Convention (2000).

⁴ For example, Lambert, Hélène. "The conceptualization of persecution by the House of Lords: Horvath v. Secretary of State for the Home Department." *International Journal of Refugee Law* 13.1-2 (2001): 16; Musalo, Karen, and Stephen Knight. "Steps forward and steps back: Uneven progress in the law of social group and gender-based claims in the United States." *International Journal of Refugee Law* 13.1-2 (2001): 51; Harvey, C. J. "Gender, Refugee law and the Politics of Interpretation." *International Journal of Refugee Law* 12.4 (2000): 680-694.

⁵ Zerbe Jr, Richard O., and Howard E. McCurdy. "The failure of market failure." *Journal of Policy Analysis and Management: The Journal of the Association for Public Policy Analysis and Management* 18.4 (1999): 558-578.

⁶ Weimer, David L., and Aidan R. Vining. *Policy Analysis: Concepts and Practice*. Taylor & Francis, 2017; Hyman, David N. *Public Finance: A Contemporary Application of Theory to Policy*. Cengage Learning, 2014; Procaccia, Uriel. "Crafting a Corporate Code from Scratch." *Cardozo Law Review* 17 (1995): 629.

⁷ Dahlman, Carl J. "The Problem of Externality." *The Journal of Law and Economics* 22.1 (1979): 141-162.

⁸ MacRae, Duncan, and James A. Wilde. *Policy Analysis for Public Decisions*. Brooks/Cole, 1979, p. 13

⁹ Baumol, William J., and Wallace E. Oates. *The Theory of Environmental Policy*, 1988. Englewood Cliffs, NJ (1975).

¹⁰ Kesten, Onur. "School Choice with Consent." *The Quarterly Journal of Economics* 125.3 (2010): 1297-1348; Abdulkadiroğlu, Atila, Parag A. Pathak, and Alvin E. Roth. "Strategy-proofness versus Efficiency in Matching with Indifferences: Redesigning the NYC High School Match." *American Economic Review* 99.5 (2009): 1954-78; Erdil, Ayttek, and Haluk Ergin. "What's the Matter with Tie-Breaking? Improving Efficiency in School Choice." *American Economic Review* 98.3 (2008): 669-89.

failure is a necessary, but not sufficient, justification for public policy intervention¹¹ since the State should also consider the side effects of its policy.¹² Thus, the State's intervention is sufficient when its gains are higher than the losses of its intervention.

At the moment of intervention, the State should consider the advantages and disadvantages of its policy. Free market economists argue that government intervention should be strictly limited.¹³ Among other reasons, they claim that under political pressure, governments might make the wrong decision. Yet, in the case of public goods, the State intervention rate is higher.¹⁴ In the case of a refugee influx, the protection of refugee rights can be considered a public good.¹⁵ On the other hand, in recent years, States have entered into a competition between legal systems that have created externalities for other countries (see Chap. VI). Thus, I suggest that in the case of State intervention, a test of proportionality should also be included: the less-intrusive generic policy should be preferred and incentives to allow the market to correct itself should be created.

In the case of a refugee influx, the State's intervention should consider the two-side matching problem through multi-dimensional feasibility constraints.¹⁶ In more concrete terms, on one side, States should consider protecting the interest of refugees and international obligations to protect and promote the rights of vulnerable groups (1951 Convention). On the other, States shall also consider the refugees' impact on their countries (see Chap. V). In addition, unlike classical two-side matching problems, in the case of a refugee influx, the State's intervention should also take into account other multidimensional constraints: such as the refugees' right to family unification, or their right to health, right to education, right to work, and right to shelter, which are all part of the integration programs and affect local public services.

Since the "refugee market" could not be regulated by itself, a permanent solution was needed: the 1951 Convention and the creation of the UNHCR. However, the historical context of the first part of the twentieth century differs from the events of the 1980s or 1990s (see Chap. I, Sec. 3) as well as the conditions of the new millennium. As a result, in recent decades, each State, in order to maximize its own benefits, has established more restrictive asylum policies. This can be explained using the tools of game theory. In brief, game theory consists of the participation of (at least) two players with (at least) two different choices (called strategies) where the outcome of their decision represents the

¹¹ Wolf, Charles. "A Theory of Non-Market Failures." *The Public Interest* 55 (1979): 114.

¹² Weimer and Vining, note 6.

¹³ Backhouse, Roger E. "The rise of free-market economics: economists and the role of the state since 1970." *History of Political Economy* 37.Suppl 1 (2005): 355-392.

¹⁴ Kalt, Joseph P. "Public goods and the theory of government." *Cato Journal* 1 (1981): 565.

¹⁵ 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.

¹⁶ Aziz, Haris, et al. "Stability and Pareto Optimality in Refugee Allocation Matchings." *Proceedings of the 17th International Conference on Autonomous Agents and MultiAgent Systems*. International Foundation for Autonomous Agents and Multiagent Systems, 2018; Delacrétaz, David, Scott Duke Kominers, and Alexander Teytelboym. "Refugee resettlement." *University of Oxford Department of Economics Working Paper* (2016).

utility or the payoff. The Prisoner's Dilemma game is the most famous example in order to explain the importance of collaboration between players, without which the market sets on inefficient equilibrium. It is also presumed that the player is *bonafide*: the player cares about what happens and can do something about it.¹⁷

The 1951 Convention does not completely fulfill either the interest of refugees or the interest of States.¹⁸ In addition, most countries have historically treated refugee resettlement as purely an administrative issue, without developing systematic transparent policies.¹⁹ Therefore, a proposal, which leads to a “better” outcome, has been presented by the international community: the burden-sharing and minimum standard regime for harmonization.

This chapter has the following structure: Section 2 explores Article 1(A)2 of the 1951 Convention through a case-law study approach by looking at the difference between refugees and economic migrants in addition to examining the application of the concept of “safe country”. While Section 3 gives an overview of the application of the principle of *non-refoulement*, Section 4 analyzes the judicial approach toward international refugee law by examining closely the interpretation of the preamble of the 1951 Convention. Section 5 exposes the different criticisms of the 1951 Convention through an L&E approach. The innovative part of this Chapter stands in the brief L&E interpretation of parts of the 1951 Convention as well as the survey of the different constitutional interpretations within the EU-27. Moreover, by including the different criticisms of the 1951 Convention, it offers a possible solution toward the Pareto optimality by also bearing in mind the side effects of this policy, e.g. the transaction costs.

To sum up, in this chapter, State intervention is considered the constitutional codification of the right to asylum.²⁰ It shows the different approaches to refugee influx by the EU-27 basic laws. In addition, this chapter offers a critical legal analysis of Article 1(2)(A), Article 33, as well as the concept of “safe country” by also offering some brief insights of L&E methods that codify the interests of national States. These insights give an alternative interpretation of the 1951 Convention without eliminating the HRs goal of the 1951 Convention. In addition, the chapter indicates the importance of burden-sharing toward Pareto optimality by pointing out the advantages of an impartial supranational public body and regionally-structure system. Moreover, the chapter underlines that these two types of interpretation – HRs approach and L&E methods – can coexist together.²¹ In other

¹⁷ Hamburger, Henry. *Games as Models of Social Phenomena*. San Francisco: W.H. Freeman and Company.

¹⁸ Aziz, note 16.

¹⁹ Delacrétaz, et al., note 16.

²⁰ It should be mentioned that Chap. III considers the State intervention as the decision to ratify or not the 1951 Convention. This decision will also impact on the national State laws dealing with refugee rights.

²¹ Chen Shi Hai v. Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 308 (Kirby J).

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

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* status³³ 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 law³⁴ 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 Bethlehem. *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 UNHCR⁵³ and case-law⁵⁴ 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 José Guinac Quiej v. Immigration and Naturalization Service.

⁵⁵ *Ibid.*

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

⁶²While 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 jobs⁶⁹ 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.

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 budgeted 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

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 W.J. *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 formed⁸⁴ 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; Menjivar, 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 Tuiitt, 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.

reasons,⁹¹ or during conflicts in which the objective is territorial acquisition.⁹² This might be the case with the Islamic State of Iraq and the Levant (ISIL), although there is no international recognition of this actor. Moreover, in the past, some Kurds from Turkey who immigrated to Germany or during the Franco regime, some Spanish guest workers in France, Germany, and Switzerland might also have been considered economic refugees.⁹³

The simplistic dichotomy between “voluntary economic migrants” versus “involuntary political refugees” has been applied by several countries, such as the US policy of interdiction with respect to Haitian refugees in the early 1980s;⁹⁴ the Vietnamese refugees by Hong Kong in the late 1980s;⁹⁵ or more recently, the Chinese policy to push back thousands of North Koreans.⁹⁶ Moreover, this dichotomy has been used in support of the call for “tougher” measures in respect of asylum-seekers. As a result, several studies suggest that the distinction is “so ingrained in the asylum procedure that interview officials are scarcely aware of it” and thus effortlessly reduce flight motives to economic ones.⁹⁷

The key element in the classification of refugees is the notion of persecution. The traditional literature has underlined persecution in order to exclude the violation of socio-economic rights from the refugee definition.⁹⁸ However, the majority of scholars⁹⁹ and judges,¹⁰⁰ in addition to the UNHCR,¹⁰¹ the Amnesty International, Human Rights Watch¹⁰², and other international organizations,¹⁰³ argue that the 1951 Convention also covers socio-economic rights.

⁹¹ This is the case of displacement arising in Northern Uganda because of the conflict between the government and the Lord's Resistance Army. Fiala, Nathan. *The consequences of forced displacement in Northern Uganda*. Households in Conflict Network, 2009.

⁹² This is the case in the displacement that resulted after Finland ceded a portion of its territory to the Soviet Union following WWII and resettled the population living there. Sarvimäki, Matti; Uusitalo, Roope; Jäntti, Markus (2009) : Long-term effects of forced migration, IZA Discussion Papers, No. 4003, Institute for the Study of Labor (IZA), Bonn, available on-line: <http://nbn-resolving.de/urn:nbn:de:101:1-20090304306>, accessed on April 30th, 2020.

⁹³ Schaeffer, Peter. "Refugees: on the economics of political migration." *International Migration* 48.1 (2010): 1-22.

⁹⁴ Farer, Tom J. "How the international system copes with involuntary migration: Norms, institutions and state practice." *Human Rights Quarterly* 17 (1995): 72; Villiers, Janice D. "Closed borders, closed ports: The plight of Haitians seeking political asylum in the United States." *Brooklyn Law Review* 60 (1994): 841; Haitian Legal Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

⁹⁵ Diller, Janelle Marie. *In search of asylum: Vietnamese boat people in Hong Kong*. Indochina Resource Action Center, 1988.

⁹⁶ Lee, Eric Yong-Joong. "National and International Legal Concerns regarding Recent North Korean Escapees." *International Journal of Refugee Law* 13.1-2 (2001): 142.

⁹⁷ Spijkerboer, Thomas. *Gender and refugee status*. Routledge, 2017.

⁹⁸ Hathaway, James C. "A reconsideration of the underlying premise of refugee law." *International Refugee Law*. Routledge, 2017. 65-119.

⁹⁹ Rens, Georg. *The interpretation of the Charter*. Oxford University Press, Oxford, 2002; Harvey, note 4; Lambert, note 4; Musalo and Knight, note 4.

¹⁰⁰ ICJ Namibia (Legal Consequences) Advisory Opinion (1971) ICJ Rep 31 ('Namibia Case'); UK: Shah [1998] 4 All ER 30, [1998] 1 WLR 74, [1997] Imm AR 584 at 152. This was approved in Sepet [2003] 3 All ER 304 at para. [6]. See also R on the Application of Altin Vallaj v. A Special Adjudicator [2001] INLR 455 at para. 25; Suresh v. Canada (Minister of Citizenship and Immigration) 2002 SCCDJ 8052 at para. 87; Hoxha [2005] 4 All ER 580 at para. 7 (Lord Hope of Craighead).

¹⁰¹ UNHCR. 1990. Executive Committee, Note on International Protection.

¹⁰² Amnesty International Secretary General. 2001. Globalisation: AI and Socio-Economic Rights; Amnesty International, Amnesty International Report. 2004. Building an International Human Rights Agenda: Upholding the Rights of Refugees and Migrants.

¹⁰³ Commission on Human Rights. 2005. Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, UN Doc. E/CN.4/2005/48; Commission on Human Rights. 2000. The Right to Food, UN Doc. E/CN.4/RES/2000/10.

The official position of the UNHCR is that an economic migrant is a person who leaves his country *voluntarily* and *exclusively* due to economic considerations.¹⁰⁴ The use of the word “exclusively” indicates that a person who flees his country for other reasons besides economic motives cannot be automatically denied classification as a refugee. In addition, the UNHCR has specified that sometimes persecution can take the form of economic discrimination or punishment. For instance, the denial of trading rights or excessive taxation to a specific group of society based on their religion or ethnicity is considered persecution as well.¹⁰⁵ A concrete example of it is the case of the Irish during the Great Hunger of the late 1840s.¹⁰⁶ Moreover, some authors have extended the protection against persecutions not only to the violation of economic or social rights but also in cases of denial of cultural rights.¹⁰⁷ Furthermore, a case-law study of citizens leaving their home country due to economic reasons shows that several judges have ruled in favor of refugee status. All cases mentioned above are those when I was analyzing the membership of a specific social group or the case of the members of the Roma community who suffer extensive discrimination in education and employment.¹⁰⁸

Therefore, according to the literature, persecution and economic considerations are not mutually exclusive alternative conditions. Indeed, refugees *might* respond to economic incentives (see Chaps. VI and V).¹⁰⁹ Between others, the two main economic factors that influence the refugee’s choice of destination country are the Gross Domestic Product (GDP) per capita¹¹⁰ and the unemployment rate.¹¹¹ However, the analysis of the economic literature does not provide unanimous results regarding their impact on the choice of destination country (see Chap. IV).

Since the distinction between “voluntary” and “involuntary” is not so clear-cut, several authors have suggested alternative approaches. Some of them suggest a distinction according to the motives;¹¹² others focus on the reason for the movement if it refers to “some doctrine of right”¹¹³ yet

¹⁰⁴ UNHCR, Handbook, note 2, para. 51

¹⁰⁵ UNHCR, Handbook, note 2, para. 63

¹⁰⁶ Zolberg, Aristide R., Astri Suhrke, and Sergio Aguayo. *Escape from violence: Conflict and the refugee crisis in the developing world*. Oxford University Press on Demand, 1989.

¹⁰⁷ Einfeld, Marcus. "Is there a role for compassion in refugee policy." *University of New South Wales Law Journal* 23 (2000): 303.

¹⁰⁸ New Zealand: Refugee Appeal No. 71193/98, RSA, 9 September 1999.

¹⁰⁹ Czaika, note 86. It should take into consideration that according to Thielemann there is no association with economic growth rate. Thielemann, Eiko R., *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration* (November 2003). IIS Discussion Paper No. 9. Available at SSRN: <https://ssrn.com/abstract=495631> or <http://dx.doi.org/10.2139/ssrn.495631>

¹¹⁰ Borjas, George J. "The economics of immigration." *Journal of Economic Literature* 32.4 (1994): 1667-1717; Massey, Douglas S., et al. "Theories of international migration: A review and appraisal." *Population and development review* 19.3 (1993): 431-466; Thielemann, note 109.

¹¹¹ Hatton, Timothy J., and Jeffrey G. Williamson. *Refugees, asylum seekers, and policy in Europe*. Springer, Berlin, Heidelberg, 2006. 249-284; Neumayer, Eric. "Asylum recognition rates in Western Europe: Their determinants, variation, and lack of convergence." *Journal of Conflict Resolution* 49.1 (2005): 43-66; Neumayer, Eric. "Asylum destination choice: what makes some West European countries more attractive than others?." *European Union Politics* 5.2 (2004): 155-180; Holzer, Thomas, Gerald Schneider, and Thomas Widmer. "The impact of legislative deterrence measures on the number of asylum applications in Switzerland (1986–1995)." *International Migration Review* 34.4 (2000): 1182-1216; Thielemann, note 109.

¹¹² Richmond, Anthony H. "Reactive migration: Sociological perspectives on refugee movements." *Journal of Refugee Studies* 6.1 (1993): 7-24. He has established 25 types of different refugee motives.

¹¹³ Zolberg, et al. note 106.

others suggest to test if the person is part of the same group that is denied the identical rights;¹¹⁴ and others suggest to look into the issue of intent.¹¹⁵

By taking into consideration all these abstract differences, it follows that judges shall ascertain refugee status on a case-by-case basis and not abstractly. In other words, it means that *de facto* refugee status is not an *ipso jure* status.

2.2. The Concept of “Safe Country” and the Problem of “Massive Influx”

One of the most common approaches taken by national policies to decrease the ascertainment of refugee status is through the application of the concept of “safe country.” Generally, this concept has been applied not only to refer to refugee citizenship or residence but also in the case of temporary transit.¹¹⁶ In other words, States deny the refugee claims based on the fact that applicants or their families are residing or have transited through a safe country.

According to the UNHCR:

“In determining whether a country is ‘safe’, states should take into account the following factors: its respect for human rights and the rule of law, its record of not producing refugees, its ratification and compliance with human rights instruments and its accessibility to independent national or international organizations for the purpose of verifying and supervising respect for human rights.”¹¹⁷

The ratification of the 1951 Convention and/or of the 1967 Protocol might be considered a rebuttable presumption that a State protects refugee rights.¹¹⁸ However, this is not a conclusive assumption since the individual asylum seeker position should also be considered.¹¹⁹ In contrast, the non-ratification of the 1951 Convention shall be considered as a conclusive legal presumption that a State does not protect refugee rights.¹²⁰

¹¹⁴ Goodwin-Gill and McAdam, note 31.

¹¹⁵ Harding, Jeremy. *The uninvited: refugees at the rich man's gate*. Profile and the London Review of Books, 2000. An Economic migrant are persons fleeing economic degradation are not entitled to the same protection given to refugees. Human Rights Watch, 2001. International Catholic Migration Committee and the World Council of Churches, NGO Background Paper on the Refugee and Migration Interface. The UNHCR has stated that civil and political rights of refugee have been denial. This is considered a ‘violation’ and they are entitled to the international protection. On the contrary, in case of economic migrants, their economic and social rights have been rejected. This is generally viewed as an ‘injustice’. As a result, they are not entitled to the international protection. However, this position has received many critiques. For instance, in case that a national government poison the water or destroy crops in order to oblige certain group of the society to accept their polities. Marcus, David. “Famine crimes in international law.” *American Journal of International Law* 97.2 (2003): 245-281; Zolberg, Aristide R., and Peter M. Benda. *Global migrants, global refugees: problems and solutions*. Berghahn Books, 2001.

¹¹⁶ Cherubini, note 42.

¹¹⁷ UNHCR, Handbook, note 2.

¹¹⁸ UNHCR. 2001. Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures). For instance, the French Conseil d’Etat refused to consider as manifestly unfounded Mr Rogers’ asylum application on the simple ground that, before entering French national territory, he had transited through a state signatory of the Geneva Convention. (CE, Ass., 18 decembre 1996, ministre de l’interieur c/ M. Rogers, n 180856, conclusions M. Delarue)

¹¹⁹ UNHCR, 2001, *ibrid*. The UNHCR has pointed out that this clause has been applied too quickly, without any guarantees. For instance, the French Conseil d’Etat refused to consider as manifestly unfounded Mr Rogers’ asylum application on the simple ground that, before entering French national territory, he had transited through a state signatory of the Geneva Convention. (CE, Ass., 18 decembre 1996, note 126).

¹²⁰ des Places and Deffains, note 45.

The term “safe country” has been applied in three different senses. These divergent interpretations of the same notion indicate dissimilar objectives. The first interpretation of “safe country” is narrow. A State, assuming that the “third safe country” offers similar protection to the one in which the asylum application was made, unilaterally decides the conditions under which the applicant is sent to the “third safe country” where the refugee has the closest links. In this case, destination countries have an “altruistic externality,”¹²¹ which means that States benefit more from knowing that refugees are better off somewhere else rather than accepting them.

The second interpretation of the notion of “safe country” aims to share the burden of refugee claims. States, part of international agreements, designate a safe country between them in order “to distribute” refugee claims among the parties: asylum seekers are sent to the country selected on that basis. The UNHCR highlights the importance of this type of treaty.¹²² Concrete examples of it are the Dublin Regulation between the EU Member States, or the agreement between the USA and Canada.¹²³ In these cases, States are obliged – under international¹²⁴ or EU¹²⁵ laws – to ascertain that refugee claims will be examined by means of a fair procedure in the new country.

The third interpretation of the term “safe country” is to highlight that the country of origin is a safe country. So, while the aim of the first interpretation of the notion of “safe country” was to avoid the refugee’s abuse of rights, the second meaning intends to underline the importance of regional cooperation and the last meaning establishes that the asylum-seeker is not a refugee.

To rationalize the asylum-seeker flow, in September 2015, the EU published a list of “safe countries,”¹²⁶ which is considered a rebuttable presumption.¹²⁷ Although presumptions impact on the incentives of both plaintiff and defendant,¹²⁸ this assumption should not be considered conclusive for

¹²¹ Sudgen, note 48.

¹²² NHCR. 1998. Implementation of the Dublin Convention: Some UNHCR Observations.

¹²³ The US-Canada Safe Third Country Agreement 2002. According to it, a person who entered first the Canada (or USA) cannot apply for asylum in USA (or the Canada) and will be sent away. This agreement has been considered lawful by the Canadian Charter of Rights and Freedoms Federal Court of Appeal of Canada, decision of 29 June 2008, *The Queen v. Canadian Council for Refugees*, Canadian Council of Churches, Amnesty International and John Doe (Canadian Council for Refugees). However, a lower court, considered it as violation of international law. Federal Court of Canada, decision of 29 November 2007, *Canadian Council for Refugees*, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen, on which see S. J. Glen (2007–2008: 587 ff.).

¹²⁴ UNHCR, note 26; UNHCR. 1996. Considerations on the ‘Safe Third Country’ Concept;

¹²⁵ Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national or stateless person (recast).

¹²⁶ The ‘Proposed Common EU List’ are: Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey. All these countries, except Bosnia and Herzegovina and Kosovo are EU candidate country. Therefore, as part of the membership in EU, they have fulfilled the ‘Copenhagen criteria’, which guarantees democracy, the rule of law, human rights and respect for and protection of minorities. More information: European Commission, Safe countries of origin Proposed common EU list, 2015, available on-line <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf> accessed on April 30th, 2020.

¹²⁷ UNHCR, Handbook, note 2.

¹²⁸ Bernardo, Antonio E., Eric Talley, and Ivo Welch. "A Theory of Legal Presumptions." *Journal of Law, Economics, and Organization* 16.1 (2000): 1-49.

two reasons. First, the international¹²⁹ and EU¹³⁰ laws establish that refugee claims shall be adjudicated individually. Second, empirically, in 2014, the EU Member States have granted refugee status to citizens from this “Proposed Common EU List.”¹³¹

The principle of non-*refoulement* is not applied in the case of “mass migrations across frontiers or of attempted mass migrations.”¹³² This codified the national preference brought forward by the Dutch delegate and was approved by the representatives of Italy, Germany, Sweden, France, and Belgium. A simple cost-benefit analysis reveals the States’ position, if faced with a large influx of refugees, due to the extraordinary costs incurred by refugee claims, must include such costs in their national budgets. (e.g. the EU budget allocation for refugees during 2015 and 2016 have increased by more than 200%).¹³³ It should be stated that preparatory work is fundamental to understand the 1951 Convention goal. In addition, the preparatory work of the 1951 Convention is the main focus of the *originalistic* interpretation.¹³⁴

The UNHCR has clarified that the “*mass migrations across frontiers or of attempted mass migrations*” means:

“mass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers”¹³⁵

A narrow *originalist* interpretation can lead to a concern that Article 33 (1) protects national stability at the expense of refugee rights.¹³⁶ Several arguments against this narrow interpretation can be given. First, this paragraph should be interpreted in the spirit of the 1951 Convention, which aims

¹²⁹ The convention of 1961 presumes that refugee claim should be judge individually. In addition, Protocol 4 of ECHR prohibits collective expulsion.

¹³⁰ Article 36 Asylum Procedure Directive states “a third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if ...”

¹³¹ For instance, 23.1% of applications coming from Turkey or 23.1% of applications coming from Albania were well-founded in 2014. More information regarding it: European Commission, note 126.

¹³² Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting.

¹³³ European Commission, note 66.

¹³⁴ Originalist theories attempt to link interpretation to the time when the law was enacted. This style of interpretation brings certainty into law. Within originalist theories there are two different groups: textualism, which focusses on the meaning of words, and intentionalism, which emphasis the drafting history of the bill. Letsas, George. "Strasbourg's interpretive ethic: lessons for the international lawyer." *European Journal of International Law* 21.3 (2010): 509-541.

¹³⁵ UNHCR. 2004. EXCOM Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx No. 100 (LV).

¹³⁶ Conference of Plenipotentiaries, note 132.

to protect refugee HRs.¹³⁷ Second, there is a tendency to apply Article 33 (1) also in the cases of mass migrations across frontiers,¹³⁸ which is also the official position of the UNHCR¹³⁹ and of the EU.¹⁴⁰

In addition, it must be noted that collective expulsion is not prohibited *per sé*. This practice is a violation of HRs only if it does not follow a careful and objective individual assessment.¹⁴¹ This would be the case: 1) if the authorities have not put in place any procedure to identify the expelled aliens,¹⁴² 2) where the employees carrying out the expulsion were unqualified to conduct individual interviews,¹⁴³ and 3) where expulsion orders were drawn up in exactly the same terms for all the aliens concerned.¹⁴⁴ This has been established in both Article 1 of Protocol No. 7¹⁴⁵ and Article 4 of Protocol No. 4,¹⁴⁶ which are procedurally similar.¹⁴⁷

3. The Principle of Non-Refoulement

This section examines Article 33 of the 1951 Convention in relation to Article 1(A)(2) of the 1951 Convention and other international treaties as well as its historical interpretation. The aim of this Section is to show the evolution of the interpretation of Article 33 as well as its limitations since this principle is not absolute.

The principle of *non-refoulement* is considered the most important rule in the 1951 Convention. Article 33 establishes:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of the territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

¹³⁷ Goodwin-Gill and McAdam, note 31.

¹³⁸ Cherubini, note 42. In contrary: Nepal’s rejection of asylum-seekers from Tibet in 2011 (Hathaway, note 98); or Tanzania and other neighboring African countries’ rejection of asylum-seekers from Rwanda in 1995 (Juma, Monica Kathina. *Asylum and the Politics of Humanitarian Assistance in East Africa*. Cambridge University Press, 2000); or Macedonia’s rejection of refugees from Kosovo in 1999 (Barutciski, Michael, and Astri Suhrke. “Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing.” *Journal of Refugee Studies* 14.2 (2001): 95-134.

¹³⁹ UNHCR. 1981. Executive Committee Conclusion on protection of asylum-seekers in situations of large-scale influx No. 22 (XXXII); UNHCR. 1981. Executive Committee Conclusion on temporary refuge No. 19 (XXXI), 1981, para. a); UNHCR Executive Committee Conclusion on international cooperation, note 143.

¹⁴⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

¹⁴¹ ECtHR, Application 7011/75.

¹⁴² ECtHR, Application No. 27765/09 para. 185.

¹⁴³ *Ibid.*

¹⁴⁴ ECtHR, Application 51564/99, para. 62.

¹⁴⁵ Article 1 of Protocol No. 7 states: ‘1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security’.

¹⁴⁶ Article 4 of Protocol No. 4 states: ‘Collective expulsion of aliens is prohibited.’

¹⁴⁷ Schokkenbroek, Jeroen. *Theory and Practice of the European Convention on Human Rights*. Oxford. 2006.

The prohibition of non-*refoulement* has also been recognized in Article 7 of the International Covenant on Civil and Political Rights and in Article 3 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

Article 33 uses similar terminology as Article 1(A)(2). Indeed, the phrase “race, religion, nationality, membership of a particular social group, or political opinion” is identical. Moreover, the phrase “frontiers of the territories” implies a country of origin or habitual residence (the term used in Article 1(A)), in addition to “threatened” that evokes a “fear of persecution.”

In the first years of the 1951 Convention’s life, denial of entrance at the frontier continued to be the prevailing practice. This practice was based on a historical interpretation of rules: the Swiss delegate stated in the preparatory work of the 1951 Convention that the principle of non-*refoulement* “could not . . . be applied to a refugee who had not yet entered the territory of a country.”¹⁴⁸

However, this type of practice is not legal since the 1951 Convention is meant to recognize the refugee status and to protect their rights. To achieve this goal, States should admit asylum-seekers, at least temporarily, since they have the implicit right to reside in the host country until their process of ascertaining has been completed. This approach has been confirmed by several scholars,¹⁴⁹ the UNHCR,¹⁵⁰ the General Assembly of UN,¹⁵¹ and by other regional organizations.¹⁵² However, some countries have denied the right to a temporary residence by expelling migrants who had crossed the border illegally.¹⁵³ Some examples of it include Jordan and Syria when they were faced with a massive influx of fleeing Iraqi refugees, or Pakistan when faced with large numbers of Afghans. However, it should be mentioned that none of these countries have signed either the 1951 Convention or the 1967 Protocol.

Moreover, some official legal documents imply that the principle of non-*refoulement* is not applicable outside the national territory,¹⁵⁴ while others suggest that this principle (since it is part of the general principle of the rule of law) is suspended in international zones.¹⁵⁵ The US Supreme Court

¹⁴⁸ UNHCR. 1990. The Refugee Convention, 1951, The Travaux Préparatoires analyzed with a Commentary by Dr Paul Weis

¹⁴⁹ Hurwitz, Agnes, and Agnès G. Hurwitz. *The collective responsibility of states to protect refugees*. Oxford University Press on Demand, 2009; Hathaway, James C., and William S. Hicks. "Is There A Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear." *Michigan Journal of International Law* 26 (2004): 505; Coleman, note 28; Lauterpacht and Bethlehem, note 32; Goodwin-Gill and McAdam, note 31; In contrast: Grahl-Madsen, note 36; Calamia, Antonio Marcello. *Ammissione ed allontanamento degli stranieri*. A. Giuffrè, 1980.

¹⁵⁰ UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; EXCOM. 1997. Conclusion on Safeguarding Asylum No. 82 (XLVIII); UNHCR. 2004. EXCOM General Conclusion No. 90 (LV).

¹⁵¹ UN. 1997. the Declaration on Territorial Asylum.

¹⁵² Organization of African Unity Convention Governing Refugee Problems; Asian-African Legal Consultative Organization; European Convention on Human Rights and the Committee of Ministers of the Council of Europe in 1967.

¹⁵³ Goodwin-Gill, et al., note 31.

¹⁵⁴ USA regarding refugees coming from Haiti: Executive Order 12.324 of 29 September 1981 and Executive Order 12.807 of 24 May 1992.

¹⁵⁵ For instance, this theory has been used by the USA government concerning the ‘extraterritoriality’ of its base at Guantanamo.

also held that Article 33(1) is not applicable extraterritorially.¹⁵⁶ However, these policies have been criticized by the ECtHR,¹⁵⁷ the UNHCR,¹⁵⁸ the UN Committee,¹⁵⁹ as well as other international organizations¹⁶⁰ and scholars.¹⁶¹ Additionally, it is also claimed that Article 33 has codified an international *ius cogens*,¹⁶² which is binding for all States, including countries that have not signed the 1951 Convention.

The evolution of this principle should be highlighted. While before the so-called indirect *refoulement* – a host State sending refugees to a third country that will repatriate them to their origin countries – was not prohibited,¹⁶³ the current jurisprudence¹⁶⁴ and legal scholarship¹⁶⁵ agree that Article 33(1) also prohibits the so-called indirect *refoulement*.

The principle of non-*refoulement* is not absolute. Although the 1951 Convention applies a HRs approach,¹⁶⁶ the national interest of protecting national security has also been codified: Article 1C-F establishes the clauses excluding specific categories of individuals from the concept of refugee, and Article 32 allows the expulsion of a refugee lawfully present in the territory of the host country under certain conditions. National governments have traditionally linked migration policy with issues of national security.¹⁶⁷

Article 33(2) states:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

¹⁵⁶ US Supreme Court, decision of 21 June 1993, *Sale v. Haitian Centers Council (Sale)*, in United States Reports.

¹⁵⁷ ECtHR, Application nos. 3394/03, 55721/07, and also confirmed by the application no. 27765/09

¹⁵⁸ UNHCR, Advisory Opinion on the Extraterritorial, note 96; EXCOM, Conclusion on Safeguarding Asylum, note 150; UNHCR EXCOM General Conclusion No. 90 (LV), note 150.

¹⁵⁹ Committee against Torture, United States, CAT/C/USA/CO/2, 25 July 2006.

¹⁶⁰ Human Rights Committee set up under the International Covenant on Civil; and Political Rights and Inter-American Commission on Human Rights.

¹⁶¹ Goodwin-Gill and McAdam, note 31; 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; 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 (2003): 741.

¹⁶² Poynder, Nick. "Recent Implementation of the Refugee Convention in Australia and the Law of Accommodation to International Human Rights Treaties." *Australian Journal of Human Rights* 2.1 (1995): 75-90; Goodwin-Gill and McAdam, note 31; Greig, Donald W. "The protection of refugees and customary International Law." *The Australian Year Book of International Law* Online 8.1 (1983): 108-141. In contrast: Hathaway, note 98.

¹⁶³ In the preparatory work of the 1951 Convention the indirect *refoulement* was explicitly rejected (Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, especially pp. 4–5)

¹⁶⁴ ECtHR, note 103.

¹⁶⁵ Goodwin-Gill, et al., note 31; Wouters, note 26.

¹⁶⁶ Vanheule, note 1.

¹⁶⁷ Mogire, Edward. "Refugee realities: Refugee rights versus state security in Kenya and Tanzania." *Transformation* 26.1 (2009): 15-29; Adamson, Fiona B. "Crossing borders: International migration and national security." *International Security* 31.1 (2006): 165-199; Bigo, Didier. "Security and immigration: Toward a critique of the governmentality of unease." *Alternatives* 27.1_suppl (2002): 63-92. Also, see Chap. V.

The British and French delegates requested this sub-section.¹⁶⁸ It includes two different cases. First, a refugee can be sent back to a country of origin if there are reasonable grounds that he constitutes a security threat in the host country. It should be mentioned that Article 33(2) requires only “reasonable grounds” and not “full proof,” which is a higher standard.¹⁶⁹ Nevertheless, it prevents arbitrary expulsion,¹⁷⁰ as well as prospective danger for the future¹⁷¹ of the host country.¹⁷²

Second, refugees may also be expelled from that territory for reasons of national or public security while remaining as refugees under the definition of article 1.¹⁷³ From the interpretation of articles 1C and 33(2) it derives that the procedure of revocation of refugee status differs from the application of the exception to non-*refoulement*. Thus, refugees may have their status revoked without automatically being expelled. However, they can be expelled in cases where the refugee status has been denied from the beginning.

Although Articles 1F¹⁷⁴ and 33(2) seem to apply the same *ratio*, they prescribe different functions. While Article 33(2) protects outsourcing State national security, Article 1F (denial of the Convention’s applicability) has a *punitive* function. After the terrorist attacks of September 11, 2001, the difference between these articles has become blurred. In fact, in the US practice, there is a tendency to not separate between these two different proceedings since, according to the American courts’ decisions,¹⁷⁵ having been convicted of a particularly serious crime *per se* makes the refugee a danger for the community. In contrast, in Australia, the UK, Germany, France, and Spain, national laws have established some rebuttable presumptions.¹⁷⁶

From a purely legal perspective, these two proceedings should be considered dissimilar because they have been established in two different parts of the 1951 Convention. In addition, presumptions should only be taken into account and should not be considered conclusive because this will change the burden of proof by making it a *probatio diabolica* for refugees.

¹⁶⁸ Conference of Plenipotentiaries, note 132.

¹⁶⁹ Grahl-Madsen, *Atle. Commentary on the 1951 Refugee Convention (Articles 2-11, 13-37)*. UNHCR, 1997.

¹⁷⁰ Lauterpacht and Bethlehem, note 32.

¹⁷¹ *Ibid.*; Grahl-Madsen, note 169.

¹⁷² Article 33(2) is not applied in case of prospective future danger for a third country Lauterpacht and Bethlehem, note 32.

¹⁷³ High Court of Ireland of 17 December 2010, *Artur Abramov v. Minister of Justice, Equality and Law Reform (Abramov)*.

¹⁷⁴ The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations. Article 1F of the 1951 Convention is examined in Chap. V, Sec. 4.1.

¹⁷⁵ US Court of Appeals, Tenth Circuit, decision of 8 February 1995, *Nader Ghloum Al-Salehi v. Immigration and Naturalization Service*; US Court of Appeals, Tenth Circuit, decision of 20 November 2009, *N-A-M v. Attorney General*.

¹⁷⁶ Section 91U Australia’s Migration Act; in UK, Section 72 of the 2002 Nationality, Immigration the Asylum Act; in Germany, Section 25 (3) *Bersetzung durch den Sprachendienst des Bundesministeriums des Innern (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory)*; in France, L-213-1 Code de l’entrée et du séjour des étrangers et du droit d’asile (Code of entry and residence of foreigners and asylum), which is really broad since it considers the ‘public order’; Section 8 Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria (Law ruling the right of asylum and subsidiary protection.).

From an L&E perspective, the burden of proof entails several effects. Specifically, legal presumptions emphasize game theory. As stated in the introduction, in the framework of game theory, each player aims to maximize his or her own utility resulting in a strategy. Two rational strategies can result with inefficient solution which can be improved through cooperation. In this case, one player (ie. the refugee) may use false or fraudulent documentation (Conclusion No. 58 (XL) – 1989) by leading to a strategic behaviour. Thus, evidentiary rules (i.e. initial presumptions or burdens of proof) are an important mechanism for striking an optimal balance.¹⁷⁷

Indeed, legal presumptions impact on the incentives of both plaintiff and defendant, in addition to influencing how the judge considers the evidence offered by the counterparty:¹⁷⁸ strong pro-defendant presumptions foreclose lawsuits and strong pro-plaintiff have the opposite effect. Moderate presumptions give equilibria between shirking and suit depending on: 1) social importance of effort; 2) the costs of filing suit, which is often a credible deterrent for defendants; and, 3) the comparative advantage that diligent agents have over their shirking counterparts in supporting their defenses.

In summary, Article 33 of the 1951 Convention is one of the most important principles established in this international treaty. Although this principle has some limitations, (i.e. Article 33(2) or Article 1F of the 1951 Convention) this principle is also applicable to national borders. Nevertheless, national State interest has been protected due to the fact that Article 33 is not absolute as well as through the burden of proof.

4. The Judicial Approach toward International Refugee Law

This section offers an interpretation of the 1951 Convention through the application of the Vienna Convention on the Law of Treaties of 1986 (the Vienna Convention), which codifies international customary law.¹⁷⁹

Article 31 of the Vienna Convention states:

“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

¹⁷⁷ Bernardo, note 128.

¹⁷⁸ *Ibid.*

¹⁷⁹ Japan, Taxes on Alcoholic Beverages, WTO Doc AB-1996-2 (1996) s. D (Report of the Appellate Body); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility) [1995] ICJ Rep 6 at 21; Territorial Dispute (Libyan Arab Jamahiriya/Chad) [1994] ICJ Rep 6 at 21.

From an L&E perspective, the interpretation of rules in good faith decreases transaction costs and opportunism.¹⁸⁰ As it is well-known, the transaction costs depend on the sociocultural similarities or dissimilarities among countries or on the number of countries involved.¹⁸¹ The 1951 Convention has been ratified by 75% of all countries, which have different socio-cultural values. In addition, the L&E literature shows that good faith is the opposite of opportunism.¹⁸² In the case of the 1951 Convention, the opportunism is the behavior of a free rider,¹⁸³ which is highly incentivized by the current version of international refugee law.¹⁸⁴

From a purely legal perspective, the fact that the title of this article has been written in the singular, the “General Rule of Interpretation,” denotes that judges should take into consideration both the literal meaning and the object and purpose of the treaty.¹⁸⁵ Several scholars,¹⁸⁶ judges,¹⁸⁷ and the UNHCR¹⁸⁸ support a universal interpretation of the 1951 Convention. According to the Vienna Convention, the universal interpretation is based on the *object and purpose* of the international agreement.

A possible method to understand the *object and purpose* of the international agreement is to look into the preamble of the 1951 Convention.¹⁸⁹ The preamble of the 1951 Convention states:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms.

¹⁸⁰ Posner, Richard A. *Economic analysis of law*. Wolters kluwer law & business, 2014.

¹⁸¹ Just, Richard E., and Sinaia Netanyahu. *Conflict and cooperation on trans-boundary water resources*. Springer Science & Business Media, 2012.

¹⁸² Mackaay, Ejan, and Violette Leblanc. «The law and economics of good faith in the civil law of contract» prepared for the conference of the European Association of Law and Economics, Nancy, France, 18-20 September 2003.

¹⁸³ Bouteillet-Paquet, Daphné. *L'Europe et le droit d'asile*. Editions L'Harmattan, 2001; Des Places and Barbou, note 45.

¹⁸⁴ Başak, K. A. L. E. "The Limits of an International Burden-Sharing Approach: The Syrian Refugee Protection Crisis and Its Consequences on Turkey's Refugee Policy." *PERCEPTIONS: Journal of International Affairs* 22.3 (2017): 55-84.

¹⁸⁵ Refugee Appeal No. 70366/96, RSAA, 22 September 1997, p. 24. Refugee Appeal No. 72668/01, RSAA, 5 April 2002, para. 157, James C. Hathaway, note 98.

¹⁸⁶ Foster, Michelle. *International refugee law and socio-economic rights: refuge from deprivation*. Cambridge University Press, 2007; Hathaway, James C. *The law of refugee status*. Butterworths, 1991.

¹⁸⁷ New Zealand: Refugee Appeal No. 74665/03, note 43, at para. 38; UK: Horvath v. Secretary of State for the Home Department [2000] Imm AR 205 (Ward LJ); UK: R v. Secretary of State for the Home Department, ex parte Robinson [1998] QB 929, [1997] 4 All ER 210, [1997] 1 WLR 1162, [1997] Imm AR 568 ('Robinson'); Australia: Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another (1996) 190 CLR 225 (Kirby J) ('Applicant A').

¹⁸⁸ UNHCR. 1996. Report on International Protection, UN Doc. A/AC.96/527; UNHCR Executive Committee, General Conclusion on International Protection, note 2.

¹⁸⁹ UK: Golder v. United Kingdom (1975) ECtHR (ser A); (1979) 1 EHRR 524 at para. 34 ('Golder'); Inter-American Court of Human Rights: Advisory Opinion No. OC-1/82, Inter-American Court of Human Rights, 24 September 1982; USA: United States, Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (1998) (Report of the Appellate Body).

According to it, the interpretation of the 1951 Convention should be developed in the context of international HRs standards.¹⁹⁰ As stated in the introduction, the HRs approach to the 1951 Convention is indeed the prevalent approach:¹⁹¹ the UNHCR,¹⁹² other international bodies,¹⁹³ and the most of the academic scientific community¹⁹⁴ have also supported it.

There are two main critiques of the HRs approach. First, a large body of right violations might be compared with persecution.¹⁹⁵ Second, by applying this approach, judges shall also determine the liability of a certain State as responsible for the violation.¹⁹⁶

Responding to these critiques, scholars have argued that the infringement of HRs does not mean an automatic violation of the 1951 Convention: violations of HRs must be classified on the grounds of race, religion, nationality, membership of a particular social group or political opinion.¹⁹⁷ In reply to the second critique, the aim of the 1951 Convention is to protect refugee rights and not to establish the liability of a State.¹⁹⁸

In contrast, another part of the preamble states:

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

After looking closely at the preamble, it could also be interpreted that the purpose of the 1951 Convention is to support States as opposed to bestowing rights upon individuals.¹⁹⁹ This perspective aligns with the codification of national States' interests in international refugee law. In accordance with this part of the preamble, in the 1980s, the UNHCR highlighted the destabilizing effect of refugees (see Chap. I, Sec. 3). Moreover, the refugee influx might have an economic impact on national security or in the job market as well as might increase the possibility of terrorism acts (see Chap. V).

These two types of interpretations can coexist since they are not mutually exclusive.²⁰⁰ States' cooperation is fundamental in order to enhance refugee rights and to share the burden of refugee

¹⁹⁰ Foster, note 186; Hathaway, note 149.

¹⁹¹ Vanheule, note 1.

¹⁹² UNHCR, Handbook, note 2; UNHCR Executive Committee, General Conclusion on International Protection, note 2; UNHCR Executive Committee, note 2; Guidelines on International Protection, note 2.

¹⁹³ European Council on Refugees and Exile and Amnesty International, note 3; Inter-Conference Working Parties: Human Rights Nexus Working Party, Human Rights Conference Report.

¹⁹⁴ Harvey, note 4; Lambert, note 4; Storey, Hugo, and Rebecca Wallace. "War and peace in refugee law jurisprudence." *American Journal of International Law* 95.2 (2001): 349-366; Musalo and Knight, note 4.

¹⁹⁵ Steinbock, Daniel J. "Interpreting the refugee definition." *University California Los Angeles Law Review* 45 (1997): 733. The same approach has been taken by Lady Justice Hale of the English Court of Appeal in the Horvath [2000] Imm AR 205, note 163.

¹⁹⁶ Nathwani, Niraj. *Rethinking refugee law*. Martinus Nijhoff Publishers, 2003.

¹⁹⁷ UK: Court of Appeal in *Amare v. Secretary of State for the Home Department* [2005] All ER (D) 300 at para. 27.

¹⁹⁸ New Zealand: Refugee Appeal No. 74665/03, note 43.

¹⁹⁹ Australia: Applicant A and Another, note 163.

²⁰⁰ Chen Shi Hai, note 21.

protection.²⁰¹ During the 1990s, several attempts, such as the Schengen Implementation Convention and the Dublin Regulation, were drafted to organize cooperation among the EU Member States in the area of migration. These were attempts to centralize the EU asylum policy.²⁰²

Moreover, when a court applies the 1951 Convention, it should also consider “any relevant rules of international law applicable in the relations between the parties” (Article 31(3)(c) Vienna Convention). Therefore, there is a need for a “systematic integration” of the international legal system.²⁰³ For this reason, the court should also ponder customary international law, other treaties, and *soft-law* documents. This is important because scholars,²⁰⁴ judges,²⁰⁵ and the UNHCR²⁰⁶ agree that an evolutionary approach to treaty interpretation should be applied.

The application of customary international law has been considered fundamental in refugee law not only by the legal scientific community,²⁰⁷ but also by judges.²⁰⁸ However, since customary international law is general, it can involve an extensive investigation of sources outside the treaty, which leads to disagreement.²⁰⁹

International treaties shall be applied if: 1) a country is a monist system that considers international law an integral part of national law without the need of the law of ratification (i.e. the Netherlands);²¹⁰ 2) a country has ratified it (i.e. Article 34 Vienna Convention); 3) if the international treaty is considered a codification of *ius cogens*;²¹¹ or 4) if the country has implicitly accepted or tolerated the principles established in the international agreement²¹² (the so-called implied or presumed intent).²¹³ Some of these international agreements are the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Racial Discrimination.

²⁰¹ des Places and Deffains, note 45.

²⁰² Deakin, Simon. "Legal Diversity and Regulatory Competition: Which Model for Europe?." *European Law Journal* 12.4 (2006): 440-454.

²⁰³ Koskenniemi, Martti, and Päivi Leino. "Fragmentation of international law? Postmodern anxieties." *Leiden Journal of International Law* 15.3 (2002): 553-579.

²⁰⁴ Ress, note 99..

²⁰⁵ ICJ Namibia, note 100; UK, Shah, note 100; UK, 3 All ER 304, note 100; UK, [2001] INLR 455, note 100; UK, [2005] 4 All ER 580, note 100.

²⁰⁶ UNHCR. 1990. Executive Committee, Note on International Protection.

²⁰⁷ Sands, Philippe. "Treaty, custom and the cross-fertilization of international law." *Yale Human Rights and Development Law Journal* 1 (1998): 85; Marceau, Gabrielle. "A Call for Coherence in International Law—Praises for the Prohibition Against" Clinical Isolation" in WTO Dispute Settlement." *Journal of World Trade* 33.5 (1999): 87-152.

²⁰⁸ UK: Sepet [2001] EWCA Civ 681; UK: Sepet [2003] 3 All ER 304, note 100.

²⁰⁹ Sands, note 207.

²¹⁰ Heringa, Aalt Willem, and Philipp Kiiver. "Constitutions compared. An introduction to comparative constitutional law." *Ius Commune Europaeum* 104 (2012); Von Bogdandy, Armin. "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law." *International Journal of Constitutional Law* 6.3-4 (2008): 397-413.

²¹¹ Marceau, note 207; Koskenniemi, Martti. *Fragmentation of international law: difficulties arising from the diversification and expansion of international law: report of the Study Group of the International Law Commission*. Erik Castren Institute, 2007.

²¹² Pauwelyn, Joost. "The Role of Public International Law in the WTO: How far can we go?." *American Journal of International Law* 95.3 (2001): 535-578.

²¹³ Schokkenbroek, Jeroen. "Francis A. Jacobs and Robin CA White, The European Convention on Human Rights Oxford." *Common Market Law Review* 36.4 (1999): 852-855; Rosenne, Shabtai. *Developments in the Law of Treaties, 1945-1986*. Cambridge University Press, 1989.

Regarding the application of *soft-law* documents, the doctrine has argued that this viewpoint is not coherent with the legal positivism approach because *soft-law* is not a source of international law.²¹⁴ However, their importance has been highlighted by case-law²¹⁵ and legal scholars.²¹⁶ This is a direct result of the fact that within the UN it is quite challenging – or maybe impossible – to publish legally binding documents where different countries pursue dissimilar political interests.

To sum up, this section offered an interpretation of the 1951 Convention by examining its preamble. It showed that although the HRs approach is its main goal, some parts of the preamble underlined the State's national interests.

5. Critics of the 1951 Convention: The Law and Economics Approach

This section focuses on the criticism of the 1951 Convention by applying a L&E approach. After explaining the different types of games which can be applied in the case of refugee influx, this section proposes a possible solution that decreases losses in the total social welfare employing a game theory approach among States. By taking into account the most recent refugee crisis, this chapter focuses on the game between the EU Member States. Notably, facing the refugee crisis through a regionally-structured system approximates Pareto optimality more closely in comparison to both State individual approach, as well as a global one. The regional approach has some advantages compared to the global system: the Member States share similar cultural, social-economic, and legal values. In addition, the costs of transfer within burden-sharing are lower. This section, as well as Chap. VI, reveals the benefits of the EU approach to refugees compared to the individual State's behavior.

The 1951 Convention has received several criticisms by L&E scholars since it fulfills neither the interest of refugees nor the interest of States.²¹⁷ As stated above (see Sect. 2), the 1951 Convention does not fully protect refugee interests for two main reasons. First, the persecution cases (ie. race, religion, national origin, political opinion, or membership in a particular social group) are expansive and ambiguous. Second, each State has the power to ascertain the refugee status as well as provide different rights in its territory. On the other side, the 1951 Convention does not fully protect the State's interests since it incentivizes the free-rider problem.²¹⁸

²¹⁴ Higgins, Rosalyn. "Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting." *European Human Rights Law Review* (1996): 570-582.

²¹⁵ New Zealand: Re R, Refugee Appeal No. 59/91, Refugee Status Appeals Authority, 19 May 1992, at 20.

²¹⁶ Aust, Anthony. *Modern Treaty Law and Practice*. Cambridge University Press, 2013; Hathaway, note 98; Brandl, Ulrike. "Soft Law as a Source of International and European Refugee Law." *Europe and Refugees: a Challenge* (1997): 203-226.

²¹⁷ Aziz, note 16.

²¹⁸ Başak, note 184.

The case of asylum seekers, can be structured as games between States,²¹⁹ between the asylum country and the international organization aiding refugees²²⁰ or between the origin country and the international organization assisting refugees.²²¹ Scholars agree that in the case of a game between the asylum seeker or origin country and the international community, the theory of movement offers a better explanation than game theory since it also considers the different threats and the probability those threats are acquired in reality.²²²

Game theory between States can be seen in the case of restrictive asylum policies within the EU Member States in the 1990s, which also led to the “race to the bottom” (see Chap. VI, Sec. 3.2.). For example, 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. In this case, players face a Prisoner Dilemma: cooperation or no cooperation with other countries. An example of a game between asylum country and the international community can be seen in the case of the Northern Macedonia during the Kosovo crisis of 1999. In this case, the two strategies for the country of asylum was whether or not to allow refugees to enter the country while the two strategies for NATO was whether or not to limit itself to financial assistance or also include asylum assistance.²²³ Lastly, an example of a game between the country of origin and the international community is the case of the Eritrea refugee crisis of the 1990s. The two strategies for the country of origin were whether or not to allow repatriation of its own citizens while the two strategies of the UNHCR were whether or not to provide assistance to refugees.

²¹⁹ Vink, Maarten. "The Limited Europeanization of Domestic Asylum Policy: EU Governments and Two-Level Games." *First YEN Research Meeting on Europeanisation, Workshop IV 'Europeanisation of Domestic Policies*. 2001.

²²⁰ Williams, John HP, and Lester A. Zeager. "Macedonian Border Closings in the Kosovo Refugee Crisis: A Game-Theoretic Perspective." *Conflict Management and Peace Science* 21.4 (2004): 233-254; Zeager, Lester A. "Negotiations for Refugee Repatriation or Local Settlement: A Game-Theoretic Analysis." *International Studies Quarterly* 42.2 (1998): 367-384.

²²¹ Zeager, Lester A., and Johnathan B. Bascom. "Strategic Behavior in Refugee Repatriation: A Game-Theoretic Analysis." *Journal of Conflict Resolution* 40.3 (1996): 460-485.

²²² Zeager, note 220; Stone, Randall W. "The Use and Abuse of Game Theory in International Relations: The Theory of Moves." *Journal of Conflict Resolution* 45.2 (2001): 216-244.

²²³ Please note that in the picture, the I use as strategies of the NATO: assistance or no assistance because this better shows the Prisoner Dilemma's goal and can be applied also in other cases rather than the case of North Macedonia-NATO.

| | | State B | |
|---------|-----------------------|---------------------|--------------------------|
| | | <i>Cooperation</i> | <i>No Cooperation</i> |
| State A | <i>Cooperation</i> | Best outcome | |
| | <i>No Cooperation</i> | | Dominant Strategy |

Figure 1: Game Between States

| | | UNHCR | |
|-------------------|------------------------------|---------------------|--------------------------|
| | | <i>Assistance</i> | <i>No Assistance</i> |
| Country of Asylum | <i>Refugee Protection</i> | Best outcome | |
| | <i>No Refugee Protection</i> | | Dominant Strategy |

Figure 2: Game Between Country of Asylum and International Community

| | | UNHCR | |
|-------------------|------------------------|---------------------|--------------------------|
| | | <i>Assistance</i> | <i>No Assistance</i> |
| Country of Origin | <i>Repatriation</i> | Best outcome | |
| | <i>No Repatriation</i> | | Dominant Strategy |

Figure 3: Game Between Country of Origin and the International Community

In all these cases, we can observe a prisoner dilemma type of game, whereas pursuing the common good by cooperation (agreement) may lead to a better outcome for both players; nevertheless, all players aim to maximize their utility, which is called the dominant strategy. Figure

1-3 offer an overview of the dominant strategy: no cooperation between States; no assistance with no asylum protection; and no assistance with no repatriation. In all these cases, defection dominated cooperation by creating losses in the total social welfare.

However, when we take into consideration the fact that in the case of refugee influx, the international refugee regime only deals with the consequences and not with the causes of a problem, which add to the losses in the total social welfare, contrary to the case of the Prisoner's Dilemma, States might have little to gain from cooperation.²²⁴

Narrowing the focus on the game between the EU Member States, the literature has included the current version of the Dublin Regulation²²⁵ (ie. the principle of first EU entry country) based on a Prisoner's Dilemma with unequal participants,²²⁶ which "goes squarely against the type of substantive cooperation,"²²⁷ by providing States (and also refugees) incentives to not comply with these rules²²⁸ since while the EU has an interest to avoid secondary movements within the EU, the first EU country of entry does not have any incentive to register their applications.

In the current refugee crisis, the ECtHR²²⁹ gave the destination country a *de facto* liability, even if a transfer system would not necessarily be illegal. Moreover, during the summer of 2019, some national courts, such as in Germany²³⁰ and in the Netherlands,²³¹ suspended the application of the "Dublin transfer" to Greece. This means that States are inclined to defect by maximizing their individual benefits, also by (national or international) judges. In addition, *de facto*, the refugees' interests are taken into consideration. This should entail the reduction of refugee adaptation costs (see Chap. IV, Sec. 5.2.).

In more concrete terms, in general, a player, an EUMS, does not aim to cooperate. The payoff of it, is the absence of an increase of national budget for the protection of persecuted individuals.²³² A concrete example of this equilibrium is the non-compliance of Hungary, Poland, and the Czech

²²⁴ Suhrke, Astri. "Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action." *Journal of Refugee Studies* 11.4 (1998): 396-415.

²²⁵ 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)

²²⁶ Noll, Gregor. "Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union." *German Year Book International Law* 40 (1997): 405.

²²⁷ 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.

²²⁸ Lutz, P., Kaufmann, D., Stünzi, A., & Egli, S. (2016). *Gefangen im Dublin-Dilemma: Wie kann die europäische Asylpolitik reformiert werden?* (Diskussionspapier NR.32/November 2016). This model has been criticized by Koeppinghoff. Koeppinghoff, Georg. "Why Dublin Fails: The Prisoner's Dilemma in Europe's Responsibility-Allocation for Refugees." *Available at SSRN 3229767* (2018).

²²⁹ ECtHR, Application no. 29217/12.

²³⁰ Administrative Court of Munich, 17 July 2019, M 11 S 19.50722, M 11 S 19.50759.

²³¹ Dutch Council of State, 17 July 2019, 201902302/1/V3.

²³² For instance, the EU budgets for refugees during 2015 and 2016 have increased by more than 200%. European Commission. 2016. *Eu budget 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.

Republic with the relocation scheme decided by the Council in 2015,²³³ which was confirmed by the CJEU in September 2017.²³⁴ If the game is played only by two EUMSs, its equilibrium is the non-co-operation, which is also the dominant strategy. However, as demonstrated in Sect. 2, some EUMSs might decide to cooperate, although the counterplayer decides to not cooperate. Eventually, this is the case of national lawmakers who think in long terms: for instance, in 2015, Germany opened its borders for Syrian refugees by considering the positive impact that they might have on the ageing population or in economic sectors where native citizens do not wish to work.

Last, the best outcome would be the cooperation of all EUMSs. In order to increase this result, by also considering that this game theory is done with multiple players in a sequential component, in May 2016, a “new” version, the Dublin VI, was published.²³⁵ This version also received much criticism since it does not give a solution to the previous criticisms from either a HRs approach, according to scholars,²³⁶ NGOs,²³⁷ and also the European Parliament²³⁸, nor from an L&E perspective. The main critics focus on the HRs approach since the new proposal establishes harsh sanctions on refugees; it highlights the absence of any concrete change to the existing system; and, it goes against the main case-law of the ECtHR.²³⁹

From an L&E approach, I point to two main problems. Without going into details, although the system remains similar to Dublin III,²⁴⁰ the “new” proposal affects the different payoffs. First, Article 5 (Consequences of non-compliance) establishes refugee sanctions since it aims to punish secondary movements within the EU. These sanctions might affect refugee decisions to be registered in the first EU country rather than to continue the secondary movement. However, this should be tested in reality. Second, Article 3 (Access to the procedure for examining an application for international protection), the so-called pre-Dublin procedure, underlines the importance of the EU-Turkey-statement of 2015 and 2016. According to it, EU Member States, have the obligation – Dublin III stated the option – to send the asylum seeker to a third safe country. The new mandatory pre-procedure increases total registration costs. But there is no EU institution liable to control its

²³³ 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

²³⁴ Joined Cases C-643/15 and C-647/15.

²³⁵ Proposal for a Regulation of The European Parliament and of the Council 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)

²³⁶ Maiani, Francesco. *The Reform of the Dublin III Regulation*. Parlement Européen, 2016;

²³⁷ European Council on Refugees and Exiles. 2016. The Road out of Dublin: Reform of the Dublin Regulation (Policy Note #02), available on-line: <https://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-02.pdf>, accessed on April 30th, 2020; ProAsyl. 2016. Reform der Dublin- Verordnung (Dublin-IV, COM (2016) 270), available on-line: https://www.proasyl.de/wp-content/uploads/2015/12/Stellungnahme_Dublin-IV-PRO-ASYL.pdf, accessed on April 30th, 2020.

²³⁸ European Parliament. 2017. Reform of the Dublin System. Briefing: EU Legislation in Progress, available on-line: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%29586639_EN.pdf, accessed on April 30th, 2020.

²³⁹ European Council on Refugees and Exiles, note 234; ProAsyl, note 234.

²⁴⁰ *Ibid.*

application. Thus, EU Member States – except border EU Member States, such as Greece, Italy, and Spain – have no incentives to apply it.

In Chapter VI, the thesis proposes a burden-sharing controlled by a centralized body, e.g. the EU (see Chap. VI, Sec. 3.1.) in addition to the EU minimum standard regime for harmonization (see Chap. VI, Sec. 4.2) as a possible solution that could improve the outcome of the game between the EU Member States.

To give a general overview of the problem from a L&E approach, three issues should be briefly mentioned. First, burden-sharing might increase transaction costs (see Chap. VI, Sec. 3.3.), which *per se* constitutes a “market failure.”²⁴¹ In case of an international refugee influx, States have an incentive to establish inefficient laws because they aim to maximize their interests, without thinking of externalities they create, especially political costs toward other neighboring States (see Chap. III). The thesis underlines the advantages of a centralized authority ruling asylum law that will decrease transaction costs as well as (negative) externalities (see Chap. VI). In “pure” legal terms, an independent and impartial agency monitoring it will decrease the problem of “abuse” of powers of more powerful neighbors.

Second, burden-sharing shall have clear and objective distribution keys as well as pre-established rules. Indeed, the draft German proposal of 8 September 1994²⁴² and the European schemes for relocation and resettlement²⁴³ established clear and objective distribution keys. This approach avoids considering the refugees’ choice of a final destination country. As stated in Chap. IV, some refugees choose their final destination asylum countries. Nevertheless, it should be mentioned that in the case of the EU minimum standard regime for harmonization (see Chap. VI, Sec. 4.2.), refugees’ requests can be taken into consideration when States compete with each other by attracting some groups of refugees. Moreover, these rules shall be established *ex-ante* and not *ex-post*:²⁴⁴ a cautious State would rather block access for refugees than trust the outcome of this *ad-hoc* procedure.²⁴⁵ The concept of “veil of ignorance” (see Chap. III, Sec. 2) and globalization might explain the interest of all States to enter in the burden-sharing regime: States may rationally prefer to face small and predictable costs rather than bearing the costs of a large unpredictable (maybe unstoppable) refugee inflows in the future.

²⁴¹ Zerbe and McCurdy, note 5.

²⁴² The Draft-German proposal was based on three key distributors: a) the percentage of the total Union population; b) the percentage of Union territory; and c) the percentage of the Union’ GDP.

²⁴³ The key distributors are: a) the size of the population (40%); b) the total GDP(40%); c) the average number of spontaneous asylum applications and the number of resettled refugees per 1 million inhabitants over the period 2010-2014 (10%) as it reflects the efforts made by Member States in the recent past; and d) the unemployment rate (10%).

²⁴⁴ Paragraph 5 of the Draft-German Proposal states that the member states must first decide an appropriate range of measures through prior agreement on principles for distributing refugees.

²⁴⁵ Noll, note 226.

Third, a perfect outcome (e.g. an outcome that fully respects the interest of refugees and protects the interest of locals) may not exist.²⁴⁶ In addition, a stable outcome will become difficult or impossible to reach while the refugee crisis goes on or when the number of asylum seekers increases,²⁴⁷ under the hypothesis that there exist heterogeneous priorities within different States.²⁴⁸ A possible solution might be the quasi-stable outcome, which accounts for not only the interest of locals but also the under usage of local services.²⁴⁹ This is why the draft-German proposal of 8th September 1994 and the European schemes for relocation and resettlement²⁵⁰ also considered them.

To sum up, in the case of a refugee crisis, the dominant strategy is the no-cooperation. In order to improve it, harmonization, as well as burden-sharing in a regionally-structure system might be a solution, which are considered in Chap. VI of this thesis. Indeed, in recent years, the EU has moved toward this strategy.

6. Conclusions

The 1951 Convention Relating to the Status of Refugees reflects a HRs approach. However, parts of its rules can also be explained through L&E methods as also reflecting national interests. The externalities caused by the continued flow of refugees that negatively impact on political agendas of different governments have been also highlighted by various documents published by the UNHCR Executive Committee during the 1980s.

The L&E approach is emphasized in both Article 1 [Definition of the term “refugee”] and Article 33 [Prohibition of expulsion or return (“refoulement”)] of the 1951 Convention. First, in order to create disincentives for refugees to seek asylum protection, persecuted individuals shall *objectively* prove the “well-founded” fear. Second, international protection can be asked only from outside the residence country. This leads to a decrease in administrative and eventual judicial costs determining the merits of their claims to refugee status.²⁵¹ In simple words, the asylum proceeding procedure will not start if the persecuted individual is not outside the residence country, except that judges will apply a HRs approach. The same *ratio* is used in the case of non-application of the 1951 Convention in

²⁴⁶ Delacrétaz, et al., note 16.

²⁴⁷ McDermid, Eric J., and David F. Manlove. "Keeping Partners Together: Algorithmic Results for the Hospitals/Residents Problem with Couples." *Journal of Combinatorial Optimization* 19.3 (2010): 279-303. The stable outcome could be possible if the priorities of localities are identical, which in the concrete world would be difficult.

²⁴⁸ Delacrétaz, et al., note 16.

²⁴⁹ *Ibid.*

²⁵⁰ The key distributors are: a) the size of the population (40%); b) total GDP(40%); c) average number of spontaneous asylum applications and the number of resettled refugees per 1 million inhabitants over the period 2010-2014 (10%) as it reflects the efforts made by Member States in the recent past; and d) unemployment rate (10%).

²⁵¹ Jastram, Kate. "The Kids Before Khadr: Haitian Refugee Children on Guantanamo: A comment on Richard J. Wilson's Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo." *Santa Clara Journal of International Law* 11 (2012): 81.

international areas. However, this practice has been criticized by the international community. Third, in the case of expulsion, Article 32 establishes some legal presumptions, which raises the focus on game theory.²⁵² These presumptions underline the State preferences to protect their national security. Fifth, according to the preparatory work of the 1951 Convention, Article 33 is not applied in the case of massive refugee flows since the protection of refugee rights entails high economic costs.

Although the 1951 Convention applies a “human rights intent,”²⁵³ part of its rules may be explained through an economic analysis of refugee law. These two types of interpretations can coexist.²⁵⁴ Indeed, States’ cooperation is fundamental in order to enhance refugee rights and to share the burden of refugee protection²⁵⁵ by having a centralized and impartial entity that can monitor its implementation by also limiting Coasean bargaining, reducing transaction costs, and considering sovereignty costs (see Chap. VI).

²⁵² Bernardo, et al. note 128.

²⁵³ Goodwin-Gill and McAdam, note 31.

²⁵⁴ Chen Shi Hai, note 21.

²⁵⁵ des Places and Deffains, note 45.

Chapter III

“Push” Factors upon Ratification and Compliance with the 1951 Convention

With regard to the protection of human rights, the international system has moved beyond State values toward respecting and protecting human values. Given the economic impact on the national law of refugee protection, the following two questions are addressed: 1) why do States sign the Convention Relating to the Status of Refugees (the 1951 Convention), and 2) why do States comply with it? The current literature does not offer a concrete answer to these questions. The 1951 Convention shares similarities with human rights treaties, but at the same time, it differs from them since it creates externalities within the asylum laws of a State. Thus, these questions may find an answer by considering input from various scholars who have critically examined these aspects from an economic and human rights perspectives. Moreover, by emphasizing the importance of the WTO model for trade liberalization, this chapter questions if it is possible to build a WTO model for international refugees. This research question might be answered by uncovering the differences between trade and asylum policies not only by taking into account public opinion and political support for the ratification of international treaties but also by analyzing the application of the main WTO principles to international refugees.

Key words: compliance, ratification, refugee’s protection, reputational costs, WTO model.

1. Introduction

With regard to the protection of HRs, the international system has moved beyond State values toward respecting and protecting human values.¹ However, the protection and promotion of refugee rights, which is also part of human rights protection, has a direct impact on the national budget,² especially in short and medium terms (see Chap. II, Sect. 2). International cooperation not only involves a loss of “legislative power”³ in a certain area of law (which I define them as sovereignty costs) but often requires costly policy adjustments.⁴ Although the refugee status is an *ipso jure* status, States spend

¹ Henkin, Louis. "International law: politics and values." *Developments in International Law* 18 (1995).

² European Commission. 2016. "An Economic Take on the Refugee Crisis: A Macroeconomic Assessment for the EU", available online: https://ec.europa.eu/info/sites/info/files/file_import/ip033_en_2.pdf accessed on April 30th, 2020.

³ Moravcsik, Andrew. "The origins of human rights regimes: Democratic delegation in postwar Europe." *International Organization* 54.2 (2000): 217-252.

⁴ Goldsmith, Jack L., and Eric A. Posner. "Moral and legal rhetoric in international relations: a rational choice perspective." *The Journal of Legal Studies* 31.S1 (2002): S115-S139; Holmes, Stephen, and Cass R. Sunstein. *The cost of rights: why liberty depends on taxes*.

more on human recourses.⁵ To ascertain refugee status there is a need on a case-by-case basis for administrative and eventual judicial proceedings. These proceedings are costly not only because they involve economic capital (e.g. offices for public employees or new courts) but also human capital (e.g. an increase in the number of public employees) in addition to indirect costs for the formation of State employees and judges.

Given the economic impact on national law, this chapter addresses the following two questions: 1) why do States sign the Convention Relating to the Status of Refugees (the 1951 Convention), and 2) why do States comply with it? In relation to the 1951 Convention, the literature on international L&E does not provide concrete answers to these questions. However, these questions may find an answer from various scholars who have critically examined these aspects from an economic⁶ and human rights⁷ perspective. The 1951 Convention shares similarities with human rights treaties, but at the same time, it differs from them since it creates externalities within the immigration laws of a State.⁸

More concretely, the individual's choice entails positive or negative externalities for third countries because it directly affects the flow of migration.⁹ For instance, determinations of good social welfare or low taxes on refugee-claimants have a direct positive correlation with the flow of migrants. Refugees are more likely to *choose* countries that have fewer requirements for accepting their applications. On the contrary, in the case of restrictive policies, persecuted individuals will *choose* other States that have increased public expenditures for the benefit of refugees. For example, the French asylum reform of 1991 resulted in an increase of asylum seekers moving to Germany (see Chap. IV).¹⁰

This chapter has the following structure: Sections 2 and 3 answer the two main research questions. Section 2 focuses on the main reasons for the ratification of the 1951 Convention by examining the concept of the "veil of ignorance." These factors have been divided into three groups

WW Norton & Company, 2000; Posner, Richard A. "Creating a legal framework for economic development." *The World Bank Research Observer* 13.1 (1998): 1-11.

⁵ Jaeger, Gilbert. "Refugee Asylum: Policy and Legislative Developments." *International Migration Review* 15.1-2 (1981): 52-68..

⁶ 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. Roocke, and Peter N. Barsboom. "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.

⁷ Salehyan, 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, note 1.

⁸ Salehyan, Idean. "The externalities of civil strife: Refugees as a source of international conflict." *American Journal of Political Science* 52.4 (2008): 787-801.

⁹ Bubb, Ryan, Michael Kremer, and David I. Levine. "The economics of international refugee law." *The Journal of Legal Studies* 40.2 (2011): 367-404.

¹⁰ Rotte, R., Vogler, M., Zimmermann, K.F. 1996. Asylum migration and Policy coordination in Europe, Discussion Papers, Munchener Wirtschaftswissenschaftliche Beitrage, 96-11, Juli 1996.

for presentation purposes only. Section 3 analyzes the reasons for the compliance with the 1951 Convention (ie. the three Rs: reciprocity, retaliation, and reputation) by quantifying the retaliation costs when fundamental HRs are violated by national States. Greece and Italy are brought forth as examples to quantify the non-compliance with asylum protection as part of the EU or international communities.

Section 4 studies the refugee influx through a L&E approach by investigating the gains of international cooperation on refugee flow along the lines of the WTO model for trade. Through a literature review of previous studies, public opinion of refugees is uncovered. This section also differentiates between trade and asylum protection by showing that while the movement of goods or capital is driven by comparative advantage, the refugee movement is driven by absolute advantage. The Section discusses the WTO model for refugees because while at the EU level, the free movement of goods, services, capital and persons is assured, at the international level, under certain conditions, priority is given to the exchange of trade rather than to the free movement of persons or to the liberalization of refugee movement. Thus, it is interesting to better investigate at the international level this differentiation.

The originality of this chapter does not rest in the literature review *per se*, but also in the application of its results to the case of the 1951 Convention, which is a “hybrid” version in the incorporation of both the protection of refugee HRs as well as the codification of national interests (see Chap. II). Based on the first part of this chapter, Section 4 calls for a WTO model for the refugee liberalization movement. A thorough search of the relevant literature did not yield any other academic paper that has neither reviewed and applied the literature to the ratification/compliance of the 1951 Convention, nor attempted to propose a WTO model for the refugee liberalization movement.

In summary, the national governments of host countries do not have any interest in the liberalization of the refugee movement, not only because there is a lack of reciprocity with the refugees’ origin countries but also due to the absence of public consent in the host countries. However, the creation of (negative) externalities for other countries directly impacts the (political) cost-benefit analysis of States by modifying their self-interest behavior.

2. Ratification Factors of the 1951 Convention: the “Veil of Ignorance”

This section puts forward the following “push” factors which contribute towards State ratification of the 1951 Convention: 1) historical context; 2) geographic position; 3) democratic institutions; 4) expression of an ideology; 5) reputation of newly created States; 6) non-consequential treaty and 7) flexible clauses. In addition, uncertainty plays an important impact on these variables.

The costs of ratification for States when ratifying the 1951 Convention is low: the 1951 Convention does not require a modification of national law and it gives States a high level of discretion on adopting detailed rules for the ascertainment of the refugee status (see Chap. II, Sec. 2). The same argument cannot be upheld when referring to the question of compliance: this chapter shows that the costs of compliance are – from an economic approach – higher than the costs of non-compliance. On the other hand, non-compliance creates negative externalities for the political agenda of other States,¹¹ which may also have an impact on the relationship between States. To internalize these political costs, States have to increase their cooperation with other States in addition to not behave as fully rational actors that maximize their net benefits by creating negative externalities for other States.

When States ratify, they deal with uncertainty. One of the most important concepts explaining the public choice in case of uncertainty is the “veil of ignorance.”¹² This concept was developed for the first time by John Rawls and is especially used in constitutional L&E¹³ literature.¹⁴ Although this chapter does not focus on constitutional public choice, this notion is briefly examined since it may be useful to better understand the “push” factors for the ratification of the 1951 Convention.

Through applying the concept in constitutional literature, it seems that States choose to ratify the 1951 Convention because they are uncertain about their own individual position in the future, e.g. they might belong to a minority group of countries that may produce persecuted individuals who need international protection.

From a social sciences context, the concept of uncertainty is understood in a variety of ways. The traditional approach is the absence of information about the future.¹⁵ This view is further emphasized if mitigated by the past bad experience (e.g. war costs).¹⁶ Another perspective of viewing uncertainty is considering the social transitions.¹⁷ In the case of the 1951 Convention, democratic institutions are one of the “push” factors for ratification (see Sect. 2.2.). Indeed, the social transformation happened during the 1960s and 1970s in Western Europe and during the 1990s in the

¹¹ Bubb et al. note 9.

¹² Rawls, John. *A theory of justice*. Harvard university press, 2009.

¹³ In contrast, according to some authors the conjectures of veilonomics are unsatisfactory at the theoretical level and empirically unsupported (Voigt, Stefan. "Veilonomics: on the use and utility of veils in constitutional political economy." *Behind a Veil of Ignorance?*. Springer International Publishing, 2015. 9-33)

¹⁴ Rawls, note 12.

¹⁵ The traditional approach about uncertainty - it is a lack of information among constitutional drafters about the future – is considered important in the case of the German Constitution. Strauß, Agnes. "Testing the “Veil of Ignorance” Hypothesis in Constitutional Choice: Evidence from the German Grundgesetz." *Behind a Veil of Ignorance?*. Springer International Publishing, 2015. 135-153.

¹⁶ The connection between uncertainty for the future and previous adverse effects of particular constitutional rules is in the case of the Greek constitution. Tridimas, George. "Constitutional Convulsions in Modern Greece." *Behind a Veil of Ignorance?*. Springer International Publishing, 2015. 169-185.

¹⁷ The social transformation was considered fundamental in the constitutional decision regarding Estonia in 1992 (Raudla, Ringa. "The Thickness of the Veil of Uncertainty and Its Effects on Constitution-Making in Post-communist Transition: The 1992 Constitution of Estonia." *Behind a Veil of Ignorance?*. Springer International Publishing, 2015. 203-221) and USA in 1787 (de Clercy, Cristine. "Uncertainty and the General Interest in the American Constitution: Testing the “Veil of Ignorance” Hypothesis in Constitutional Choice." *Behind a Veil of Ignorance?*. Springer International Publishing, 2015. 85-101).

ex-Communist countries. This argument coincides with the ratification years of the 1951 Convention: from 1952 to 1978 in the Western democratic countries, and during the 1990s, for the majority of the countries forming part of the Warsaw Pact of 1955. A third position dealing with uncertainty is to establish rules that last longer or forever, which become more difficult to repeal.¹⁸ Indeed, the 1951 Convention does not provide room for its revision.¹⁹

Lastly, international treaties entail sovereignty costs (i.e. the loss of legislative power in a certain topic). But, in the case of the 1951 Convention, the sovereignty costs are low since in this Convention the reference to international authority is absent and all the (twenty-one) references to authorities refer to national authorities of contracting States. States are more likely to ratify international treaties with weak obligations (e.g. low retaliation costs) because States can adapt international commitments to the respective countries' particular needs.²⁰ In addition, States have the discretion to decide the specific rules to the ascertainment of refugee status (see Chap. II, Sec. 2).

To sum up, this section studies some of the most important factors for the ratification of the 1951 Convention. It must be noted that these "push" factors are not completely independent from each other. Depending upon the State of departure, one/some of these factors is/are more important than others. Although from the States' perspective, these "push" factors are to be taken into consideration as a whole or as a majority. For presentation purposes, these "push" factors have been organized in groups.

2.1. Historical Context and Geographic Position

The historical context is one of the important factors that "push" States to sign the 1951 Convention. This variable is also strongly connected with the geographic position of a State. Before WWII, States aimed to maximize their own benefits. To them, individuals were considered incidental or indirect beneficiaries and sometimes not beneficiaries at all.²¹

This system did not produce any long-term benefits. Particularly, it resulted in human loss and severe undermining of citizen's rights.²² In fact, such behavior has contributed to the outbreak of several wars bringing high costs for the populations. For example, as Japan was not a self-sufficient country that could cover all the necessary supplies for its own population, one of the main drivers of

¹⁸ Buchanan, James M., and Gordon Tullock. *The calculus of consent*. Vol. 3. Ann Arbor: University of Michigan Press, 1962.

¹⁹ Article 45 of the 1951 Convention establishes the possibility of revision, which refers to the ratification of the single contracting State and not to all the 1951 Convention.

²⁰ Bernauer, Thomas, et al. "On Commitment Levels and Compliance Mechanisms-Determinants of Participation in Global Environmental Agreements." *British Journal of Political Science* 54.3 (2010): 401 – 419.

²¹ Henkin, note 1.

²² *Ibid.*

the Japanese government to enter into the Southeast Asia wars before WWII was the possession of land and resources outside its own territory.²³

From a political science standpoint, WWII is considered as a political flux in which new opportunities for institutional change were presented.²⁴ The creation of international organizations would seek to prevent not only the return of nationalist governments but also avoid future wars.²⁵ Thus, after WWII, international cooperation was considered an efficient strategy to avoid war costs and reduce transaction costs.²⁶ Several international organizations were also established, such as the International Monetary Fund (1944), the United Nations Educational, Scientific and Cultural Organization (1945), the General Agreement on Tariffs and Trade (1947), the World Health Organization (1948), and the North Atlantic Treaty Organization (1949).

A State is not likely to sign the 1951 Convention if it is confronted with potential future wars in the region which will have a direct effect on its population and economy. For instance, while the East European countries signed the 1951 Convention in the 1990s, Serbia, a successor²⁷ of Yugoslavia,²⁸ ratified it in 2001. This raises the hypothesis that during the 1990s, the Yugoslavian government was aware of the potential ethnic wars and the possible internally displaced persons. During the 1990s, States, including such as Yugoslavia, were aware that the interpretation of the 1951

²³ Jervis, Robert. "Cooperation under the security dilemma." *World Politics* 30.2 (1978): 167-214.

²⁴ Capoccia, Giovanni, and R. Daniel Kelemen. "The study of critical junctures: Theory, narrative, and counterfactuals in historical institutionalism." *World Politics* 59.3 (2007): 341-369.

²⁵ Alter, Karen J. "The Evolution of International Law and Courts." *International Politics and Institutions in Time* (2017): 251.

²⁶ Wotipka, Christine Min, and Kiyoteru Tsutsui. "Global human rights and state sovereignty: state ratification of international human rights treaties, 1965–2001." *Sociological Forum* 23.4: 724-754; Buergenthal, Thomas. "The normative and institutional evolution of international HR." *Human Rights Quarterly* 19.4 (1997): 703-723. Please notice that this does not mean that before the WWII, States did not cooperate with each-other. However, the most important international organizations continuing their missions also today have been established after the WWII. Moreover, the American foreign policy was changed after the WWII: from isolation to international cooperation. Kissinger, Henry, and Vera Wellings. *American foreign policy*. Royal Victorian Institute for the Blind Tertiary Resource Service, 1977; on transaction costs see Dunoff, Jeffrey L., and Joel P. Trachtman. "Economic analysis of international law." *Yale Journal of International Law* 24 (1999):1.

²⁷ Article 34(1) of the 1978 Vienna Convention on Succession of States in Respect of Treaties establishes that a new State is bound by the international agreements binding on the predecessor State. This codifies the interest of the international community since the non-respect for human rights in a successor State may result in refugee flows that create negative externalities for other States. In contrast, the 1987 Restatement (Third) of the Foreign Relations Law of the United States took the opposite view. Restatement (Third) of the Foreign Relations Law of the United States (1987), § 210(3), Reporters' Note 4. However, it shall be stated that many scholars have criticized the Restatement. Vagts, Detlev F. "State succession: the codifiers' view." *Virginia Journal of International Law* 33 (1992): 275; Zemanek, Karl. *Die Wiener Konvention über die Staatennachfolge in Verträge*. Springer, 1980; Sinclair, Ian. "Some Reflections on the Vienna Convention on Succession of States in Respect of Treaties." *Essays in Honour of Erik Castrén* 149 (1979): 153.

²⁸ Bosnia-Herzegovina (on 6 March 1992), Croatia (on 8 October 1991), North Macedonia (on 17 September 1991) and Slovenia (on 25 June 1991), Federal Republic of Yugoslavia (on 27 April 1992) all informed the UN Secretary-General that they considered themselves bound, by virtue of State succession, to the treaties to which the Socialist Federal Republic of Yugoslavia had been a party. However, the Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission) stated that the Federal Republic of Yugoslavia is a new State which cannot be considered as the sole successor to the Socialist Federal Republic of Yugoslavia. Opinion No. 10, 4 July 1992, reproduced in 31 ILM (1992) 1488 at 1526. The same conclusion has been reached by the US government. Williamson, Edwin D., and John E. Osborn. "A US Perspectives on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia." *Virginia Journal of International Law* 33 (1992): 261. In contrast, the UN has considered the Federal Republic of as a successor to the Socialist Federal Republic of Yugoslavia. UN Doc. A/48/40 (Part I), at 82. UN Doc. A/48/40 (Part I), at 82. The same approach has been taken by the international community as well. Kamminga, Menno T. "State Succession in Respect of Human Rights Treaties." *European Journal of International Law* 7 (1996): 469-484. But, the Federal Republic of Yugoslavia was part of the Convention on the Prevention and Punishment of the Crime of Genocide only in March 2001. With the creation of Montenegro as a new State, in June 2006, Serbia informed the Secretary-General of the United Nations would continue to honor the past commitment to treaties and international agreement of the former Republic of Serbia and Montenegro.

Convention was not only about refugees, but also regarding internal migration (see Chap. I, Sect. 3 and 4).²⁹ In addition, Yugoslavia may have feared that its autonomous entities could also become newborn countries during the ethnic wars of the 1990s. Thus, persecuted individuals who migrated from Croatia or Bosnia and Herzegovina to Serbia could be classified as refugees since they were outside their own countries of origin (Article 1 of the 1951 Convention). If Yugoslavia would have signed and ratified the 1951 Convention during the 1990s, this would have meant the application of high retaliation costs by the European Court of Human Rights (ECtHR) (see Sect. 3.2). However, the Serbian government signed the 1951 Convention in 2001 not out of its own free volition but because it was a mandatory step out of the Association Stabilization Agreement. Indeed, all the Western Balkan countries have signed the 1951 Convention before EU membership.³⁰

It is for this reason that the 1951 Convention is characterized by a high uncertainty when compared to other HRs treaties which are considered as low uncertainty agreements.³¹ In the case of the 1951 Convention, a political shock or a war, which are unpredictable, can change the distribution of gains.³² The L&E literature states that international cooperation reduces uncertainty. This hypothesis has been tested with different international HRs treaties.³³ According to them, the ratification by other countries within a region has a clear effect on the subsequent ratification by others in that same region.

This is the result when a State does not have a clear model for the ratification of international treaties. In these cases, States look at what other countries, especially their neighbors, do. In the case of the refugee influx, the ratification of the 1951 Convention is considered a rebuttable presumption that a State protects refugee rights.³⁴ As a result, through the application of the concept of a “safe country” (see Chap. II, Sect. 2.1.), a State will ratify the 1951 Convention by presuming that if refugees will come by land, they will send them back to their neighbors. However, the ratification of the 1951 Convention is not a conclusive assumption since the individual asylum seeker position

²⁹ Lucas, Robert EB. *Internal migration in developing countries*. Institute for Economic Development, Boston University, 1994.

³⁰ The Stabilisation and Association Agreement (SAA) constitutes the framework of relations between the European Union and the Western Balkan countries for the 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. This article is: Article 80 SAA (EU-Albania); Article 80 (EU-Bosnia and Herzegovina); Article 85 (EU-Kosovo); Article 75 (EU-North Macedonia); Article 82 (EU-Montenegro); and Article 82 (EU-Serbia).

³¹ Agreements whose distribution of gains is the result of supply-demand forces are coded as high uncertainty. In contrast, agreements aiming coordinating are coded as low uncertainty. Koremenos, Barbara, *International Institutions as Solutions to Underlying Games of Cooperation* (November 2009). IBEI Working Papers 2009/27. Available at SSRN: <https://ssrn.com/abstract=1511746> or <http://dx.doi.org/10.2139/ssrn.1511746>; Koremenos, Barbara. “Contracting around international uncertainty.” *American Political Science Review* 99.4 (2005): 549-565. Based on that definition, the 1951 Convention aims to coordinate between countries, but also is focused on the result of demand-supply forces if we considered the interaction between asylum seekers and national laws.

³² Koremenos, note 31.

³³ Wotipka and Tsutsu, note 26.

³⁴ UNHCR. 2001. *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*. For instance, the French Conseil d’Etat refused to consider as manifestly unfounded Mr Rogers’ asylum Application on the simple ground that, before entering French national territory, he had transited through a state signatory of the Geneva Convention. (CE, Ass., 18 décembre 1996, ministre de l’intérieur c/ M. Rogers, n 180856, conclusions M. Delarue)

should also be considered.³⁵ Moreover, a State will presume that due to the application of retaliation costs (see Sect. 3.2.), a neighbor country will also comply with the 1951 Convention.

Thus, if neighboring countries have ratified the 1951 Convention, the State is more inclined to sign it since it is assumed that: 1) neighboring countries have high levels of protection of refugee rights;³⁶ and, 2) neighboring countries will not bring refugees since the applicant is sent back to them by applying the notion of “safe country,” understood as the country with the closest link with the asylum seeker (see Chap. II, Sec. 2.1.).³⁷ On the other hand, non-signatory countries – in the case of *ceteris paribus* – benefit by becoming free-riders. However, as a counterargument, in the case of the 1951 Convention, States must also consider: 1) reputational costs (see Sect. 3.2.); 2) opportunity costs of not being part of a highly-interrelated community of States³⁸ and 3) political costs (i.e. refugees create externalities for the political agendas of Western European countries).³⁹

In spite of the fact that the United Nations (UN) was mentioned for the first time in 1942 during WWII when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers, a permanent international organization was created in 1951 to deal with refugee waves.⁴⁰ With the help of the UN, post-WWII is characterized as the crystallization of global HRs treaties,⁴¹ within them, also the protection of refugee rights.

Although the historical context is one of the most important “push” factors in the case of the 1951 Convention, it should be read in relation to the geographic position of a State. For example, the first country which signed the 1951 Convention was Denmark since the probability of the flow of displaced persons by the Communist Bloc reaching the small Northern European country was extremely low. As it is well-known, the goal of the 1951 Convention was to give protection to persecuted individuals coming from totalitarian regimes.⁴²

In contrast to Denmark, the Baltic countries are another example that illustrate the importance of the geographic position of a State in the analysis of the ratification of the 1951 Convention. While the other ex-communist countries, except Serbia, signed the 1951 Convention from 1991 to 1993, the Baltic countries signed it only in 1997. The geographic position of these countries may explain their choice. Since these countries are neighboring countries of Russia, the refugees’ migration costs (e.g.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ It should be noted that this is the core idea of the EU-Turkey readmission agreement of 2016 or the Canada-U.S. Safe Third Country Agreement.

³⁸ Koh, note 6.

³⁹ Salehyan, note 8.

⁴⁰ Weis, Paul. "The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a Commentary by Dr Paul Weis." *The Research Centre for International Law, University of Cambridge*, 1995.

⁴¹ Wotipka and Tsutsu, note 26.

⁴² Goodwin-Gill, G. S. and J. McAdam. *The Refugee in International Law*. Oxford, New York, 2007.

short travel distance) are low (see Chap. IV).⁴³ Therefore, in order to avoid a large refugee influx during the first years of the 1990s, governments of the Baltic countries waited during the transition period. They were “forced” to sign the 1951 Convention due to external pressure by the EU (e.g. part of the EU membership).

The SAA aims at the approximation of the future EUMS with the *acquis communautaire*. In recent decades, the EU has established a CEAS⁴⁴ since, according to the literature, it is more efficient to rule in favor of asylum protection on a supranational level rather than on the national level (see Chap. VI) or the international level (see Chap. II, Sect. 2 and 5) and the SAA is considered to be an international treaty between the EU and the future EUMS. EU institutions strive to ensure that the new EUMS has already accepted and harmonized its own legislation with the EU asylum law.

2.2. Democratic Institutions, Ideology, and Reputation

This section analyzes three different variables that are directly connected with the image of a State: 1) democratic institutions; 2) expression of an ideology; and 3) reputation of newly created States.

While European countries not part of the Treaty of Friendship, Cooperation and Mutual Assistance (the Warsaw Pact) of 1955 ratified the 1951 Convention between 1952 to 1978,⁴⁵ all ex-communist countries, except Serbia,⁴⁶ ratified the 1951 Convention in the 1990s; the majority of them between 1991-1993.⁴⁷

It seems that the establishment of democratic institutions has a direct positive impact on the ratification of the 1951 Convention. According to Amnesty International,⁴⁸ before the 1990s, these countries have recorded poor HRs performances. With the establishment of democratic regimes, these countries aimed to change their State behavior through international law. According to the literature, international HRs law has the highest impact on State behavior in cases when States have developed democratic institutions but with poor HRs records.⁴⁹ These countries aimed to use external pressure

⁴³ It should be mentioned that the refugees' adaptation costs are low as well: potential host countries have historical connection with Soviet Union, the majority of their population speaks Russian, and there is a large Russian community in these countries.

⁴⁴ The main rules of the Common European Asylum System are: Asylum Procedures Directive Dir. 2013/32/EU, Reception Conditions Directive Dir. 2013/33/EU, Qualification Directive Dir. 2011/95/EU, Dublin Regulation Reg. 604/2013/EU, EURODAC Regulation Reg. 603/2013/EU

⁴⁵ 1952: Denmark; 1953: Belgium, Germany, Luxemburg, and Norway; 1954: UK, Austria, France and Italy; 1955: Iceland and Switzerland; 1956: Ireland and the Netherlands; 1957: Liechtenstein; 1960: Greece and Portugal; 1962: Turkey; 1963: Cyprus; 1968: Finland; 1971: Malta; and in 1978: Spain.

⁴⁶ Serbia ratified the 1951 Convention in 2001. My hypothesis is that Serbia (as the successor of Yugoslavia) waited more than one decade to ratify the 1951 Convention since there were internal conflicts. According to rational choice theory, if a State has perfect information for future events that will increase public expenditure about refugees, it is better to not ratify the 1951 Convention in order to lower the number of refugees.

⁴⁷ However, it should be stated that the Baltic countries ratified the 1951 Convention only in 1997.

⁴⁸ Martens, Kerstin. "An appraisal of Amnesty International's work at the United Nations: Established areas of activities and shifting priorities since the 1990s." *Human Rights Quarterly* 26 (2004): 1050.

⁴⁹ Hathaway, note 7; 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

to enhance HRs, but instead: an L&E empirical study suggested that the ratification of international HRs treaties has no effect or has a negative effect on the protection of HRs.⁵⁰ In addition, poor democratic institutions resulted in an increase in HRs.⁵¹ Thus, it is concluded that domestic institutions are central to treaty enforcement,⁵² in particular for HRs treaties, especially as retaliation costs. To sum up this “push” factor, excluding a few exceptions (see Chap. II, Sect. 4), ratification is essential for compliance with the international treaty. HRs treaties do not bring any direct benefit to States since the reciprocity is missing (Article 60(5) Vienna Convention on Law of Treaties). Thus, enforcement of international rules against the State can only be done if the State has democratic institutions.

Another “push” factor is the ideology. To ascertain refugee status, one of the types of persecution is being a member of a group holding a particular political opinion (Article 1 of the 1951 Convention); a notion originally aimed to grant refugee rights to people coming from the Communist Bloc. The Cold War might be considered as a facilitating factor⁵³ in governments’ decisions to ratify the 1951 Convention because many governments not part of the Warsaw Pact of 1955 could expect one of the NATO superpowers to protect them if attacked by the Communist Bloc.⁵⁴ Although the Cold War slowed the progression of global HRs, several countries ratified different international HRs treaties because they were expecting few consequences from them. This might be considered an unintended consequence of the Cold War, where States try to push their ideology on the international scene.⁵⁵ In the case of the 1951 Convention, its ratification is even more enticing, considering that the 1951 Convention has several flexible clauses (see Sect. 2.3) and misses a central *ad hoc* tribunal for its implementation (see Sect. 3).

According to the L&E literature, military alliance, especially if establishing military assistance in case of an attack, leads to greater international trade.⁵⁶ Usually, the costs of war are covered by the military budget. However, the economic increase in the real income of adversaries decreases the security of a State.⁵⁷ Therefore, when a good can be supplied by several counter-States,

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 human rights treaties. Democratic institutions facilitate the right to justice and therefore State will have to compensate victims. Moravcsik, note 3.

⁵⁰ Neumayer, note 7; Hathaway, note 7.

⁵¹ Neumayer, note 7; Hathaway, note 7.

⁵² Hathaway, note 7.

⁵³ Wotipka and Tsutsu, note 26.

⁵⁴ Goldsmith, Jack L., and Eric A. Posner. *The limits of international law*. Oxford University Press, 2005.

⁵⁵ Wotipka and Tsutsu, note 26.

⁵⁶ This study examines trade levels between major powers from 1885 to 1990 by dividing military agreements between defense pacts (military assistance in case of attack) from those that do not (State promise neutrality, non-aggression, or consultation) concludes that only in the case of military assistance there is a positive correlation between security and trade. Long, Andrew G. "Defense pacts and international trade." *Journal of Peace Research* 40.5 (2003): 537-552. In addition, other studies conclude that international trade deters conflict between States and positively impacts on the national security. Polachek, Solomon William. "Conflict and trade." *Journal of Conflict Resolution* 24.1 (1980): 55-78; O Neal, John R., and Bruce Russett. *Triangulating peace: Democracy, interdependence, and International Organizations*. Norton, 2001.

⁵⁷ Gowa, Joanne. *Allies, Adversaries, and International Trade*. Princeton University Press, 1995.

rational States will choose to trade with allies by shaping their foreign trade policy, which also reduces the threat of enforcing the economy of enemies.⁵⁸

To highlight the importance of ideological aspects, European countries not part of the Warsaw Pact ratified the 1951 Convention between 1962 and 1978. Only in the late 1970s and early 1980s, with the election of right-wing parties in some Western countries, more restrictive immigration policies were introduced (see Chap. I, Sec. 3). In addition, the ex-communist countries, except Serbia, signed it during the 1990s, after the collapse of the communist regimes. Moreover, all the EU-27 constitutions protects individuals against persecution based on political grounds (see Chap. II, Sect. 2).

A third important factor for the image of a newly established State is its capability to ratify some important international treaties. Thus, all the new Western Balkans countries have ratified the 1951 Convention.⁵⁹ New States can be actors on the international stage only if recognized by other countries.⁶⁰ Thus, international cooperation⁶¹ and reputational costs are fundamental to them. As stated above, the implementation of the 1951 Convention entails economic costs.⁶² Therefore, States' willingness to incur the costs of ratification communicates something about the new-born States.⁶³ New States are perfectly aware of the economics aspects when ratifying international agreements,⁶⁴ especially as ratifying States have a better record of HRs protection than non-ratifying ones.⁶⁵ This has also been empirically verified.⁶⁶

This seems counterintuitive for two reasons. First, the 1951 Convention is a multilateral agreement. Thus, Article 60 (5) of the Vienna Convention states that suspension of an operation of a treaty is not applicable in the case of HRs treaties. Second, the modern approach to a State emphasizes that the reputation of a State is not considered as a unit with a single reputation but as a sum of different reputational costs (Sect. 3.3.).⁶⁷ Thus, a State is not "judged" only by considering the willingness to ratify the 1951 Convention, but by considering all different treaties.

⁵⁸ Gowa, Joanne, and Edward D. Mansfield. "Power politics and international trade." *American Political Science Review* 87.2 (1993): 408-420.

⁵⁹ Croatia (independent from 1991) and Slovenia (1990) in 1992; Bosnia and Herzegovina (1992) in 1993; North Macedonia (1991) in 1994; and Montenegro (2006) in 2006.

⁶⁰ For instance, Kosovo is not part of UNESCO because in 25 October 2015 it received only 92 from 94 votes needed for its membership.

⁶¹ For instance, all these countries open the negotiations with EU immediately after declaring independence. Today, Croatia (2013) and Slovenia (2004) are part of the EU, the North Macedonia and Montenegro are candidates and Bosnia and Herzegovina is a potential candidate. Moreover, all these countries are part of the Schengen area.

⁶² European Commission, note 2.

⁶³ Moore, David H. "A Signaling Theory of Human Rights Compliance." *Northwestern University Law Review* 97 (2002): 879.

⁶⁴ It should be stated that this finding is not true in the case of regional agreements. Hathaway, note 7; Keith, Linda Camp. "The United Nations International Covenant on Civil and Political Rights: Does it make a difference in human rights behavior?." *Journal of Peace Research* 36.1 (1999): 95-118.

⁶⁵ Keith, note 64.

⁶⁶ Scully, Gerald W. *Constitutional Environments and Economic Growth*. Princeton University Press, 2014.

⁶⁷ Hathaway, note 7.

Although these two counterarguments are sound, “new” born States will still ratify the 1951 Convention for two main reasons. First, they do not have other or previous criteria with which to be “judged.” In everyday life, a person will evaluate more carefully the breach of a contract by someone that has stipulated only one or the first contract rather than a party that has concluded several contracts, and, until now, he has fulfilled all of them.⁶⁸ Second, the ratification of the 1951 Convention provides newborn States the chance to ratify other future important agreements (e.g. EU or NATO memberships). A State is more likely to sign an international convention if future agreements are, on average, more valuable than the existing ones.⁶⁹ This is the case of the 1951 Convention, which does not bring a high economic burden, and is considered as an instrument for the EU integration. Moreover, as stated before, these new-born countries were stimulated to sign since other regional countries had already ratified the 1951 Convention⁷⁰ and also because it is a mandatory step of the Association Stabilization Agreement.⁷¹

2.3. Nonconsequential Treaty and Flexible Clauses

This section examines the structure of the 1951 Convention by focusing on the fact that this Convention is considered to be a non-consequential treaty that includes flexible clauses.

Today, there are more than 50,000 international treaties that cover nearly every aspect of public policies:⁷² from HRs to trade, from the internal circulation of goods, capital, and persons to the mutual recognition of titles or documents. As a result, States have narrowed their sovereignty. In other words, a State will consider sovereignty costs when ratifying international treaties, especially those treaties that are largely non-consequential since States are reluctant to give up their sovereignty.⁷³ As specified earlier, during the Cold War, States ratified several HRs treaties since they wanted to become actors in the international community. HRs treaties do not have consequences in the national legislation. In those years, among other HRs treaties, States also ratified the 1951 Convention. Indeed, the ECtHR has applied the 1951 Convention only in the last three decades and only in fifteen cases,⁷⁴ finding thirteen violations. The first case appeared in 1991 and the first

⁶⁸ Downs, George W., and Michael A. Jones. "Reputation, compliance, and international law." *The Journal of Legal Studies* 31.S1 (2002): S95-S114.

⁶⁹ *Ibid.*

⁷⁰ Wotipka and Tsutsu, note 26.

⁷¹ 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. This article is: Article 80 SAA (EU-Albania); Article 80 (EU-Bosnia and Herzegovina); Article 85 (EU-Kosovo); Article 75 (EU- North Macedonia); Article 82 (EU-Montenegro); and Article 82 (EU-Serbia).

⁷² UN. 2020. Treaty Collection, available on-line: <https://treaties.un.org/Pages/AdvanceSearch.aspx?tab=UNTS&clang=en>, accessed on April 30th, 2020.

⁷³ Wotipka and Tsutsu, note 26.

⁷⁴ In the database of the ECtHR, I searched in the box ‘International Law and Other Relevant Material’ for the words ‘refugee’, ‘migrant’ and ‘1951’. According to Article 14 of the 1951 Convention, all refugees have access to the courts of the destination countries. If not satisfied and still victims, they can apply to the ECtHR in order to receive pecuniary damages. The result of it is: ECtHR,

violation was established only in 2005, fifty-four years after the first ratification in 1952, by Denmark. Thus, during the Cold War, the 1951 Convention was never applied by the ECtHR.

Clearly, States make their own calculations when they decide whether to sign an international agreement based on the available and relevant information. However, the literature suggests that flexible clauses, such as duration, reservation, denunciation, and escape clauses, positively affect the decision to ratify an agreement.⁷⁵ The literature argues that without these “escape clauses” States would not have ratified certain multilateral trade agreements,⁷⁶ climate agreements,⁷⁷ or other international agreements.⁷⁸ In addition, flexible clauses contribute to further lower State sovereignty costs.⁷⁹

The 1951 Convention does not establish a duration clause since it aims to eliminate renegotiation costs. From the late 1970s to date, there have been several historical events that may have had a direct negative impact regarding the incentive for States to sign the 1951 Convention. First, in the late 1970s and early 1980s, more restrictive immigration policies were introduced by right-wing parties in several countries.⁸⁰ Second, in the 1990s, there were the Balkan wars, followed by the war in Afghanistan in 2001, Iraq in 2003, and in recent years, the fight against the so-called Islamic State of Iraq and the Levant. Since war generally leads to migration flows,⁸¹ States might be motivated not to renegotiate the international convention protecting refugee rights.

Nevertheless, to reduce the high costs of the absence in duration clause, the 1951 Convention offers other flexible clauses, such as reservation, denunciation, and escape clauses. Although States negotiate the best agreements possible using available information, unpredictable events might happen after agreements are signed that are beyond States’ control.⁸² At the time of signature, the

Application no. 59166/12, violation of Article 3 ECHR; ECtHR, Application no. 43611/11, no violation; ECtHR, Application no. 16643/09, violation of Article 4 Protocol 4; ECtHR, Application no. 7974/11, violation if executed; ECtHR, Application no. 41872/10, violation of Articles 13 and 3 ECHR; ECtHR, Application no. 71386/10, violation of Article 3 ECHR; ECtHR, Application no. 30696/09, violation of Articles 13 and 3 ECHR; ECtHR, Application no. 32621/06, no violation; ECtHR, Application no. 37201/06, violation of Article 3 ECHR; ECtHR, Application no. 25904/07, violation of Article 3 ECHR; ECtHR, Application no. 2947/06, violation of Article 3 ECHR; ECtHR, Application no. 13229/03, violation Articles 5 and 2 ECHR; ECtHR, Application no. 25389/05, violation of Article 13 and 3 ECHR; ECtHR, Application no. 43844/98, inadmissible; ECtHR, Applications nos. 13163-7/87, no violation. In total, there are 15 judgments: 1 inadmissible; 3 no violation was found and 11 with at least one violation found of the ECHR. The Application of this convention is the following: 1991-1; 2000-2; 2007-1; 2008-4; 2009-1; 2011-1; 20013-3; 2014-1; and 2016-2. All of the cases, except one (Russia), are against EU member states. However, four of them regard the UK (before Brexit). All of the cases, except five (one Russia and four UK) are members of the Schengen area.

⁷⁵ Koremenos, note 31; Bordo, Michael D., and Finn E. Kydland. "The gold standard as a rule: An section in exploration." *Explorations in Economic History* 32.4 (1995): 423-464.

⁷⁶ Rosendorff, B. Peter, and Helen V. Milner. "The optimal design of international trade institutions: Uncertainty and escape." *International Organization* 55.4 (2001): 829-857.

⁷⁷ Von Stein, Jana. "The international law and politics of climate change: Ratification of the United Nations Framework Convention and the Kyoto Protocol." *Journal of Conflict Resolution* 52.2 (2008): 243-268.

⁷⁸ Koremenos, note 31; Koremenos, Barbara. "Loosening the ties that bind: A learning model of agreement flexibility." *International organization* 55.2 (2001): 289-325.

⁷⁹ Rosendorff, et al., note 76.

⁸⁰ Bale, Tim. "Turning round the telescope. Center-right parties and immigration and integration policy in Europe." *Journal of European Public Policy* 15.3 (2008): 315-330.

⁸¹ Proudfoot, Malcolm Jarvis. *European refugees: 1939-52: a study in forced population movement*. No. 10. Faber, 1956.

⁸² Koremenos, note 31.

1951 Convention gave parties the opportunity to establish reservations (Article 42 of the 1951 Convention). The 1951 Convention contains several escape clauses (i.e. Article 1F, Article 32, or the non-application of Article 33 in case of a massive influx of migrants, if this is based on an *originalistic* interpretation). Thus, since States are sovereign, they may decide to withdraw from the 1951 Convention (Article 44 of the 1951 Convention), but until now this has never happened.

The importance of these clauses rests in the decrease of entry barriers for new members as well as the reduction of the risk of abrogation of the Treaty at the first exogenous shock.⁸³ However, overuse of these clauses can increase their abuse by States. Thus, these “escape clauses” can be efficient if they impose some kind of cost,⁸⁴ which is to be considered a form of compensation in the case of their use by one of the members. In the case of the 1951 Convention, the text does not establish any type of cost to deter the abuse of these escape clauses.

3. Compliance Factors of the 1951 Convention: The Three “Rs”

The literature on L&E on compliance with international law is divided into two different schools: rational actor and normative theory.⁸⁵ According to a survey published in 2009,⁸⁶ 71% of the 2,724 international HRs scholars interviewed in ten different countries characterized their research orientation in one of these groups or both them. Although these theories are not part of this study, it is argued here that through an inclusive understanding of international-relations and international-law literature on compliance, these two schools could be unified.⁸⁷

International treaties can establish two different types of compliance: the “enforcement model” and the “managerial model.”⁸⁸ In the first model, compliance is a direct result of law enforcement and it involves unilateral sanctions.⁸⁹ On the other hand, the managerial model aims to promote compliance through cooperation.⁹⁰ The 1951 Convention does not establish sanctions and

⁸³Pelc, Krzysztof J. "Seeking escape: The use of escape clauses in international trade agreements." *International Studies Quarterly* 53.2 (2009): 349-368.

⁸⁴Rosendorff, B. Peter. "Stability and rigidity: politics and design of the WTO's dispute settlement procedure." *American Political Science Review* 99.3 (2005): 389-400; Herzing, Mathias. *Essays on uncertainty and escape in trade agreements*. Institute for International Economic Studies, Stockholm University, 2005; Rosendorff, et al., note 76; Downs, George W., and David Rocke. "Optimal Imperfection: Domestic Uncertainty and Institutions in International Relations+ Princeton." (1995).

⁸⁵ Within the rational actor model there exists three different currents: 1) realism that considers compliance as coincidence; 2) institutionalism that looks compliance as strategy; and 3) liberalism that sees compliance as by-product of domestic politics. Instead, within the managerial model there exists three different currents: 1) the managerial model that sees compliance due to a norm of compliance and fostered by persuasive discourse; 2) the fairness model that recognizes compliance when rules are legitimate and just; and 3) the transnational legal process model that establishes that compliance occurs because norms are internalized. Hathaway, note 7.

⁸⁶Jordan, Richard, et al. "One discipline or many? TRIP survey of international relations faculty in ten countries." *The College of William and Mary*, 2009.

⁸⁷Hathaway, note 7.

⁸⁸Koh, note 6.

⁸⁹Danish, Kyle. "Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance With International Regulatory Agreements." *Virginia Journal of International Law* 37 (1997): 789-810.

⁹⁰*Ibid.*

therefore compliance is based on mutual cooperation. This can also be explained by applying the Coase reasoning (see Chap. II, Sect. 5 and Chap. VI, Sect. 3.1).⁹¹ According to this, corporations exist because the transaction costs (i.e. costs to monitor the implementation of the international treaties: *ad hoc* permanent tribunals) are larger than the agency costs (i.e. costs for the maintenance of the UNHCR).⁹²

States comply with international law as a result of the three Rs: reciprocity, retaliation, and reputation.⁹³ The following sections have the following structure: Section 3.1. discusses the principle of reciprocity while applying Article 60 of the Vienna Convention. Section 3.2. examines retaliation costs by quantifying the cases of non-compliance with the 1951 Convention by Greece and Italy. This also displays originality by looking at financial penalties in the case of EU infringement procedures as retaliation costs. Section 3.3. studies the reputation costs by exposing the problems of its application in the case of the 1951 Convention.

3.1. Reciprocity

In accordance with the Vienna Convention, reciprocity means “[a] party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State” (Article 60 (2) of the Vienna Convention).

In general, the cost of reciprocity cannot be applied in the case of international treaties protecting human rights (Article 60 (5) of the Vienna Convention) since these treaties stand on moral foundations⁹⁴ and generally are multilateral agreements.⁹⁵ Nevertheless, the situation might appear differently in the case of the 1951 Convention since refugee flows create externalities for political agendas of different governments.⁹⁶ By the 1980s, a (negative) law competition in the refugee field started.⁹⁷ Single destination countries aimed to attract the lowest possible number of refugees. In refugee law, a player (destination country) benefits by not accepting refugee claims and pushing them to choose other destination countries rather than hosting them.⁹⁸ In order to avoid law competition and to increase reciprocity (see Chap. VI), during the 1990s several attempts, such as the Schengen

⁹¹ Coase, Ronald H. "The problem of social cost." *Journal of Law and Economics* 3.1 (1960): 1-44.

⁹² Dunoff and Trachtman, note 26.

⁹³ Guzman, Andrew T. "A compliance-based theory of international law." *California Law Review* (2002): 1823-1887.

⁹⁴ Brilmayer, Lea. "From 'Contract' to 'Pledge': The Structure of International human rights Agreements." *The British Year Book of International Law* 77.1 (2007): 163; Keck, Margaret E., and Kathryn Sikkink. "Transnational advocacy networks in international and regional politics." *International Social Science Journal* 51.159 (1999): 89-101.

⁹⁵ Guzman, note 93.

⁹⁶ Salehyan, note 8.

⁹⁷ 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.

⁹⁸ Suhrke, Astri. "Burden-sharing during refugee emergencies: The logic of collective versus national action." *Journal of Refugee Studies* 11.4 (1998): 396-415.

Implementation Convention and the Dublin Convention, were made to organize cooperation schemes among the EU Member States.

As it will be explained later (see Sect. 4), reciprocity is also (one of) the main reason(s) for the absence of a WTO model for refugee movement or for the liberalization of asylum policies since it does not provide political support in the so-called two-level game.

3.2. Retaliation costs

Retaliation is defined as an economic punishment for the violating States. In other words, there is external pressure on countries to demonstrate their commitment to HRs norms. This type of pressure works better in regional agreements.⁹⁹ In the case of the 1951 Convention, this type of compliance cannot work perfectly not only because it is not a regional agreement but also because retaliation does not give positive results in cases of multilateral agreements¹⁰⁰ and when public goods are involved.¹⁰¹ According to the main L&E literature, the protection of refugees is considered as an international public good.¹⁰² In addition, since it is a multilateral agreement, all countries have an incentive to become free-riders.¹⁰³

In the case of the 1951 Convention, retaliation costs are the economic sanctions established by international courts. In this section, the ECtHR judgments were analyzed for several reasons. First, in regard to international adjudication, the International Court of Justice (ICJ) has only one case dealing with asylum seekers,¹⁰⁴ which is not recent. Second, the ECtHR is one of the eldest¹⁰⁵ as well as busiest¹⁰⁶ international courts in existence. Third, while only States can be parties in cases before the ICJ (Article 34 status of ICJ), in the case of the ECtHR, individuals can also appear before the Court (Article 35 ECHR). Fourth, although the ECtHR is an international court, the majority of its members are from Europe which during 2015-2017 were facing a “refugee crisis.”

In order to make a valid application to the ECtHR, a persecuted individual shall: 1) be outside of the country of his nationality (Article 1 of the 1951 Convention); 2) comply with all administrative proceedings (Directive 2013/32/EU Asylum Procedures, provided the State is EU member); 3) have exhausted all effective domestic remedies (Article 35 ECHR), and 4) have the victim status within the meaning of Article 34 ECHR.¹⁰⁷

⁹⁹ Hathaway, note 7.

¹⁰⁰ Guzman, note 93.

¹⁰¹ Guzman, Andrew T. *How international law works: a rational choice theory*. Oxford University Press, 2008.

¹⁰² Bubb et al. note 9; 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.

¹⁰³ des Places, Segolene. *Evolution of asylum legislation in the EU: Insights from regulatory competition theory*. Robert Schuman Centre for Advanced Studies, 2003; Bouteillet-Paquet, Daphné. *L'Europe et le droit d'asile*. Editions L'Harmattan, 2001.

¹⁰⁴ Judgment of 20 November 1950 (Colombia v. Peru). In the database of ICJ, I looked at the keywords: refugee, migrant, and asylum.

¹⁰⁵ The ECtHR's first session was in February 1959.

¹⁰⁶ On September 18th, 2008, the ECtHR delivered its 10,000th judgment. (ECtHR, Press Release no. 638).

¹⁰⁷ ECtHR, Application nos. 17550/90–17825/91, paragraph 46.

It is unfortunately noted that in accordance with Article 25 ECHR, the Convention does not enable the scrutiny of laws in the abstract¹⁰⁸ or as a class action.¹⁰⁹ However, in exceptional circumstances (e.g. deaths or disappearances), the ECtHR admits applications by the victims' close relatives (Article 34 ECHR), but not in relation to Article 3 ECHR, which is considered "strictly personal."¹¹⁰ These policies assist the ECtHR to reduce judicial time and costs through a consequential decrease in the number of applications.

Due to the ECtHR subsidiary nature (Article 35 ECHR), its approach is rather "conservative."¹¹¹ That is why during the first years of its existence, its inadmissibility rate was found to be around 98%, which dropped to 80% during the 1990s.¹¹² This drop might be explained as a result of the reformed control mechanism in force since November 1998 that merged the Commission and the Court into a single supervisory body.¹¹³

In relation to the 1951 Convention, the most important Article offering safeguards and protection against *refoulement* is Article 33 (the non-*refoulement* principle). Referring to the "European refugee crisis" the most affected EU Member States are Italy and Greece. Therefore, in relation to retaliation costs before the ECtHR, a study was conducted based on a case-law analysis in correlation with Article 33 of the 1951 Convention.

During 2016, the public cost per asylum seeker covering only meals and shelters was approximately 14,000 USD/per year¹¹⁴ in Greece and 13,500 EUR/per year in Italy.¹¹⁵ Since the beginning of the Arab Spring in 2011, the ECtHR has applied the 1951 Convention against Greece only three times¹¹⁶ and against Italy only in four cases.¹¹⁷ The highest retaliation cost against Italy

¹⁰⁸ *The Christian Federation of Jehova's Witnesses in France v France* (unreported 6 November 2001), available on-line: <http://swarb.co.uk/the-christian-federation-of-jehovahs-witnesses-of-france-v-france-echr-6-nov-2001/> accessed on November 30th 2019; Frowein, Jochen Abr, and Wolfgang Peukert. *Europäische menschenrechtskonvention: EMRK-kommentar*. Engel Verlag, 1996; Rogge, Kersten. *The "victim" requirement in article 25 of the European Convention on human rights*. 1988.

¹⁰⁹ ECtHR, Application no 5029/71; ECtHR, Application no 13378/05.

¹¹⁰ ECtHR, Application no 9035/06, paragraph 52.

¹¹¹ MacDonald, R. St J., Franz Matscher, and Herbert Petzold, eds. *The European system for the protection of human rights*. Martinus Nijhoff, 1993.

¹¹² Merrills, John Graham, and Arthur Henry Robertson. *Human rights in Europe: A study of the European Convention on Human Rights*. Manchester University Press, 2001.

¹¹³ Before this reform, the Court could hear the parties only if the Commission believed that there was a violation of the ECHR. In addition, the Committee of Ministers' function under Article 32 ECHR was eliminated.

¹¹⁴ By considering the number of asylum seekers after the closure of the borders on 9 March 2016 – approximately 57,000 people – with the total funds, the cost per beneficiary is \$14,088, The Guardian. 2017. Where did the money go? How Greece fumbled the refugee crisis, available on-line: <https://www.theguardian.com/world/2017/mar/09/how-greece-fumbled-refugee-crisis> accessed on April 30th, 2020.

¹¹⁵ EUR 35/day which goes to center for meals and shelter and EUR 2.50 pocket money. In concrete, Italy spends EUR 13,687,5/year. Reuter. 2015. Factbox: Benefits offered to asylum seekers in European countries, available on-line: <http://www.reuters.com/article/us-europe-migrants-benefits-factbox/factbox-benefits-offered-to-asylum-seekers-in-european-countries-idUSKCNORG1MJ20150916> accessed on April 30th, 2020.

¹¹⁶ ECtHR, Application no. 30696/09, concerning Dublin transfers on conditions of detention under Article 3 and 13 ECHR; ECtHR, Application no. 16643/09 and Application no. 8687/08 concerning conditions in detention center under Article 3, 5 and 13.

¹¹⁷ ECtHR, Application no. 27765/09, pushed-back at sea, held: violations under Article 3 ECHR, Article 4 of Protocol No 4 (prohibition of collective expulsions) and Article 13 ECHR for being exposed to risk of ill-treatment in Libya and repatriation to Somalia and Eritrea; ECtHR, Application no. 16483/12, concerning the holding in the reception center on the island of Lampedusa and on ships in Palermo harbor in Sicily, violations of Article 5(1), (2) and (4) ECHR and Article 13 ECHR, but no violation of Article 3 ECHR and Article 4 of Protocol No 4 to the ECHR; ECtHR, Application no. 27725/10, concerned Dublin transfer to Italy of a Somali

has been EUR 17,000 per applicant¹¹⁸ and EUR 5,000 against Greece. Thus, these economic punishments are often too weak to achieve optimal compliance.¹¹⁹ This result is coherent with other L&E studies showing the absence of a total compliance rate with the judgment of the ICJ and other international dispute mechanisms.¹²⁰ The potential retaliation costs given to the winner counterparty in the case of non-compliance with the GATT or WTO disputes are considered fundamental.¹²¹

In the case of the *ceteris paribus*, it would be in the self-interest of a State to pay these eventual low economic sanctions rather than to comply with the 1951 Convention.¹²² This principle is similar to the application of the “efficient breach” theory, considered only from the standpoint of the hosting country and by not considering the international welfare. However, in the spirit of international cooperation in refugee law which aims for the elimination of negative externalities, States cannot apply the “efficient breach” theory *tout court* but shall additionally ponder the political costs of their immigration policies.

In addition, these States shall comply with the adverse judgments given by the ECtHR in accordance with Article 46 ECHR.¹²³ In general, democratic countries have a high rate of compliance with the ECtHR’s decisions.¹²⁴ In this specific case, the ECtHR has established few adverse

asylum seeker, Application was found manifestly ill-founded and declared inadmissible; ECtHR, Application no. 16643/09, concerned immediate returns to Greece from Italy, Held: Greece violated Article 13 ECHR combined with Article 3 ECHR, for lack of access to asylum procedure and risk of deportation to Afghanistan. A violation by Italy of Article 4 of Protocol No 4 and Article 3 ECHR by returning these applicants to Greece exposed them to the shortcomings of the Greek asylum procedure, and a violation of Article 13 ECHR combined with Article 3 ECHR and Article 4 of Protocol No 4 to the ECHR of the lack of access to asylum procedure in the port of Ancona.

¹¹⁸ ECtHR, Application no. 27765/09, paragraphs 215-218, non-pecuniary damage: EUR 15,000 for each applicant (24 applicants), costs and expenses: EUR 1,575.74; ECtHR, Application no. 16643/09, paragraphs 251-252 and 256, non-pecuniary damage: with regards to Italy and Greece - applicants did not submit their claim for just satisfaction within time-limit (see Rules of Court, article 60), no amount was granted, costs and expenses: EUR 5,000 (granted jointly to the applicants); ECtHR, Application no. 16483/12, paragraphs 285 and 288, non-pecuniary damage: EUR 2,500 for each applicant (3 applicants), costs and expenses: EUR 15,000 to applicants jointly; ECtHR, Application no. 30696/09, paragraphs 406, 411, 414, and 420: non-pecuniary damage: against Greece - EUR 1,000, against Belgium – EUR 24,900 costs and expenses: EUR 3,450 and EUR 6,075 respectively.

¹¹⁹ Koh, note 6.

¹²⁰ Schulte, Constanze. *Compliance with decisions of the International Court of Justice*. Oxford University Press, 2004. This book examines the compliance record of states parties to proceedings before the ICJ from 1945 to 2005. This analysis reveals that the compliance record for judgments is generally satisfactory. In addition, according to Couvreur, the noncompliance rate with final ICJ judgments are very low. Muller, A. Sam, et al. *The International Court of Justice: its future role after fifty years*. Martinus Nijhoff Publishers, 1997. However, the compliance rate is higher when the case has contemporaneous consent or submitted by special agreements. In concrete, according to Charney, the compliance rate was 80 percent from 1946 to 1987, which has decreased to 60 percent from 1987 to 2004. Charney, Jonathan I. "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance." *The International Court of Justice at a Crossroads* 288 (1987).

¹²¹ Bown, Chad P. "On the economic success of GATT/WTO dispute settlement." *The Review of Economics and Statistics* 86.3 (2004): 811-823. This article uses GATT/WTO trade disputes between 1973 and 1998. This trend is also justified with the fact that retaliation costs are fundamental in case of bilateral relationships. Indeed, out of 109 WTO disputes covering the period from 1 January 1995 to 1 March 2007 only in 8 cases the WTO has been requested and has authorized retaliations. Wilson, Bruce. "Compliance by WTO members with adverse WTO dispute settlement rulings: the record to date." *Journal of International Economic Law* 10.2 (2007): 397-403.

¹²² Polinsky, A. Mitchell. *An introduction to law and economics*. Aspen Publishers, 1989.

¹²³ According to Article 46 of the ECHR, although the phrase used is “to abide by” rather than “to comply with.” However, through a lexical-semantic analysis approach, these phrases are identical. This is further confirmed by the French version of the Article 94 (1) of the UN Charter, which uses the phrase “se conformer” as it is used in the French version of the ECHR. The English version of the Article 94 (1) of the UN Charter states “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”

¹²⁴ Von Staden, Andreas. *Shaping human rights policy in liberal democracies: Assessing and explaining compliance with the judgments of the European Court of Human Rights*. Princeton University, 2009; Helfer, Laurence R. "Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime." *European Journal of International Law*

judgments towards them: three against Greece and four against Italy. Thus, rational States will continue to behave according to their pre-existing preferences for the *status quo ante* without following the outcome propagated by the Court since these adverse judgments are sporadic.

But, if in the future, adverse judgments persist and continue, rational States will be guided by their guidelines established in the judgments through establishing alternative public migration policies that are in conformity with these adverse judgments. However, among several available options that reasonably satisfy the remedies according to these adverse judgments, it is expected that rational States will choose the “new” migration policy that is closest to their original preference.

For instance, in the case of Italy, the recommendation of the UNHCR concerning the adjudication of the *Hirsi Jamaa* case as published on 5 September 2012¹²⁵ stated that Italy-Libya Agreements should include safeguards. Until now, the Memorandums – which currently are suspended – between these two countries focus on the provisions of equipment and military, strategic, and technological support. The most recent one was signed on 2 February 2017.

After a long political discussion, the Italian Law no. 67 of April 2014 and the Legislative Decree¹²⁶ no. 7 of 15 January 2016 have decriminalized the act of illegal migration. These laws aim not only to comply with the ECtHR decision¹²⁷ as well as follow the UNHCR recommendation,¹²⁸ but also to decrease judicial costs (e.g. in the case of a criminal sanction, there is a need of a criminal judgment) or public costs for detention in prisons, for which Italy has been condemned by the ECtHR for overcrowding in prisons.¹²⁹ Thus, it seems that among several options, the Italian government has chosen a new migration policy that is coherent with rational choice since it decreases public costs (e.g. judicial costs and prison detention costs) without substantially modifying the Italy-Libya Agreements.

However, during the summer of 2019, Italy modified its immigration policy with the highly controversial Law-Decree¹³⁰ no. 53 of 14 June 2019 which converted into Law no. 77 of 8 August 2019. The Italian Administrative Court of Lazio has suspended its implementation,¹³¹ although the prosecutor had started

19.1 (2008): 125-159. However, it should be mentioned that in 2005 a study involving all the ECtHR’s judgments also towards non-democratic States concluded that there were no “good data” to corroborate whether “compliance with ECHR judgments has been high or low.” Posner, Eric A., and John C. Yoo. “Judicial independence in international tribunals.” *California Law Review* (2005): 1-74.

¹²⁵ Recommendations by UNHCR concerning the execution of the Grand Chamber judgment of the ECtHR (Application No. 27765/09)
¹²⁶ According to Article 76 of the Italian Constitution “the exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes.”

¹²⁷ ECtHR, Application no. 27765/09.

¹²⁸ The recommendation of the UNHCR states that Italy should provide information concerning access to the asylum procedure to all persons who could potentially be in need of international protection, rather than solely to those who have already explicitly expressed the intention to apply for asylum. In addition, access to effective remedy should be implemented. These two recommendations could not be followed if the act of illegal migration is considered a criminal offense.

¹²⁹ ECtHR, Application no. 43517/09, this was also a pilot judgment, which is a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems

¹³⁰ According to Article 77 of the Italian Constitution, the Government may, in case of necessity and urgency, issue a decree having force of law.

¹³¹ Italian Regional Administrative Court of Lazio, Section III, No. 05479/2019 of 14 August 2019.

a criminal proceeding against Ms. Carola Rackete (then, declared innocent)¹³² There was an immediate reaction by the EU¹³³ and by the international community.¹³⁴

To give a general overview of the analysis, in the case of an EUMS, retaliation costs could also be considered as sanctions given by the EUCJ to an EUMS for the infringement of the EU law. Nevertheless, the infringement procedure is quite long and the financial penalties (either a lump sum and/or a daily payment) can be asked for by the Commission only when the EU country, despite the court's judgment, still doesn't rectify the situation (Article 260(2) TFEU). In fact, since 2015 with the start of the European Refugee Crisis, focusing only on CEAS, the Commission has opened 7 different infringement procedures against Italy,¹³⁵ and 7 different infringement procedures against Greece.¹³⁶ However, all of them dealt with the incorrect implementation of the EU asylum law rather than asking for financial penalties to be paid. In addition, currently, only 5 cases are still open.

To sum up, in the case of Italy and Greece, since 2015, there has been no financial penalties for the infringement of the CEAS, and the economic sanctions established by the ECtHR are quite low as compared to the annual public cost per asylum seeker.

3.3. Reputational costs

Reputation is the main instrument for maintaining a high level of treaty compliance.¹³⁷ States aim to be part of a highly interrelated community of States.¹³⁸ It is interesting to notice that a study evaluating 155 nations with market economies between 1960 and 1980 found that the average growth rate in societies where HRs are violated and freedom is restricted equals one-third of that of free societies.¹³⁹ Therefore, the more a State restrains itself by compliance with HRs treaties, the stronger the signal is

¹³² Trib. Agrigento, Uff. GIP, ord. 2 luglio 2019, no. 2592/19.

¹³³ CJEU, Joined Cases C-391/16, C-77/17 and C-78/17.

¹³⁴ ECtHR, Press Release, ECHR 240 (2019).

¹³⁵ The infringement procedures against Italy are: Non-conformity with Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (infringement no. 0142235; closed); Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (infringement no. 20130276; closed); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 - Recast Qualification Directive (infringement no. 20140135; closed); Alleged violations of obligations under Regulation 343/2003 and Directive 2005/85/EC (infringement no. 20142126; closed); Situation of Unaccompanied Minors Seeking Asylum (infringement no. 20142171; closed); Incorrect Implementation of the Recast EURODAC Regulation (EU) 603/2013 (infringement no. 20152203; closed); Non-compliance with Council Decisions 2008/615/JHA and 2008/616/JHA (Prüm Decisions) (infringement no. 20162095; active).

¹³⁶ Violation of European Asylum Law and Fundamental Rights of Migrants in Greece (infringement no. 20094104; active); Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (infringement no. 20130266; closed); 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 (infringement no. 20150402; closed); 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 (infringement no. 20150402; closed); Incorrect Implementation of the Recast EURODAC Regulation (EU) 603/2013 (infringement no. 20150402; closed); Non-compliance with Council Decisions 2008/615/JHA and 2008/616/JHA (Prüm Decisions) (infringement no. 20094104; active); Non-Compliance with Directive 2011/93/EU (Child Sexual Abuse) (infringement no. 20192230; active).

¹³⁷ Downs and Jones, note 68; Guzman, note 93.

¹³⁸ Koh, note 6.

¹³⁹ Scully, note 66.

sent to attract cooperative opportunities.¹⁴⁰ The opportunity costs associated with this forgone cooperation are important,¹⁴¹ although the economic gains from that should be also considered.¹⁴² However, research suggests that compliance rates are often considerably lower than one would expect them to be if every deviation had important effects on every current and future agreement.¹⁴³

The violation of the 1951 Convention can also raise reputational costs. However, reputational costs have several problems. First, reputational costs can be determined only if violations can be easily observed.¹⁴⁴ The 1951 Convention does not establish clear specific rules thus giving discretion to national jurisdictions, especially regarding the ascertainment of the refugee status.

Second, States are part of various international treaties such as treaties dealing with trade, investment, security, environment, and HRs. This is the modern approach to a State, which is not considered as a unit with a single reputation but as a sum of different reputational costs.¹⁴⁵ Even in the same area, there might be various reputational costs (e.g. the failure of NATO operations in North Macedonia in 2001 did not negatively impact other HRs treaties). Thus, there are no incentives for States to concentrate their efforts on building up an international reputation in the protection of refugee rights since their protection is costly. That is why self-interested States distribute their efforts in different fields where they gain the highest net benefits possible.

Third, States are aware that compliance rates and timing¹⁴⁶ of defections are generally weakly correlated across treaties.¹⁴⁷ In addition, other States will ponder defections whether or not there are extreme conditions or normalcy.¹⁴⁸ In the recent refugee crisis, it might be that compliance with the 1951 Convention is estimated differently from normalcy, also by considering that according to the *originalistic* interpretation, Article 33 is not applied in the case of a massive influx of migrants.¹⁴⁹

¹⁴⁰ Moore, note 63; Barrett, Scott. "International cooperation and the international commons." *Duke Environmental Law & Policy Forum* 10 (1999): 131-145.

¹⁴¹ Kailitz, Steffen. *Schlüsselwerke der Politikwissenschaft*. Springer-Verlag, 2008.

¹⁴² Hathaway, note 7.

¹⁴³ Simmons, Beth A. "International law and state behavior: Commitment and compliance in international monetary affairs." *American Political Science Review* 94.4 (2000): 819-835; Victor, David G., Kal Raustiala, and Eugene B. Skolnikoff. *The implementation and effectiveness of international environmental commitments: Theory and practice*. MIT press, 1998; Downs, George W. "Enforcement and the Evolution of Cooperation." *Michigan Journal of International Law* 19 (1997): 319; Elliott, Kimberly Ann, and Thomas O. Bayard. *Reciprocity and retaliation in US trade policy*. Peterson Institute Press: All Books, 1994; Hudec, Robert E. *Enforcing international trade law: The evolution of the modern GATT legal system*. MICHIE, 1993; Smith, Edwin M. "Understanding Dynamic Obligations: Arms Control Agreements." *Southern California Law Review* 64 (1990): 1549; Siverson, Randolph M., and Joel King. "Attributes of national alliance membership and war participation, 1815-1965." *American Journal of Political Science* (1980): 1-15.

¹⁴⁴ Simmons, Beth A. *Mobilizing for Human Rights: international law in domestic politics*. Cambridge University Press, 2009.

¹⁴⁵ Hathaway, note 7.

¹⁴⁶ For instance, empirical finding suggests that the number of years since ratification of the International Covenant on Civil and Political Rights and the Torture Convention is associated with a worse human rights record. Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. "Human rights in a globalizing world: The paradox of empty promises." *American Journal of Sociology* 110.5 (2005): 1373-1411.

¹⁴⁷ Downs and Jones, note 68.

¹⁴⁸ Guzman, note 93.

¹⁴⁹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-Fifth Meeting, p. 21.

Fourth, in democratic countries, elections may lead to the change of governments. Thus, reputational costs cannot be passed from one government to another. As stated above, right-wing parties have established more restrictive immigration policies.¹⁵⁰ This might be the case of the previous Austrian legislative elections held on 15 October 2017. In addition, although the L&E literature does not provide unanimous results, the ideological orientation of governments has an impact on the refugee's choice of the destination country,¹⁵¹ which will then influence the migrants' choice of other States since the protection of refugee rights is considered a public good.¹⁵² However, it should be stated that from an empirical standpoint, except rare cases, such as Greece's temporary withdrawal from the ECHR between 1969 and 1974, no State has ever terminated a HRs treaty, although there might have been radical changes of government.¹⁵³

Fifth, reputational costs in multilateral agreements need collective actions.¹⁵⁴ But, different countries underline dissimilar preferences. So, the reputational sanction is difficult to work as a unanimous action.

Sixth, according to the literature, States will revise their estimations of another State following a defection or pattern of defections, "only for agreements which are (1) affected by the same or similar sources of fluctuating compliance costs and (2) valued the same or less by the defecting state."¹⁵⁵ This might be the case of the 1951 Convention, where refugees create negative externalities for other countries.

4. A WTO model for the liberalization of refugee movement

This section looks at the refugee influx through the perspective of the WTO model. It compares, through L&E approach, the different policy approaches between the liberalization of trade, on one side, and the restriction of asylum law, on the other. This section focuses on the principle of reciprocity as the key factor for the lack of negotiations for liberalization of refugee movement by also examining the failure of potential solutions that may smoothen the absence of the lack of reciprocity in the case of asylum law.

¹⁵⁰ Bale, note 80.

¹⁵¹ The change of government also impacts on the fiscal policies, which generates capital flight. However, left-wing governments are more inclined to restrict capital outflows than right-wing governments. Alesina, Alberto, and Guido Tabellini. "External debt, capital flight and political risk." *Journal of international Economics* 27.3-4 (1989): 199-220. In addition, the government ideology impacts on citizen policy: while citizenship liberalisation is more likely to occur with a leftist government, the most important factor is the relative strength of far-right parties. However, other factors outside the control of parties – i.e. referendum – play an important role in the citizenship policy (i.e. Irish referendum of 2004). 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.

¹⁵² Downs and Jones, note 68.

¹⁵³ Kamminga, note 28.

¹⁵⁴ Simmons, note 143.

¹⁵⁵ Downs and Jones, note 68.

Currently, in the international arena, governments have aimed to liberalize trade,¹⁵⁶ but they have also increased restrictions in asylum law (see Chap. I, Sect. 3). In other words, although governments have promoted the liberalization of trade through multilateral negotiation (e.g. the GATT/WTO), a similar model does not exist for international refugees.¹⁵⁷ This is controversial since the liberalization of movements contributes to worldwide efficiency more than the liberalization of trade in goods.¹⁵⁸

The barriers to refugee acceptance are higher than those to the international movement of goods. According to the latest data of OECD, in 2018, 6.8% of the population were refugees,¹⁵⁹ by contrast, the average share of good imports was 30% of the GDP.¹⁶⁰ Thus, asylum policies appear to be much tougher than restrictions on trade, at least, for the OECD countries. Several studies suggest that the GATT/WTO is associated with lower tariffs and increased trade. For instance, membership of the GATT increases trade by 25%.¹⁶¹ In addition, for successive rounds, industrial country imports have increased by 175% between 1950 to 2000,¹⁶² or worldwide gains resulted from the Uruguay Round were at 0.5%,¹⁶³ although the benefits for industrialized countries have been (much) larger.¹⁶⁴

Considering the fact that WTO model has increased the worldwide utility, why has this model not been proposed in the case of refugees? A potential answer to that is connected to the public opinion toward imports and refugees. Studies have shown that there is a correlation between public opinion and policies:¹⁶⁵ governments respond to more negative public opinion with tougher policies.¹⁶⁶ While the public opinion toward imports is generally favorable,¹⁶⁷ a general literature overview underlined the negative public opinion of local citizens toward refugees.

¹⁵⁶ Hoekman, Bernard, and Aaditya Mattoo. "Liberalizing trade in services: lessons from regional and WTO negotiations." *International Negotiation* 18.1 (2013): 131-151.

¹⁵⁷ However, it should be mentioned that from an economic perspective, there exist two main transfer systems – north-to-south and south-to-south transfers (Chap. VI, Sec. 3.1.) – which are not based on a WTO model of liberalization.

¹⁵⁸ Rodrik, D. 'Final Remarks' in Boeri, Tito, Gordon Hanson, and Barry McCormick. *Immigration policy and the welfare system: a report for the Fondazione Rodolfo De Benedetti*. Oxford University Press, 2002.

¹⁵⁹ World Bank. 2020. Refugee population by country or territory of asylum - OECD members, available on-line: <https://data.worldbank.org/indicator/SM.POP.REFG?locations=OE>, accessed on April 30th, 2020.

¹⁶⁰ OECD. 2020. Trade in goods and services, available on-line: <https://data.oecd.org/trade/trade-in-goods-and-services.htm>, accessed on April 30th, 2020.

¹⁶¹ Baier, Scott L., and Jeffrey H. Bergstrand. "The growth of world trade: tariffs, transport costs, and income similarity." *Journal of International Economics* 53.1 (2001): 1-27.

¹⁶² Subramanian, Arvind, and Shang-Jin Wei. "The WTO promotes trade, strongly but unevenly." *Journal of International Economics* 72.1 (2007): 151-175.

¹⁶³ Harrison, Glenn W., Thomas F. Rutherford, and David G. Tarr. "Quantifying the Uruguay round." *The Economic Journal* 107.444 (1997): 1405-1430.

¹⁶⁴ Francois, Joseph F., Bradley McDonald, and Hakan Nordstrom. "The Uruguay Round: a numerically based qualitative assessment." *The Uruguay Round and the Developing Countries* (1996): 253-291.

¹⁶⁵ Erikson, Robert S. "The relationship between public opinion and state policy: A new look based on some forgotten data." *American Journal of Political Science* (1976): 25-36.

¹⁶⁶ Hatton, Timothy J. "Should we have a WTO for international migration?." *Economic Policy* 22.50 (2007): 340-383.

¹⁶⁷ Mayda, Anna Maria, and Dani Rodrik. "Why are some people (and countries) more protectionist than others?." *European Economic Review* 49.6 (2005): 1393-1430; O'Rourke, Kevin H., and Richard Sinnott. "What determines attitudes towards protection? Some cross-country evidence." *Brookings Trade Forum*. Vol. 2001. 2001.

In fact, public attitude toward refugees could be understood by using qualitative methods, in particular polls. All empirical studies reviewed in this section, are based on quantitative studies that were conducted in different countries, such as in the USA,¹⁶⁸ in Lebanon,¹⁶⁹ in Australia,¹⁷⁰ or worldwide.¹⁷¹ All showed a negative attitude toward refugees. Polls showed a more positive attitude toward high-skilled workers,¹⁷² such as doctors and teachers, and young people, and students,¹⁷³ and a (much) more negative attitude for non-white and more culturally distinctive asylum seekers.¹⁷⁴ Younger, politically liberal, and more educated citizens¹⁷⁵ or female citizens¹⁷⁶ show a higher acceptance toward refugees. However, since polls can be notoriously unreliable, ambiguous, and biased in the wording and order of questions,¹⁷⁷ a qualitative study was also examined,¹⁷⁸ and it concluded that a negative attitude towards refugees exists. Thus, various studies using different methods and data and conducted in diverse socio-cultural and historical contexts show the negative attitude towards refugees.

This negative attitude toward refugees might explain why in the second half of the twentieth-century, asylum policies became tougher (see Chap. I, Sec. 3), while, as it was shown here, also due to the WTO,¹⁷⁹ trade policies have become more liberal. Thus, although public opinion might reflect

¹⁶⁸ Galston, William A. "What Americans really think about the Syrian refugee crisis." (2016). This pool was done after the Paris attacks by asking 628 US citizens. Public opinion began to shift from a positive attitude towards a negative one. Indeed, 53% of Americans said that the United States should stop accepting refugees altogether.

¹⁶⁹ Cherri, Zeinab, Pedro Arcos González, and Rafael Castro Delgado. "The Lebanese–Syrian crisis: impact of influx of Syrian refugees to an already weak state." *Risk management and healthcare policy* 9 (2016): 165. This study shows an adverse attitude towards Syrian refugees too since refugees were a threat for national stability (52%), decreasing job opportunities or minimum wages (82%) by also negatively affecting the national economy (90%). In addition, they also found that 50% of respondents believed that the Syrian refugees received unfair economic assistance. Review of secondary data from gray literature and reports focusing on the influx of Syrian refugees to Lebanon by visiting databases covering humanitarian response in complex emergencies.

¹⁷⁰ Schweitzer, Robert, et al. "Attitudes towards refugees: The dark side of prejudice in Australia." *Australian Journal of Psychology* 57.3 (2005): 170-179. The current study was comprised 261 volunteer university students (119 males and 142 females) in Australia. Participants were assessed on a prejudicial attitude measure, measures of symbolic and realistic threat and the Marlowe-Crowne Social Desirability Scale. The results indicated over half (59.8%) of participants scored above the mid-point on prejudicial attitudes.

¹⁷¹ Ipsos, M. O. R. I. "Global views on immigration and the refugee crisis." London: Ipsos MORI (2016). This study was conducted in 2016, covering 16,000 people in 22 countries. This is eventually the study with the highest number of participants and also with the highest number of countries involved. Dempster, Helen, and Karen Hargrave. "Understanding public attitudes towards refugees and migrants." London: Overseas Development Institute & Chatham House (2017).

¹⁷² Bansak, K., J. Hainmueller, and D. Hangartner. "Europeans Prefer a Proportional Allocation of Asylum Seekers Over the Dublin Status Quo." *PNAS* 1.7 (2017); Blinder, S., M. Ruhs, and C. Vargas-Silva. "Thinking behind the numbers: Understanding public opinion on immigration in Britain." *The Migration Observatory* (2011).

¹⁷³ Blinder and Vargas-Silva, note 172.

¹⁷⁴ Heath, A., and Richards, L. (2016) Attitudes towards Immigration and their Antecedents: Topline Results from Round 7 of the European Social Survey. London: European Social Survey ERIC.

¹⁷⁵ Heath and Richards, note 174; TENT (2016) *Public perceptions of the refugee crisis*. New York: TENT Foundation; IOM (2015) *How the world views migration*. Paris: International Organization for Migration (IOM); Crawley, Heaven. "Understanding and changing public attitudes: A review of existing evidence from public information and communication campaigns." (2009).

¹⁷⁶ Schweitzer, Robert, et al. "Attitudes towards refugees: The dark side of prejudice in Australia." *Australian Journal of Psychology* 57.3 (2005): 170-179.

¹⁷⁷ Crawley, Heaven. "Evidence on Attitudes to Asylum and Immigration: What we know, don't know and need to know." (2005).

¹⁷⁸ Yigit, Ismail Hakki, and Andrew Tatch. "Syrian refugees and Americans: Perceptions, attitudes and insights." *American Journal of Qualitative Research* 1.1 (2017): 13-31. This study focusses on the public attitude of American citizens towards the Obama decision to accept around 10,000 refugees within a resettlement program. It shows that the public opinion does not distinguish between undocumented or illegal migrants or refugees, by also comparing refugees with them. The study applied face to face interviews of around 45 to 50 minutes with Americans and content analyses of the online blog Humans of New York for Syrian refugees. All participants resided in a southern state in the US.

¹⁷⁹ Significant share of trade liberalization took place also outside of the GATT/WTO framework. Findlay, Ronald, and Kevin H. O'Rourke. *Power and plenty: trade, war, and the world economy in the second millennium*. Princeton University Press, 2009.

a political opinion and might be affected or manipulated by politicians it should be stated that public politics of trade and asylum are distinctive: trade is seen as national and essentially economic,¹⁸⁰ while asylum protection is seen as a threat to the national culture.¹⁸¹

Potential reasons for these stricter asylum policies might be government budgets, macroeconomic crises, governmental ideology, and the spread of democracy. As stated in Chap. II, in recent years, there has been an enormous increase in the States' budgets for refugees. History has also shown that macroeconomic crises negatively impact asylum policies (see Chap. I, Sec. 3) because foreigners are viewed as competitors for national jobs (see Chaps IV and V) and might decrease wages or job opportunities, especially for unskilled jobs (see Chap. V). Governmental ideology might impact asylum policies as well (see Chap. IV).

Lastly and most importantly, tougher asylum policies are strongly connected to the public perception of refugees since politicians must justify their decisions to voters. During the twentieth century, the share of population having the right to vote has increased: from less than 30% during the 1920s,¹⁸² to every competent citizen. Although some groups, such as employers as a whole, gain directly from the increased labor demand (see Chap. V), they do not possess enough votes to impact national policies.

Consumers and laborers compose a high share of voters, which affects the decision of public policymakers. As stated above, public opinion about refugees is negative since the public views refugees as illegal or undocumented migrants.¹⁸³ Thus, refugees are perceived as competitors for the job market and the cause of a decrease in the wages of locals, especially for unskilled jobs (see Chap. V). Additionally, for citizens, the different approaches toward trade and refugees rest also in key differences in the economic fundamentals. Trade is based on comparative advantages, while asylum acceptance relies on absolute advantages. In other words, in the case of trade, both countries may gain or lose from the exchange of goods since both countries will export and import various types of goods, which might also be supplementary goods between each-other. On the contrary, in the case of refugee protection, poor countries will supply other countries with persecuted citizens. This will lead to the increase of national budget of host countries, which will not gain any benefits, at least, not in the short or medium terms (see Chap. II). Thus, only poor countries that supply with persecuted citizens will gain benefits, which will not be shared with other (host) countries.

¹⁸⁰ Greenaway, David, and Douglas R. Nelson. "The distinct political economies of trade and migration policy: through the window of endogenous policy models, with a focus on North America." *Labor Mobility and the World Economy*. Springer, Berlin, Heidelberg, 2006. 295-327.

¹⁸¹ Getmansky, Anna, Tolga Sinnmazdemir, and Thomas Zeitzoff. "Refugees, xenophobia, and domestic conflict: Evidence from a survey experiment in Turkey." *Journal of Peace Research* 55.4 (2018): 491-507; Schweitzer, Robert, et al. "Attitudes towards refugees: The dark side of prejudice in Australia." *Australian Journal of Psychology* 57.3 (2005): 170-179.

¹⁸² Waldman, Michael. *The fight to vote*. Simon and Schuster, 2016.

¹⁸³ Yigit, Ismail Hakki, and Andrew Tatch. "Syrian refugees and Americans: Perceptions, attitudes and insights." *American Journal of Qualitative Research* 1.1 (2017): 13-31.

That is, in the case of trade, exporters often constitute a strong lobby group for better access in foreign countries. Meanwhile, liberal asylum policies fail to gain political support because there is no clear lobbying group supporting it as trade liberalization is seen as improved market access in foreign countries.¹⁸⁴ Thus, the balance of power in domestic trade politics gradually shifted in favor of liberalization.¹⁸⁵

In the international arena, States have cooperated by establishing GATT/WTO. Although the UNHCR aims to protect refugees, neither the UNHCR (see Chap. I) nor the International Organization for Migration (IOM)¹⁸⁶ had in their missions the liberalization of refugee movement on a global level. As is well-known, GATT was part of the Havana Charter of 1947, which endeavoured to create the International Trade Organization (ITO). GATT had a simple mission¹⁸⁷ and could survive although ITO never was born. In contrast, the UNHCR sought a permanent solution for continuous refugee influxes (see Chap. I, Sec. 4). This is a lofty goal since the L&E approach demonstrates that the regional system has more advantages than the international one and the international “refugee market” has failed (see Chap. II, Sects. 1 and 5).

From the moment of ratification and compliance, States also make an economic cost-benefit analysis to maximize their highest net benefits (Sect. 2 and 3). The basic goal of GATT/WTO was to escape from a trade-driven prisoner’s dilemma.¹⁸⁸ In contrast, in the case of the “refugee market,” States are captured in a prisoner dilemma style of game, both on the supranational level (see Chap. II, Sect. 5 and Chap. VI) and especially on the international level (see Chap. II, Sects. 1 and Sect. 5), with no successful cooperation which can free them from sub-optimal strategies.

Moreover, the main principles of GATT/WTO are reciprocity, non-discrimination, and national treatment. Reciprocity here refers to the access to foreign markets in exchange for approximately an equal value of foreign suppliers in domestic markets. Article 10 of the Draft-conventions dealing with trade by the International Law Commission puts forward the most favorable national clause. This underlines the principle of non-discrimination. Thus, the privileges of one party must be granted to all parties to the negotiations. Lastly, national treatment means that foreign companies are subject to the same rules as national firms.

To propose a WTO model for refugees, the WTO’s principles should be applied also in this “new” WTO model for refugees. All (democratic) countries already apply a non-discrimination policy toward citizens and foreigners. This is also established in Article 3 of the 1951 Convention or

¹⁸⁴ Gilligan, Michael J. *Empowering exporters: reciprocity, delegation, and collective action in American trade policy*. No. 8. University of Michigan Press, 1997.

¹⁸⁵ Luszti, Michael. *The limits of protectionism: Building coalitions for free trade*. University of Pittsburgh Pre, 2004.

¹⁸⁶ Hatton, note 166.

¹⁸⁷ Irwin, Douglas A. "The GATT in historical perspective." *The American Economic Review* 85.2 (1995): 323-328.

¹⁸⁸ Bagwell, Kyle, and Robert W. Staiger. *The Economics of the World Trading System*. MIT press, 2004.

as a constitutional right in the majority of the EU-27 basic laws (see Chap. II, Sect. 2). In addition, family reunification is one of the criteria in asylum laws and also, one of the main principles of the Dublin Regulation. Moreover, Family Reunification Directive 2003/86 is also applicable to refugees.¹⁸⁹ Thus, the principle of non-discrimination is applied in both trade and asylum laws. Only the discrimination against refugees within the legal framework is relevant here though other forms of discrimination can also accrue in reality.

The 1951 Convention establishes several rights for refugees, which, apart from political rights, are similar to those of local citizens. These rights include property rights (Article 13), artistic and intellectual property rights (Article 14), the right to association (Article 15), the right of access to court (Article 16), the right to work (Articles 17-19), the right to welfare (Articles 20-24), etc. These rights are also established in the CEAS.¹⁹⁰ Though refugees do not have identical rights as citizens since they lack political rights, it can be concluded that they do have similar rights. Therefore, also in asylum law, the principle of national treatment is applied.

Focusing on the last element: the principle of reciprocity is not applicable since refugee influx is one-way street where trade is not. Indeed, Article 1(A)(2) states that refugees are persecuted individuals that leave their own country for different types of persecution (see Chap. II, Sect. 2). In other words, while the trade balance (import/export) of each country could go to zero, this is impossible with the influx of refugees. History has shown that the two main reasons for forced migration are armed conflict, especially, civil wars and genocide,¹⁹¹ or autocracy.¹⁹² Poor countries have a higher probability of armed conflicts.¹⁹³ Autocracy does not exist in the rich Western countries. Furthermore, rich countries are more attractive than poor countries (see Chap. IV, Sect. 5.3.).¹⁹⁴

Thus, if rich countries (e.g. Western European countries, the USA and Canada) were gathered together with poorer countries (e.g. sub-Saharan countries) or countries in conflict areas (e.g. Middle East countries), it will be difficult, perhaps even impossible, to see how improved terms of access for asylum seekers of the poorer/conflict areas countries could be of equal value to similar conditions granted by richer countries in return. As a result, if trade is based on comparative, asylum policies

¹⁸⁹ European Commission. Common European Asylum System European, available on-line: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en, accessed on April 30th, 2020.

¹⁹⁰ *Ibid.*

¹⁹¹ Schmeidl, Susanne. "Exploring the causes of forced migration: A pooled time-series analysis, 1971-1990." *Social Science Quarterly* (1997): 284-308; Davenport, Christina, Will Moore, and Steven Poe. "Sometimes you just have to leave: Domestic threats and forced migration, 1964-1989." *International Interactions* 29.1 (2003): 27-55.

¹⁹² Neumayer, Eric. "Bogus refugees? The determinants of asylum migration to Western Europe." *International Studies Quarterly* 49.3 (2005): 389-410. p. 389

¹⁹³ Royal Geographical Society, available on-line: <https://www.rgs.org/schools/teaching-resources/the-geography-of-conflict/conflict-today/>, accessed on April 30th, 2020.

¹⁹⁴ This is the result of an analysis of a large date from 1982 to 1999 within the EU. Neumayer, Eric. "Asylum destination choice: what makes some West European countries more attractive than others?." *European Union Politics* 5.2 (2004): 155-180.

are based on absolute advantage. To arrive at a better result in asylum law as well, a net asylum balance of zero is needed. Indeed, restrictive policies aim to do that.

Moreover, it is fundamental to recognize the consistency between national and international policy. In (democratic) countries, the ratification of an international agreement needs the support of the national legislative body. This is done through the so-called “two-level game.”¹⁹⁵ A country ratifies an international treaty if its gains are higher than the losses, including sovereignty costs. This also needs political support. While trade is supported by a clear lobby, liberalization of refugee protection of national citizens of developed countries in the poorer countries lacks a lobby to support it, at least, in the rich countries. Thus, there is little to bargain over in the international arena when there would not be political support at home.¹⁹⁶

According to experimental economics, reciprocity is fundamental to human interactions.¹⁹⁷ Reciprocity helps the public opinion to consent to the liberalization of refugee acceptance since national governments shall face them as well as balance different interest groups. Unfortunately, in the case of migration, public opinion has an adverse impact. The absence of reciprocity is the main reason for the absence of international bargains to crystalize a WTO model for refugees since there is no political support by the national Parliaments.

To smooth the effect of the absence of reciprocity, two solutions could be put forward: the linkage of asylum policies with trade or establishing temporary solutions. For instance, the Annex on Movement of Natural Persons of the General Agreement on Trade in Services indirectly affects migration without giving the right to work in the host country or the right to a resident permit. International economics experts have argued that this will increase negotiation costs.¹⁹⁸

In case of strong cooperation in other sectors, although focused on trade, e.g. the EU, the linkage of trade-asylum protection might bring better results. Another example is the U.S.-Canada Free Trade Agreement of 1987, which paved the way to change the Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries of 2002 (STCA). These two examples further underline the importance of a regional approach rather than an international one (see also Chap. II, Sect. 5). The second solution is exemplified by the Kosovo’s refugee crisis, where

¹⁹⁵ Putnam, Robert D. "Diplomacy and domestic politics: the logic of two-level games." *International organization* 42.3 (1988): 427-460; Milner, Helen V. *Interests, institutions, and information: Domestic politics and international relations*. Princeton University Press, 1997.

¹⁹⁶ Hatton, note 166.

¹⁹⁷ Fehr, Ernst, Urs Fischbacher, and Simon Gächter. "Strong reciprocity, human cooperation, and the enforcement of social norms." *Human nature* 13.1 (2002): 1-25. Indeed, in the case of the ultimatum game, where parties interact anonymously and only once, so reciprocity is not an issue, parties do not accept an offer that according to them insufficiently generous, even though this does not coincide with their narrow economic interest to do so. In addition, they aim to inflict punishments, even though this is costly for them.

¹⁹⁸ Hatton, note 166.

the protection was temporary¹⁹⁹ as well as resettlements.²⁰⁰ However, these solutions have faced difficulties in their applications: e.g. the EU quota refugee-sharing failed in its implementation;²⁰¹ the Canadian constitutional court has questioned the constitutionality of the USA-Canada STCA;²⁰² and, the 1951 Convention presumes the *ipso jure* status (see Chap. II, Sect. 2), which brings the impossibility of refugee status as only temporary.

To sum up, trade is different from asylum protection. If trade is based on comparative advantage, asylum policies are based on absolute advantage. Thus, the principles of reciprocity cannot be applied. In addition, the potential solutions given for eliminating this absence have been confirmed to be ineffective in their implementation.

5. Conclusions

The economic analysis of international refugee law might also explain the main “push” factors why States have ratified and complied with the 1951 Convention. States ratified the 1951 Convention by considering several “push” factors. Mainly, they aimed to eliminate war costs by enhancing international cooperation, which is essential in the case of future uncertainty. In addition, national governments have continued to comply with the 1951 Convention because they intend to maintain their reputation and lower the retaliation costs.

Thus, a rational State will, in the case of *ceteris paribus*, not comply with the 1951 Convention if they estimate that the surplus obtained by the deviation (the public expenditure for the protection and promotion of refugee rights) is higher than the opportunity costs (the reputational costs of non-compliance that impact on future international agreements and the retaliation costs) since this strategy maximizes its payoffs. This is particularly reinforced by the fact that the 1951 Convention is a multilateral agreement focusing on the protection of refugees (e.g. a public good).²⁰³ In addition, reputational costs generate several problems and retaliation costs are extremely low and inevitable due to the barriers in filing an application to the ECtHR.

Therefore, States are interested to sign the 1951 Convention, but may not be interested to comply with it because there is an absence of an *ad hoc* tribunal for its enforcement. However, States’

¹⁹⁹ McHugh, Lois B., et al. "Kosovo: Refugee Assistance and Temporary Resettlement." Congressional Research Service, The Library of Congress, 1999.

²⁰⁰ Fitzpatrick, Joan. "Temporary protection of refugees: elements of a formalized regime." *American Journal of International Law* 94.2 (2000): 279-306.

²⁰¹ 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.

²⁰² Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe V. Canada (Challenge To The Canada-Usa Safe Third Country Agreement)(2007 FC 1262). This decision has been underlined again after the election of Donald Trump as president of the USA.

²⁰³ Downs and Jones, note 68.

self-interested behavior is shaped by the fact that their policies generate negative externalities for other countries, although States benefit more from the non-compliance strategy. In other words, States also take into consideration the political costs of their immigration policies towards the other States since the protection of refugees is considered a public good.²⁰⁴

A WTO model for refugees is impossible since trade is different from asylum protection. The increase in refugees affects national culture, whereas trade does not. Refugee protection is more permanent than trade. Asylum seekers do not have the right to vote and the lobby group for the protection and promotion of their rights is not clearly formed in the national host countries. In addition, (rich) host countries do not have any interest in increasing employment vacancies for refugees or decreasing national wages, especially for unskilled jobs. Thus, this asymmetry between host countries and origin countries underpins the WTO model for refugees since asylum law is characterized by absolute advantage rather than comparative advantage, as it is in trade. As a result, national governments will not liberalize asylum policies since they find the restriction in asylum policies politically optimal. Thus, national governments do not have any interest to form an international organization similar to the WTO for the liberalization of asylum policies.

Another interesting application of the WTO model in the case of refugees might be the dispute resolution mechanism, which allows enforcement in the absence of an international coercive power. Nevertheless, this mechanism might not be possible in the case of protection of refugees for two main reasons. First, Article 60 (5) of the Vienna Convention states that suspension of an operation of a treaty is not applicable in the case of HRs treaties, as the 1951 Convention is considered. Second, and more important, in the 1951 Convention, there is an absence of an *ad hoc* tribunal for its enforcement. As a result, as shown in Section 3.2., the retaliation costs, applied by the ECtHR or EUCJ, are quite low compared to the annual public cost per asylum seeker.

²⁰⁴ Bubb et al. note 9; Betts, note 102.

Chapter IV

The different variables affecting the refugees' decision process

Abstract

This chapter analyzes the empirical studies regarding refugees' decision processes, focusing on the main variables that affect it. By including a micro-model of migration adapted for the refugee movement, this chapter takes a nominalist approach, which underlines the similarities between refugees and other types of migrants. In addition, by examining some of the most important empirical research conducted on migrants and refugees, this work discusses "choices" made by refugees at a certain point in their trip as to their final destination country. The chapter offers a literature review by identifying and separating the "push" and "pull" factors in addition to studying the impact of economic variables on refugees' decision processes.

Key words:

adaptation costs, information, migration costs, non-monetary costs, opportunity costs, previous investment costs.

1. Introduction

Migration, in general, and of refugees, in particular, is one of the biggest global challenges of our time. The traditional literature has studied it from two main perspectives: a legal approach,¹ and a socio-cultural perspective, indicating the importance of integration.²

However, in recent decades, scholars have analyzed through a L&E international as well as national refugee laws. In line with this approach, this chapter exposes various variables that affect the refugees' decision process. This new approach can shed light and put to the test different political and policy statements made by officials, politicians, and indeed academics

¹ For instance: Wouters, Cornelis Wolfram. *International legal standards for the protection from refoulement*. Intersentia Publishers, 2009; UNHCR. 1992. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees; Jackson, Ivor C. "1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection, The." *International Journal of Refugee Law* 3.3 (1991): 403; Jaeger, Gilbert. "Refugee Asylum: Policy and Legislative Developments." *International Migration Review* 15.1-2 (1981): 52-68.

² Delle Donne, Marcella. *Avenues to integration: refugees in contemporary Europe*. Impermedium, 1995; Black, Richard. *Geography and refugees: Patterns and processes of change*. Belhaven Press, 1993.

in EUMS as well, claiming that welfare provisions or economic growth might be considered as “pull” factors by refugees.³

The premise of this chapter is that only a persecuted individual can be entitled to refugee status. A refugee is someone unable or unwilling to stay in his country of origin owing to a well-founded fear of being persecuted due to race, religion, nationality, membership of a particular social group, or political opinion (see Chap. II). In political terms, there are three distinguishable categories of refugees: activists, targets, and victims.⁴ Activists are persecuted because they have been involved in political actions against local authorities. Refugees as targets are members of a particular social or cultural group. Refugees as victims are individuals who are persecuted based on a feature that they cannot control (e.g. ethnicity). If a persecuted individual applies for asylum in another country, his status is transformed into an asylum seeker. Then, if his application is accepted, his status is transformed from an asylum seeker to an asylum migrant. If the application is turned down, however, he will be bound to be sent back to his home country, and if he avoids deportation, he becomes an illegal immigrant (person unlawfully staying in a country).⁵

However, a persecuted individual can decide not to apply for refugee status, giving up the advantages that this status brings and thus becoming an illegal immigrant (immigrant unlawfully staying in a country). The benefits of such a move result from the low probability to be recognized as a refugee – especially in the case of a massive influx, thus avoiding the risk of certain deportation if the refugee status is rejected. For instance, in 2019, in the EU-27, out of 676,300 first-time asylum applicants, only 38.1% of these applications were considered as protected migrants, granting refugee or subsidiary protection status, or an authorization to stay for humanitarian reasons. Among these protected migrants, only 52.9% resulted in grants of refugee status.⁶ Thus, in 2019, in the EU-27, only one out to five first-time asylum applicants received the refugee status.

³ Esping-Andersen, Gosta. *The three worlds of welfare capitalism*. John Wiley & Sons, 2013; Bloch, Alice, and Liza Schuster. "Asylum and welfare: contemporary debates." *Critical Social Policy* 22.3 (2002): 393-414; Brochmann, Grete, and Tomas Hammar. *Mechanisms of immigration control: A comparative analysis of European regulation policies*. Bloomsbury Academic, 1999. However, there is still a difference in use of different services offered in the host countries between the local community and migrants because minority communities – such as refugees or economic migrants – do not have all the necessary information or because there is a cultural difference. Law, Ian, et al. "The effect of ethnicity on claiming benefits: evidence from Chinese and Bangladeshi communities." *Benefits* 9 (1994): 7-11.

⁴ Zolberg, Aristide R., Astri Suhrke, and Sergio Aguayo. *Escape from violence: Conflict and the refugee crisis in the developing world*. Oxford University Press on Demand, 1992.

⁵ It should be mentioned that from a socio-ethical approach, a person cannot be classified as an ‘illegal migrant’; but as a person unlawfully staying in a country. However, the economic literature of refugee law uses this term.

⁶ Eurostat, Asylum Statistics. 2020. Asylum applications (non-EU) in the EU-27 Member States, 2008–2018 available on line: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Number_of_asylum_applicants:_increase_in_2019 accessed on April 30th, 2020.

Apart from the low refugee rate, there are other two “push motives” why individuals may opt out of this option. First, the probability of being expelled by the State is higher for asylum seekers rather than for illegal immigrants. For example, in the UK, in 2002, 4.7% of illegal immigrants caught by the police were expelled while 11% of Iraqis and 55% of Yugoslavs whose asylum claims had been rejected were removed.⁷ Secondly, there is a chance in the future that there will be a pardon or they will be granted clemency and they will receive a resident permit.⁸ For instance, “southern European governments regularly confer legal status to hidden illegal immigrants who stay in the country for a long time.”⁹

Another option for refugees is to apply for a resettlement program.¹⁰ Resettlement refers to the transfer of refugees from an asylum-providing country to another country that has agreed to admit them and ultimately grant them permanent settlement. Resettled refugees have advantages over asylum seekers; however, the probability of being selected for resettlement is extremely low. For instance, in 2019, these programs provided only 81,300 places out of 20.4 million UNHCR-estimated refugees in need of protection.¹¹ Thus, this number is really low. These refugees are called resettlement refugees (or quota refugees): persecuted individuals who have been declared as refugees and are considered for transfer to other destination countries.

In addition to genuine refugees (Article 1(A)(2)) and resettlement refugees, there are also two other groups of refugees: “Anticipatory refugees,”¹² persecuted individuals – generally with high education skills – that can anticipate the future events that are going to lead to their persecution, and “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. Their behavior is similar to economic migrants.¹³

This chapter is structured as follows: Section 2 exposes the methodology of this chapter by only considering the microeconomic model of migration. The Section aims to show that the

⁷ Monheim, Jenny. "Human trafficking and the effectiveness of asylum policies." *German Working Papers in Law and Economics* 2008.1 (2008): 3.

⁸ In March 2007, Germany’s policymakers reached an agreement to provide residency permits for asylum seekers whose applications were denied in the 1990s but whose deportations have been deferred for some reasons. Leise, Eric. "Germany to Regularize 'Tolerated' Asylum Seekers." *Migration Information Source* 5 (2007).

⁹ Jennissen, Roel, and Leo van Wissen. "The distribution of asylum seekers over Northern and Western European countries, 1985-2005." *Genus* 71.1 (2015).

¹⁰ According to the literature, the resettled refugees might often lack valuable labor market skills (i.e. language skills or specialized human capital), which also impact on their integration in the destination country’s labor market. De Silva, Arnold. "Earnings of immigrant classes in the early 1980s in Canada: A re-examination." *Canadian Public Policy/Analyse de Politiques* (1997): 179-202. As a result, their admission is generally done through a decentralized system (i.e. Canada) where private NGOs interested in sponsoring overseas refugee claimants must negotiate a Sponsorship Agreement with the Minister of Immigration. Trebilcock, Michael J. "The law and economics of immigration policy." *American Law and Economics Review* 5.2 (2003): 271-317.

¹¹ UNHCR. 2018. Global Trends, available on-line <https://www.unhcr.org/resettlement.html> accessed on April 30th, 2020.

¹² 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.

¹³ *Ibid.*

application of various methods, as well as the application of different data, might not always lead to unique results, although they have similarities. In addition, within refugees, there is a division of anticipatory refugees, resettlement refugees, and bogus refugees – on one side – and the genuine refugees – on the other. This classification is essential in order to better value the cost-benefit analysis of persecuted citizens. Section 3 highlights the importance of information since information is important to clarify if refugees could be considered as rational agents. Moreover, Section 4 and 5 expose the up-to-date empirical findings, distinguishing between “push” factors and “pull” factors, and by giving particular focus to the economic variables.

The innovative part of this chapter rests on the incorporation of all of these variables in a single study. The results of which could also be used as an impact assessment of refugee policies, especially in case of any future massive influx of migrants (i.e. environmental migrants or climate refugees). In addition, civil servants or members of NGOs dealing with the protection of refugee rights can find an overview of the main variables that affect the refugees’ decision process. Thus, they would be better prepared for the investigation of refugee files as well as during refugees’ interviews. However, this work is based on general data, and employees or volunteers dealing with refugee protection shall strongly consider on a case-by-case basis the specific situation of the individual asylum seeker (see Chap. II, Sect. 4).

In addition, the innovative part of it rests in not only the literature review *per se* but also in its interpretation of the migration formula adapted to different groups of refugees. Section 3 discusses the role of information which distinguishes between different groups of refugees as well as underlines the UNHCR’s definition of the causes of migration. Section 5.3 further uncovers different studies that show the correlation between macroeconomic variables and the refugee’s decision process without considering them as economic migrants.

2. Methodology of the Chapter: Different Theories of Migration

This Section analyzes the different theories of migration adapted to refugee movements. Currently, there is no single coherent theory of international migration.¹⁴ This chapter looks at the microeconomic model and does not examine macro theories, such as the dual labor market

¹⁴ Massey, Douglas S., et al. "Theories of international migration: A review and appraisal." *Population and development review*(1993): 431-466.

theory¹⁵ or the world systems theory,¹⁶ because, since the formation of the IRO, refugee status is an individual right (see Chap. I, Sect. 2). Nevertheless, the “new economics of migration”¹⁷ is studied in Sect. 4 since, sometimes, family is an important unit of decision making. Additionally, the network theory¹⁸ and the theory of cumulative causation¹⁹ have been used to explain the perpetuation of international movement (see Sect. 4.1.).

As the UNHCR underlines,²⁰ refugees flee after a calculated consideration of a combination of political, economic, and other reasons. The simplistic dichotomy between “voluntary economic migrants” versus “involuntary political refugees” is challenging (see Chap. II, Sec. 2.1.). Thus, this chapter applies a nominalist approach,²¹ which “stress[es] the similar structural position of refugees and other migrants with regards to the labor market, restrictive government immigration policies, and racism in host societies.”²² In addition, in accordance with the literature²³ and with the UNHCR,²⁴ this chapter presupposes that persecuted individuals strive for a durable solution beyond just safety.

¹⁵ Piore, Michael J. *Birds of passage: migrant labor and industrial societies*. Cambridge University Press, 1980.

¹⁶ Morawska, Ewa. "The sociology and historiography of immigration/Virginia Yans-McLaughlin, Immigration Reconsidered: History, Sociology, and Politics." (1990): 187-240; Sassen, Saskia. *The mobility of labor and capital: A study in international investment and labor flow*. Cambridge University Press, 1990; Castells, Manuel. *The informational city: Information technology, economic restructuring, and the urban-regional process*. Oxford: Blackwell, 1989; Walton, John. *Labor, class and the international system*. Academic, 1981; Petras, Elizabeth McLean. "3: The Global Labor Market in the Modern World-Economy." *International Migration Review* 15.1 suppl (1981): 44-63.

¹⁷ Stark, Oded, and David E. Bloom. "The new economics of labor migration." *The American Economic Review* 75.2 (1985): 173-178.

¹⁸ Gurak, Douglas T., and Fee Caces. "Migration networks and the shaping of migration systems." *International migration systems: A global approach* (1992): 150-176; Massey, Douglas S. "The social and economic origins of immigration." *The Annals of the American Academy of Political and Social Science* 510.1 (1990): 60-72; Massey, Douglas S., and Felipe García España. "The social process of international migration." *Science* 237.4816 (1987): 733-738; Taylor, J. Edward. "Differential migration, networks, information and risk." *Migration, human capital and development* 4 (1986): 147-171; Hugo, Graeme J. "Villae-community ties, village norms and ethnic networks: a review of evidence from the Third world." *Migration decision making: Multidisciplinary approaches to microlevel studies in developed and developing countries*. (1981): 186-224.

¹⁹ Massey, D. "1990: Social structure, household strategies, and the cumulative causation of migration. *Population Index* 56, 3-26." (1990).

²⁰ UNHCR. 2000. *The State of the World's Refugees 2000/Fifty Years of Humanitarian Action*. Geneva, Switzerland: United Nations High Commissioner for Refugees.

²¹ Within the current debate there are two different perspectives: realist and nominalist. Hein, Jeremy. "Refugees, immigrants, and the state." *Annual Review of Sociology* 19.1 (1993): 43-59). While the realist approach considers the distinction to be real by emphasizing the psychological trauma of refugees, the nominalist approach considers refugees as a social construction that has similarities with other immigrants. For the realist approach: Keller, Stephen L. *Uprooting and social change: The role of refugees in development*. Manohar Book Service, 1975; Kunz, Egon F. "Part II: The Analytic Framework: Exile and Resettlement: Refugee Theory." *International Migration Review* 15.1-2 (1981): 42-51. For the nominalist approach: Richmond, Anthony H., and Kathleen Valtonen. "Global apartheid: Refugees, racism, and the new world order." *Refugee: Canada's Journal on Refugees* 14.6 (1994).

²² Black, Richard. "Refugees and displaced persons: geographical perspectives and research directions." *Progress in Human Geography* 15.3 (1991): 281-298. p. 286.

²³ Moret, Joëlle. *The path of somali refugees into exile: a comparative analysis of secondary movements and policy responses*. SFM, 2006.

²⁴ UNHCR. 2005. *Convention plus core group on addressing irregular secondary movements of refugees and asylum seekers: joint statement by the co-chairs, UNHCR High Commissioner's Forum; UNHCR. 2004. Protracted Refugee Situations, Executive Committee of the High Commissioner's Programme, Standing Committee 30th Meeting.*

Refugee status is an individual right (see Chap. I, Sect. 2). By adapting the neoclassical micro model of migration²⁵ to the refugee movement, individuals move not only to avoid persecution but also to maximize their life utility. Using Borjas' model,²⁶ refugees calculate the benefits offered by host countries estimated over a time horizon from 0 to n . Not all refugees are to be seen as rational individuals since they are persecuted individuals (see Chap. II, Sect. 2). However, some of them, or at a certain point of their trip, make a choice, although this is (very) limited (see Sect. 3). The formula presupposes that the socioeconomic context within which the decision is made affects the context in which subsequent decisions are made.

$$ER(0) = \int_0^n [P_1(t)P_2(t)Y_d(t) - P_3(t)Y_0(t)] e^{-rt} dt - C(0)$$

In cases of anticipatory refugees or resettled refugees, this formula is interpreted as in the case of real economic migrants. In other words, $ER(0)$ is the expected net return from migration calculated just before the departure at time 0, where:

t is time,

$P_1(t)$ is the probability of avoiding deportation from the area of destination (1.0 for legal migrants and <1.0 for undocumented migrants),

$P_2(t)$ is the probability of employment at the destination,

$Y_d(t)$ is the earnings if employed at the destination country,

$P_3(t)$ is the probability of employment in the origin community,

$Y_0(t)$ is the earnings if employed in the destination country,

r is the discount factor, and

$C(0)$ is the sum total of the costs of movement (including psychological costs).

Thus, if $ER(0) > 0$, anticipatory refugees will leave and resettled refugees will apply for resettlement programs. On the contrary, if $ER(0) < 0$, anticipatory refugees will stay in the host country and wait until there is a direct threat, and resettled refugees will stay in the country that has already recognized him as a refugee. Lastly, if $ER(0) = 0$, the actor is indifferent between staying and moving (anticipatory refugees) or between applying or not applying for resettlement programs (resettled refugees). The same formula can be applied to the case of bogus refugees or for other refugees that make a clear choice between different host countries, although they have left for persecutory reasons. Therefore, in all these cases, wage differences and employment rates do count in their rational decisions.

²⁵ Todaro, Michael P., and Lydia Maruszko. "Illegal migration and US immigration reform: A conceptual framework." *Population and development review* (1987): 101-114; Sjaastad, Larry A. "The costs and returns of human migration." *Journal of political Economy* 70.5, Part 2 (1962): 80-93; Todaro, Michael P. "Economic development in the third world." (1989).

²⁶ Borjas, George J. *Friends or strangers: The impact of immigrants on the US economy*. Basic Books, 1990.

In the case of (genuine) refugees – by considering that $ER(0)$ is the expected net return at time 0, which might be the starting day of persecution or later – this formula is to be calculated where:

t is time, which is considered the rest of refugee's life since refugee status is an *ipso jure* (see Chap. II, Sect. 2),

$P_1(t)$ is the probability of being accepted as asylum migrant in the destination country (1.0 for (genuine) refugees that can also prove it),

$P_2(t)$ is the probability of employment at the destination country, after being accepted as an asylum migrant or if the right to work is given to also asylum seekers from the moment of asylum application,

$Y_d(t)$ is earnings (social welfare and/or salary, if employed)²⁷ at the destination country, by also including migration costs and – in particular – adaptation costs.

$P_3(t)$ is the probability of persecution in the country of origin, by also including psychological costs of persecution as well as the previous investment costs.

$Y_0(t)$ are the lost earnings in the country of origin;

r is the discount factor, and

$C(0)$ is the sum total of the costs of movement (including psychological or non-monetary costs).

Thus, if $ER(0) > 0$, (genuine) refugees will leave. If $ER(0) < 0$, they will stay in their origin countries, and if $ER(0) = 0$, the actor is indifferent between staying and moving.

This chapter is based on the push-pull paradigm of Ravenstein²⁸ adapted to the refugee movement while also taking into account some of its main criticism.²⁹ This paradigm rests in the “push” factors that drive a person to leave her place of origin (under the condition of threat) and in the “pull” factors that attract her to the destination countries, where the decision is done in several steps and there is a passage of time from the first step (leave or stay) to the last step (apply for refugee status in the final destination country). Different from the push-pull paradigm of Ravenstein, which focuses only on the economic variables, this chapter also considers other factors, in particular social factors, under the variable of the migration network.

The variables that affect the decision process are divided into four main groups: previous investment costs, emotional costs, migration costs, and adaptation costs. Before their analysis in Sections 4 and 5, some clarifications should be made. First, in all of the different

²⁷ It is social welfare and salary, if the country does not recognize a right to work for asylum seekers. It is only salary, if the persecuted person immediately started working in a country that recognizes a right to work for asylum seekers. It is only social welfare, in the case that although the persecuted person is accepted as asylum migrant, he does not find a job.

²⁸ Ravenstein, Ernst Georg. "The laws of migration." *Journal of the statistical society of London* 48.2 (1885): 167-235.

²⁹ The main critics have come by the scholars highlighting the importance of the historical-political factor. While Ravenstein focused only on the economic differentials between the sending and receiving countries, these scholars also consider the historical and political factors. Thus, the link is not only due to wage/job opportunities differentials, but also due to a variety of links, such as former colonial ties, cultural and linguistic similarities etc. Portes, Alejandro, and József Böröcz. "Contemporary immigration: Theoretical perspectives on its determinants and modes of incorporation." *International migration review* 23.3 (1989): 606-630. Another criticism come from the literature that considers social factors an important variable as well. Boyd, Monica. "Family and personal networks in international migration: recent developments and new agendas." *International migration review* 23.3 (1989): 638-670. The social network impacts in both the decision to leave the origin country as well as to *choose* the destination country.

phases, individuals have opportunity costs. For instance, individuals leave all their monetary investments the moment they decide to leave their home country. There are also opportunity costs the moment that they decide to continue the trip to another safe country, although they have crossed the borders and are already in a safe country. Second, opportunity costs should not only be considered monetary losses but should include various emotional costs as well. For instance, the moment that they decide to leave their home country, they lose a part of or entire relationships with friends and relatives. Third, these non-monetary costs continue on in the destination country, since refugees have to adapt to the new social-economic and cultural context. Fourth, even though these costs might affect all phases, two main ones should be highlighted: 1. stay in or leave the home country, when the “push” factors are more important; and 2. deciding the final host destination country, when similar to the main variables that attract economic migrants, the “pull” factors are considered fundamental. Fifth, the goal of the figures is to demonstrate the refugee decision process since refugees consider all these macro-groups together without clear distinctions. Additionally, in all of these steps, there are opportunity costs as well as non-monetary costs. Thus, the figures *only* serve an explanatory purpose.

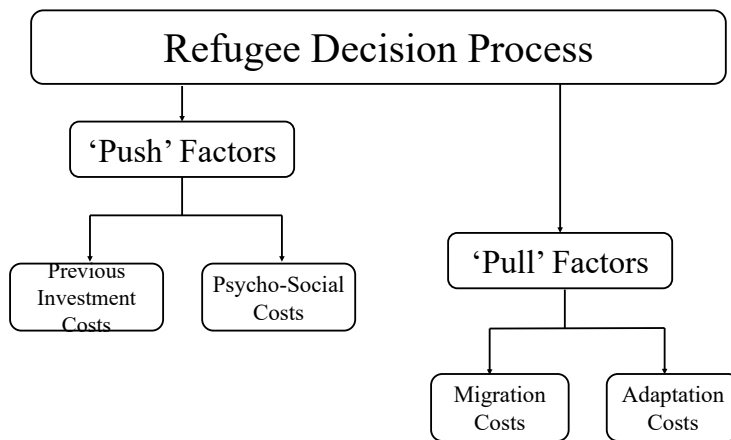


Fig. 1. The Refugee Decision Process

Figure 1 shows the two phases of the refugee decision process and the four main macro-groups that affect them. Also, visually, the Figure aims to show that there are at least two steps for the decision. The first step has an impact on the second. Thus, if after personal considerations, refugees decide to stay, then persecuted individuals will not consider the “pull” factors. Although the different variables play dissimilar roles in the refugee decision-making

process, for explanatory purposes, the main macro-factors that affect the refugee decision process are previous investment costs, emotional costs, migration costs, and adaptation costs.

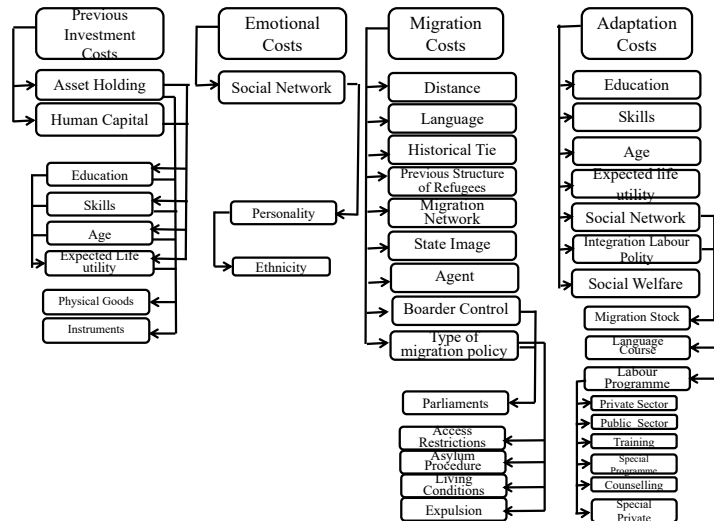


Fig. 2. The Main Variables that Impact the Refugee Decision Process

Figure 2 details the main macro-factors that affect the refugee decision process. The main goal of this figure is to give a visual overview of the chapter since these variables are not independent of each other and are not mutually exclusive.³⁰ Indeed, some variables, such as education, skills, age, and expected life utility, are common in both the “push” and “pull” factors. In other words, young skilled citizens with a high level of education demonstrate that they envision their future in the host countries by investing more of their human capital there, rather than the other groups. Moreover, opportunity costs or non-monetary costs will exist in all the different stages of the refugee’s decision process.

To sum up, this Chapter applies a nominalist approach. Moreover, the various methods applied show the impossibility of having unique clear results regarding the effect of the different variables uncovered in this chapter. However, these findings have been adapted to the refugee movement based on the micro-model of migration.

³⁰ Spinks, Harriet. *Destination Anywhere?: Factors Affecting Asylum Seekers' Choice of Destination Country*. Parliamentary Library, 2013.

3. The Role of the Information

The literature has identified several variables that may influence refugee decision making. Although this chapter is based on various empirical research conducted in a different socio-economic and historical context, these studies have some similarities. They have been published and cited by different scholars based on large samples. They were also conducted in Western countries during a period of economic growth and generally measuring a high refugee influx after an international conflict (e.g. Iraq war or ex-Yugoslavia wars).

The literature distinguishes among different groups of variables that demonstrate the pattern of destination countries by considering the “push” factors – such as previous investment costs and the emotional costs – and the “pull” factors – such as migration costs and adaptation costs. The “push” factors are fundamental during the decision to stay in or leave the origin country, where refugees aim to find an immediate safe place. In contrast, the “pull” factors are highly relevant in “choosing” the specific destination country, where persecuted individuals also focus on a permanent solution. Although the “pull” factors are the *only* important variables for economic migrants, they might also impact the decision process of refugees. For instance, as the literature argued, the reason why many Indians, Pakistanis, and Ghanaians asylum-seekers arrive in Belgium can be exclusively explained neither by colonial or geographical factors³¹ nor by the terms of established migration theories.³²

Furthermore, in the current refugee crisis, some Western European countries, which due to their geographic position are not the first safe country, receive a higher number of requests for international protection.³³ So, it might be that persecuted individuals are taking into account other aspects than the “push” variables or immediate safety. Indeed, the literature suggests that even genuine acute refugees rarely apply for international protection in the first “safe” country.³⁴ Although this chapter does not deny the conceptualization of refugees as “forced migrants” obliged to flee from persecution,³⁵ it also considers the importance of some “pull” factors common to economic migrants. These “pull” variables are especially important in the case of anticipatory refugees,³⁶ bogus refugees, and refugees to be resettled. In addition, the impact of these “pull” factors is increasing with the increase of information about the final

³¹ Ramakers, J. "Migranten en Ontwikkeling: Enkele elementen uit de discussie tussen eigenbelang en humanitaire principes." *Bared* 15 (1995): 16-18.

³² 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.

³³ Eurostat, note 6.

³⁴ Day and White, note 32; 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.

³⁵ Boyle, P., Halfacree, K. and Robinson, V. *Exploring Contemporary Migration*. Wesley Longman Limited, 1998.

³⁶ Johansson, note 12.

destination countries, which expands during the period persecuted individuals stay in refugee camps or transit countries.³⁷

The above differs from some of the existing literature that assumes asylum seekers know little or nothing regarding the final destination country,³⁸ and that it is unlikely that refugees will place importance on the information given by official institutions since there is a lack of trust in them.³⁹ Refugees do extract information from agents or smugglers⁴⁰ and social networks of potential future asylum seekers,⁴¹ and former country fellows. Often, the information passed on by migrants in the destination countries to other potential migrants in their home countries is not fully correct.⁴² This is in part because the migrants in the destination countries focus on the positive aspects of their experiences.⁴³

In general, refugees do not conduct a rational choice by comparing different advantages and disadvantages of various options⁴⁴ since there they do not have the full necessary information,⁴⁵ especially regarding the “pull” factors. In accordance with the majority of the reviewed literature, the chapter does not aim to demonstrate a concrete clear correlation between refugee choice and “pull” variables. However, occasionally, persecuted individuals encounter choices and do make decisions.⁴⁶ This is clearly the case of anticipatory refugees, resettlement refugees, and bogus refugees.

In other cases, speaking about “choice” is a contentious term⁴⁷ since persecution, sometimes prompt and unexpected, is the main factor that affects their decision to flee. Nevertheless, this does not mean that persecuted individuals should be considered passive individuals unable to choose and propelled by external factors.⁴⁸ Such refugees can opt between different options, although their range of possibilities is (very) limited.

For instance, the level of information of persecuted individuals who pass through secure transit countries increases,⁴⁹ especially through the information given by agents.⁵⁰ This has

³⁷ Day and White, note 32; Havinga and Böcker, note 34.

³⁸ Havinga and Böcker, note 34.

³⁹ Koser and Pinkerton. *The social networks of asylum seekers and the dissemination of information about countries of asylum*. Home Office, 2002.

⁴⁰ *Ibid.*

⁴¹ Robinson, Vaughan, and Jeremy Segrott. *Understanding the decision-making of asylum seekers*. Home Office, 2002; Koser and Pinkerton, note 39.

⁴² Crawley, Heaven. *Chance or choice? Understanding why asylum seekers come to the UK*. Refugee Council, 2011.

⁴³ Koser and Pinkerton, note 39.

⁴⁴ Crawley, note 42; Havinga and Böcker, note 34.

⁴⁵ Simon, Herbert A. "A behavioral model of rational decision making." *The Quarterly Journal of Economics* 69.1 (1955): 99-118.

⁴⁶ Havinga and Böcker, note 34.

⁴⁷ Crawley, note 42.

⁴⁸ *Ibid.*

⁴⁹ Havinga and Böcker, note 34.

⁵⁰ Day and White, note 32.

been confirmed in different studies such as in the UK,⁵¹ Belgium,⁵² the Netherlands,⁵³ and Canada.⁵⁴ This might be also the case in the current refugee crisis, where persecuted individuals do not apply for refugee status in the first EU country.⁵⁵ Moreover, all persecuted individuals have similar information to other migrants regarding the opportunity costs and the emotional costs. Thus, refugees opt between different options – at least – regarding the “push” factors⁵⁶ and can “balance the costs of staying versus the costs of migrating.”⁵⁷

The motives influencing the behavior of the persecuted individuals are personal as is the balance between the different variables. Evidently, the aggregated data is not able to reveal them. In addition, this data should be viewed as illustrative and not representative.⁵⁸ However, the individual decision process is also influenced by the main macro-level factors represented in this chapter.⁵⁹ For instance, the decision to come into the EU might be connected not only with language or historical ties but also with the image of the EU as a zone where rule of law are respected and this can also positively impact their prospects.

To sum up, information is an important factor to classify an agent as a rational one. A distinction should be made within. Anticipatory refugees, resettlement refugees, and bogus refugees should be distinguished from genuine refugees who are protected according to Article 1(A)(2) of the 1951 Convention. While it is clear that in the cases of anticipatory refugees, resettlement refugees, and bogus refugees, a choice is made and they behave as economic migrants, in the case of genuine refugees, the literature argues about these results.

4. “Push” Variables: Previous Investment Costs and the Emotional Costs

There are two main factors influencing the decision of a persecuted individual to leave his country: the perceived threat severity and its credibility or probability.

⁵¹ Havinga and Böcker, note 34.

⁵² *Ibid.*

⁵³ Doornheim, L., and N. Dijkhoff. *Toevlucht zoeken in Nederland (148)*. Wetenschappelijk Onderzoek-en Documentatiecentrum, 1995; Brink, Marjolein, and Mutiara Pasariboe. *Asylum seekers in the Netherlands*. Instituut voor Sociale Geografie, Universiteit van Amsterdam, 1993; Hulshof, M. E., Lia de Ridder, and P. J. Krooneman. *Asielzoekers in Nederland*. Instituut voor Sociale Geografie, 1992.

⁵⁴ Barsky, Robert F. "Arguing the American Dream à la Canada: Former Soviet citizens' justification for their decision making of host country." *Journal of Refugee Studies* 8.2 (1995): 125-141; Barsky, Robert F. "Why Canada? Why Québec?" *Assessing the convention refugee's decision making of Québec and Canada as host country in 1992*. European Centre for the Study of Argumentation, 1994.

⁵⁵ Eurostat, note 6.

⁵⁶ Boyle, note 35.

⁵⁷ Neumayer, Eric. "Bogus refugees? The determinants of asylum migration to Western Europe." *International Studies Quarterly* 49.3 (2005): 389-410. p. 389

⁵⁸ If data had been representative, there would have been a substantial amount of scientific discussion regarding the methodology of choosing them.

⁵⁹ Havinga and Böcker, note 34.

The increase of threat severity or its probability will positively impact the decision to flee since it raises the cost of staying.⁶⁰ The threat severity represents the total discounted loss if the individual chooses to stay and the threat is carried out. The threat credibility is the probability that the threat is carried out.⁶¹ In the case of refugees as activists or as targets (where an individual can control his behavior vis-à-vis the threat) the threat severity or its probability might be decreased or even eliminated if the persecuted individual weighs the persecution or fleeing more costly than maintaining or expressing the personal belief or principles which brings him to a risk of persecution. In these cases, agents might change their behavior and remain in the origin countries.

The threat may come from a violation of political rights or civil liberties by the regime and from ethnic tensions or threat of violence by other individuals. The empirical literature has confirmed that countries with gross HRs violations are the countries with the highest number of refugees.⁶² Indeed, such threats are most significant during armed conflict, especially civil wars and genocide.⁶³ War has a large positive effect on the decision making of refugees: “an increase of one battle-related death per thousand of the population increases asylum applications by around 40%.”⁶⁴ In addition, autocracy has a positive impact on asylum flows.⁶⁵ Famines and natural disasters are “push” factors only in cases of internal and cross-border displacements.⁶⁶

If the persecution is based on the grounds that refugees cannot change (e.g. ethnicity), they will seriously ponder the “push” factors. Figure 3 illustrates the main variables and sub-variables that affect these two main macro-factors.

⁶⁰ Neumayer, note 57.

⁶¹ Schaeffer, Peter. "Refugees: on the economics of political migration." *International Migration* 48.1 (2010): 1-22.

⁶² Moore, Will H., and Stephen M. Shellman. "Fear of Persecution Forced Migration, 1952-1995." *Journal of Conflict Resolution* 48.5 (2004): 723-745; Gibney, Mark, Clair Apodaca, and James McCann. "Refugee Flows, the Internally Displaced, and Political Violence (1980-1993): An Exploratory Analysis." *Whither Refugee* (1996): 45-66.

⁶³ Schmeidl, Susanne. "Exploring the causes of forced migration: A pooled time-series analysis, 1971-1990." *Social Science Quarterly* (1997): 284-308; Davenport, Christina, Will Moore, and Steven Poe. "Sometimes you just have to leave: Domestic threats and forced migration, 1964-1989." *International Interactions* 29.1 (2003): 27-55; Moore and Shellman, note 62.

⁶⁴ Hatton, Timothy J. "The rise and fall of asylum: What happened and why?." *The Economic Journal* 119.535 (2009): F183-F213, F194

⁶⁵ Neumayer, note 57.

⁶⁶ Zolberg, et al., note 4; Myron, Weiner. *The Global Migration Crisis: Challenge to States and to Human Rights*. HarperCollins College Publishers, 1995.

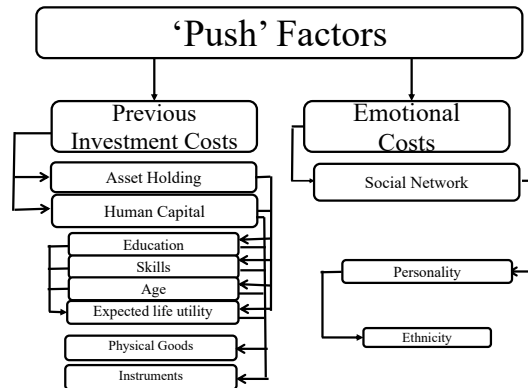


Fig. 3. The Main “Push” Factors that Impact the Refugee Decision Process

Previous Investment costs depend on the initial asset holding and human capital. Both these variables – especially human capital – depend on other factors, such as the level of education, skills, age, and expected lifetime utility.⁶⁷ Moreover, part of these dependent variables – such as education, skills, and age – indirectly influence another variable: the expected lifetime utility. Young well-educated individuals expect higher utility in their future than the old generation. This result is also underlined by the human capital economic theory, which predicts that people of working age are most likely to migrate as they have a higher chance to increase their life utility than others.⁶⁸

These variables also influence the type of asset holding. Economic capital is comprised of physical goods and capital investments. This distinction is important for two main reasons. First, the cost of maintenance is correlated with the physical presence only for the first group of assets. Second, the type of investment depends on the characteristics of the agent. Generally, younger, well-educated individuals invest more in obligations and on the stock market than the older generation.⁶⁹ However, it should be underlined that persecution negatively influences all types of returns. A final remark should be added. The previous investment costs also depend on their profitability. In other words, if the physical investments done in the origin country are

⁶⁷ Some example of economic capital: does the refugee own land, a flat, real estate, or other economic investments? So, what is the property ownership? Example of human capital: if the refugee has a job that cannot be easily obtained abroad, for instance, a professor?; individual relationship: is the refugee single or in a stable relationship? Has s/he children? Where are his/her parents living? So, his/her family status/background; type of persecution: individuals might change their affiliation to a particular group or political party, but they cannot change their ethnic.

⁶⁸ Massey, note 14; Borjas, George J. "The economics of immigration." *Journal of economic literature* 32.4 (1994): 1667-1717.

⁶⁹ David Shelton "Distribution of life assurance, pensions and investment products" in Ennew, Christine, Trevor Watkins, and Mike Wright, eds. *Cases in marketing financial services*. Butterworth-Heinemann, 2014; Silos, Pedro. "Housing, portfolio decision making and the macroeconomy." *Journal of Economic Dynamics and Control* 31.8 (2007): 2774-2801.

not profitable or not so profitable, a rational agent or a forward-looking agent would still consider leaving rather than staying since he will value the uncertain future in the host country more beneficial than his current assets.

Given that human capital investment is irreversible, persecuted skilled workers are particularly keen to emigrate.⁷⁰ Globalization in the labor market also has an effect on this decision process.⁷¹ Therefore, education is a “push” factor, especially for skilled people.⁷² Nevertheless, it should be added that some particular human capital returns cannot be transferred. For instance, experts of public administration in a certain country, or farmers specializing in a product that cannot grow in other places should transform their human capital investments. It should be stated that indeed, refugees include a larger proportion of workers with skills that have little international transferability.⁷³ However, low skill transferability is associated with high investment in human capital and higher earnings growth.⁷⁴

Within the emotional costs, the social network in the origin country plays a significant role. According to economic theory, the higher the cost, the lower the demand. As a result, the higher the density of relatives and friends in the origin country, the lower the probability of migration there will be.⁷⁵ The social network in the country of origin also depends on the ethnic group,⁷⁶ since different ethnic groups value the importance of a social network dissimilarly. The migration network in the host countries will also affect the decision to leave rather than to stay.

In other words, the impact of culture on the family structure is well-known in the literature.⁷⁷ While in Northern Europe, Canada, and the USA, the nuclear family, sometimes comprised of only one person or a one-parent family, is predominant, in other countries, the family tie is stronger. This strong family connection is higher in the Islamic cultures and in Africa, where sometimes, the family is a unit of three different generations (grandparents, parents, and children).

⁷⁰ Docquier, Frédéric, Olivier Lohest, and Abdeslam Marfouk. "Brain drain in developing countries." *The World Bank Economic Review* 21.2 (2007): 193-218.

⁷¹ Czaika, Mathias. "The political economy of refugee migration." *Jahrbücher für Nationalökonomie und Statistik* 229.6 (2009): 803-824.

⁷² Dreher, Axel, Tim Krieger, and Daniel Meierrieks. "Hit and (they will) run: The impact of terrorism on migration." *Economics Letters* 113.1 (2011): 42-46; Eggert, Wolfgang, Tim Krieger, and Volker Meier. "Education, unemployment and migration." *Journal of Public Economics* 94.5 (2010): 354-362.

⁷³ Fellner, William. *Contemporary Economic Problems*. American Enterprise Institute, 1979.

⁷⁴ Chiswick, Barry, and Paul W. Miller. *Handbook of the Economics of International Migration: The Impact*. Elsevier, 2014.

⁷⁵ Ritchey, P. Neal. "Explanations of migration." *Annual Review of Sociology* 2.1 (1976): 363-404.

⁷⁶ Deković, Maja, Inge B. Wissink, and Anne Marie Meijer. "The role of family and peer relations in adolescent antisocial behaviour: comparison of four ethnic groups." *Journal of Adolescence* 27.5 (2004): 497-514; Barth, Fredrik. *Ethnic Groups and boundaries: The social organization of culture difference*. Waveland Press, 1998.

⁷⁷ Georgas, James. "Family: Variations and changes across cultures." *Online readings in psychology and culture* 6.3 (2003): 2307-0919; Georgas, James, et al. "Functional relationships in the nuclear and extended family: A 16-culture study." *International Journal of Psychology* 36.5 (2001): 289-300.

The latest Eurostat data⁷⁸ show that the main countries of origin are countries where family ties are essentials. In addition, family reunification is applied to refugees (Family Reunification Directive Dir. 2003/86), and family reunification is one of the criteria for determining the Member State responsible for examining an application for international protection (Article 6(3)(a) Dublin III). The migration literature has also emphasized the importance of another migration model: the “new economics of migration.”⁷⁹ This model differs from the classical micro-level decision model (see Sect. 2) by focusing on the decision-maker: from the single individual to the householder.

The neoclassical micro model of migration has been challenged by the “new economics of migration” arguing that citizens are not isolated individual actors but a large unit of related people – typically a family or household who act collectively. The critique can be disputed by two main reasons. First, both these theories are essentially micro-level decision models that change only the unit assumed to make the decision (the individual or the householder).⁸⁰ Second, and more importantly, the refugee right is an individual right (see Chap. I, Sect. 2). Thus, by using a normative argument, even if the family tie is important in some ethnic groups, still the model proposed in this chapter could be applied by recognizing that the main difference rests only in the decisionmaker.

To sum up, the threat’s severity and its credibility are the main factors that incentivise a migrant for international protection (see Chap. II, Sects. 2 and 2.1.). At the moment of departure, the persecuted individual carefully takes into account the previous investments in the origin country as well as emotional ties within the social network, among other factors. These costs are not solely monetary but also non-monetary costs. By choosing to leave due to persecutory reasons, these costs are considered opportunity costs too.

5. “Pull” Variables: Migration Costs and Adaptation Costs

In the decision process, refugees also take into account the migration costs and adaptation costs. Figure 4 shows the main “pull” factors affecting the refugee’s decision-making process. These are also the main “drivers” of economic migrants, anticipatory refugees, bogus refugees, and refugees to be resettled. In addition, for acute refugees, their role proportionally increases with

⁷⁸Eurostat, note 6.

⁷⁹ Stark and Bloom, note 17.

⁸⁰ Massey, note 14.

the rise of information, which occurs during their stay in refugee camps or transit countries (see Sect. 3).

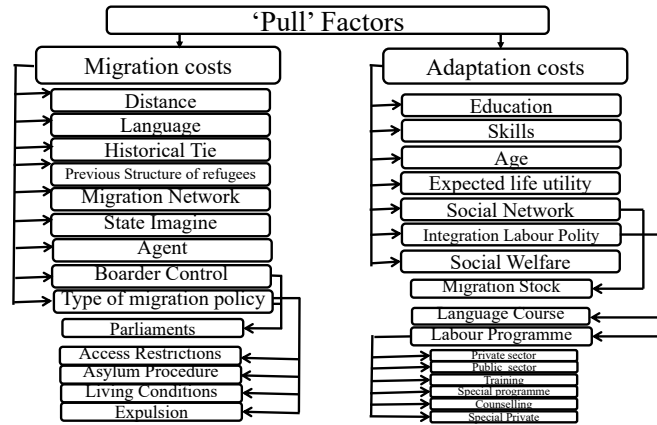


Fig. 4. The Main ‘Pull’ Factors that Impact the Refugee Decision Process

Migration and adaptation costs are partly monetary (e.g. payment of the trip) and partly psycho-social costs (e.g. adaptation to the new environment). Additionally, at the moment of *choice*, as limited as it may be, opportunity costs exist since there might be different options. The “pull” factors, as a second step, are affected by the previous step(s). For instance, these costs will be considered only if the persecuted person decides to leave the country of origin.

5.1. Migration Costs

Migration costs depend on, among others, the distance, language, historical ties,⁸¹ and also the existing support structures for refugees,⁸² migration network,⁸³ what refugees imagine as a safe country,⁸⁴ travel “agents,”⁸⁵ border control,⁸⁶ and the type of asylum policy. The literature does not show a correlation between the country of origin and the country of asylum in terms of political relationship, cultural or religious links.⁸⁷

⁸¹ Schaeffer, note 61.

⁸² Stark, Oded. "On the economics of refugee flows." *Review of Development Economics* 8.2 (2004): 325-329.

⁸³ Neumayer, note 57.

⁸⁴ Havinga and Böcker, note 34. Sometimes, the close political relationship between the governments of the country of origin and the country of asylum negatively affects the refugee decision-making. This is the case of persecuted individuals from the Ivory Coast going to Britain and not to France (as their former colony) or why some Zairean refugees do not go to France or Belgium since they assume that the French and Belgians collaborate with the Mobutu regime.

⁸⁵ Havinga and Böcker, note 34.

⁸⁶ Djajić, Slobodan. "Asylum seeking and irregular migration." *International Review of Law and Economics* 39 (2014): 83-95.

⁸⁷ Havinga and Böcker, note 34.

Contrary to what may be expected, in the case of non-temporary persecution, the average geographical distance does not have any association⁸⁸ or it has an unexpected negative effect⁸⁹ on the refugee's decision process of a destination country. This result is in contrast to the theoretical premise that closer destination countries share a similar socio-cultural heritage and therefore migration and adaptation costs will be lower. In fact, destination countries receive higher refugee claims from former colonies regardless of their geographical distance, since they share the same language and historical ties⁹⁰ in addition to the possible impression of refugees that the "mother country" has the duty to receive them.⁹¹

In the current refugee crisis, according to the latest Eurostat data,⁹² the geographical distance does not count since the main destination countries are Germany, France, and Spain and the main origin countries are Syria, Venezuela, and Afghanistan. The colonial tie, as well as the share of language and history, can explain why Venezuelan and Colombian persecuted individuals asked for asylum protection in Spain. Indeed, in 2019, Spain received the highest number of applicants from a single country (Venezuela) to one of the EUMS.

The infrastructure of previous camps or facilities for past refugee flows decreases migration costs. For example, the construction of camps in Iran and Pakistan for Afghan refugees in the wake of the 1979 Soviet invasion may have contributed to the considerable follow-up refugee flows between 1994 to 1996 (Taleban events). In this case, not only were the costs of the destination country lower due to already-established structures but also the refugees' migration costs were lower. In particular, the previous flow means better networking with persecuted individuals coming from the same nationality, understood as the ethnic-cultural category. This is also true due to established smuggling networks and better information on the options of a particular destination country. Thus, in addition to the growth of networks, the previous camps or facilities for past refugees might also explain the perpetuation of refugees through the theory of cumulative causation.⁹³ As a result, in these cases, additional movement is progressively more likely over time.⁹⁴

⁸⁸ Thielemann, Eiko R., *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration* (November 2003). IIS Discussion Paper No. 9. Available at SSRN: <https://ssrn.com/abstract=495631> or <http://dx.doi.org/10.2139/ssrn.495631>

⁸⁹ Havinga and Böcker, note 34; Böcker, Anita 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>

⁹⁰ Robinson and Segrott, note 41.

⁹¹ Havinga and Böcker, note 34. This was true in the case of Zairians refugees in Belgium; but, not in the case of refugees in the Netherlands.

⁹² Eurostat, note 6.

⁹³ Massey, note 19.

⁹⁴ Gunnar, Myrdal. "Rich Lands and Poor: The Road to World Prosperity." (1957).

This is not the first time that refugee camps increase the likelihood of refugees choosing to become a refugee. During the medieval times in Europe, two different religious orders ransomed war prisoners.⁹⁵ These orders have ransomed or released roughly one million prisoners. Although difficult to understand now, a soldier may “choose” to seek international protection as refugee in a prison camp and hope to be ransomed or released by these orders.

Moreover, the migration network functions as an important facilitator since it helps with information.⁹⁶ This is also called the “chain migration.”⁹⁷ According to the International Organization for Migration, almost all the countries in the world are influenced by migration. Around 3% of the total population are migrants;⁹⁸ 40% of them live in industrialized countries,⁹⁹ which are the main destination countries. The network through ties of kinship, friendship, or shared community origin in the destination country is an important variable for refugees. The network in the destination country decreases the costs and risk of movement and increases the expected net returns since the network connection constitutes a form of social capital. This means migration brings further migration since the network expands¹⁰⁰ as well as migration costs decrease. In other words, the first migrant influx is costly. Subsequently, the migration costs for friends and relatives left behind become lower and lower; especially for members of the close family. At a certain point, migration becomes self-perpetuating. By underlying the importance of the network, asylum policies can expect to have great difficulties controlling flows. The only control that they can apply is narrowing the network within the fundamental HRs (e.g. the right to family).

The image of the destination country as a State based on the rule of law with democratic institutions is also considered an important variable that impacts the refugee decision process.¹⁰¹ This is also the case in the current crisis where persecuted individuals prefer to continue their trip and not stay in safe transit countries such as Turkey¹⁰² or other Eastern European countries.¹⁰³

⁹⁵ Frey, Bruno S., and Heinz Buhofer. "Prisoners and property rights." *The Journal of Law and Economics* 31.1 (1988): 19-46.

⁹⁶ Neumayer, note 57. However, in few cases, refugees moved without contacting social networks even where they exist. Koser and Pinkerton, note 39.

⁹⁷ Koser and Pinkerton, note 39.

⁹⁸ International Organization for Migration, *World Migration, 2003: Managing Migration: Challenges and Responses for People on the Move*, IOM, 2003, p. 4.

⁹⁹ *Ibid.*, p. 44.

¹⁰⁰ Gurak and Caces, note 18; Massey, note 18; Massey and Felipe, note 18; Taylor, note 18; Hugo, note 18.

¹⁰¹ Havinga and Böcker, note 34.

¹⁰² Ekmekci, Perihan Elif. "Syrian refugees, health and migration legislation in Turkey." *Journal of immigrant and minority health* 19.6 (2017): 1434-1441.

¹⁰³ House, Freedom. "Nations in Transit 2017-Hungary." *Democracy* 3.3.75 (2017): 4-00.

An important factor in the decision process of persecuted individuals is the agents: the smugglers or the human traffickers. They play a very significant role not only in facilitating the journey but also in providing access to travel documents.¹⁰⁴ In recent decades, with increasing policy restrictions, their role of information distributors has become more significant.¹⁰⁵ Their activities may also include smuggling, where there is a unique relationship with a client.¹⁰⁶ Smugglers have become the villains and the heroes of the situation.¹⁰⁷ In the case of trafficking, there is an on-going relationship that does not end after crossing the border.¹⁰⁸ However, even in these cases, refugees still have options,¹⁰⁹ although sometimes agents impose their will on them,¹¹⁰ especially regarding the destination country.¹¹¹

Although destination countries are not against immigration, they aim to only attract migrants with high economic potential: according to the literature the most successful migrants in the labor market are economic migrants, followed by family migrants and then refugees.¹¹² Indeed, refugees, compared to other migrant groups, in the first phase of their residence in the host countries, are much more likely to depend on welfare benefits.¹¹³ Border control and restrictive asylum policies are variables that are usually controlled by national governments. However, when a State is part of an international or supranational public body – e.g. the EU – the national Parliament has decided to give up some of its sovereignty (see Chaps. II and VI). The literature underlines that refugees are aware of amendments to national migration policies. For instance, the French Asylum Reform of 1991 resulted in an increase in asylum seekers

¹⁰⁴ Crawley, note 42.

¹⁰⁵ Van Liempt, Ilse, and Jeroen Doomernik. "Migrant's agency in the smuggling process: The perspectives of smuggled migrants in the Netherlands." *International Migration* 44.4 (2006): 165-190; Collyer, Michael. "When do social networks fail to explain migration? Accounting for the movement of Algerian asylum-seekers to the UK." *Journal of Ethnic and Migration Studies* 31.4 (2005): 699-718; Papadopoulou, Aspasia. "Smuggling into Europe: transit migrants in Greece." *Journal of Refugee Studies* 17.2 (2004): 167-184; Castles, Stephen, Heaven Crawley, and Sean Loughna. *States of conflict: causes and patterns of forced migration to the EU and policy responses*. IPPR, 2003; Koser and Pinkerton, note 39; Nadig, Aninia. "Human smuggling, national security, and refugee protection." *Journal of Refugee Studies* 15.1 (2002): 1-25; Morrison, John, Executive Director, and Beth Crosland. *The trafficking and smuggling of refugees: the end game in European asylum policy?*. UNHCR, 2000; Koser, Khalid. "Asylum policies, trafficking, and vulnerability." *International Migration* 38.3 (2000): 91-111; Salt, John. "Trafficking and human smuggling: A European perspective." *International Migration* 38.3 (2000): 31-56; Koser, Khalid. "Social networks and the asylum cycle: The case of Iranians in the Netherlands." *International Migration Review* 31.3 (1997): 591-611.

¹⁰⁶ Papadopoulou, note 105.

¹⁰⁷ Van Liempt and Doomernik, note 105.

¹⁰⁸ Morrison, note 105.

¹⁰⁹ Havinga and Böcker, note 34.

¹¹⁰ Robinson and Segrott, note 41.

¹¹¹ Zimmermann, Susan. "Why seek asylum? The roles of integration and financial support." *International Migration* 48.1 (2010): 199-231.

¹¹² Cobb-Clark, Deborah A., and Siew-Ean Khoo. *Public policy and immigrant settlement*. Edward Elgar Publishing, 2006; Aydemir, Abdurrahman. "Immigrant selection and short-term labor market outcomes by visa category." *Journal of Population Economics* 24.2 (2011): 451-475.

¹¹³ Colic-Peisker, Val, and Peter Waxman. *Homeland wanted: Interdisciplinary perspectives on the refugee resettlement in the West*. Nova Science, 2005.

going to Germany.¹¹⁴ But, the L&E literature does not agree regarding the correlation between these policies and the refugee decision process. While some research demonstrates their positive impact,¹¹⁵ other empirical studies argue that there is no impact of these policies.¹¹⁶

Asylum policies can be divided into four ingredients: access restrictions, asylum procedure, living conditions, and expulsions.¹¹⁷ Access restrictions are the different policies that prevent the arrival of potential asylum seekers, such as penalizing the transportation of illegal migrants into a national territory (see Chap. I, Sect. 3). Focusing on the convergence in time, this type of policy decreases the number of asylum claims.¹¹⁸ This is also shown empirically,¹¹⁹ on a short-term basis.¹²⁰

The asylum procedure aims at the creation of the use of the concept of a safe country (see Chap. II, Sect. 2.2.) as well as the adoption of temporary measures of international protections like actions taken during the Kosovo crisis (see Chap. IV). This policy did not have any effect¹²¹ since asylum seekers did not disclose their origin or transit countries. This was also underlined by the UNHCR during the 1980s (Point A UNHCR Executive Committee's Conclusion No. 58 (XL) – 1989).

In the 1990s, the living conditions of asylum seekers have been limited. In other words, benefit payments were reduced. In addition, the right to work was denied and centralized housing was made compulsory. Moreover, refugee mobility was limited, and asylum social benefits were paid in kind or with vouchers. By applying the micro-model of migration exposed in this Chapter, this type of policy does have an impact on refugees; in particular, on bogus refugees. It shall be underlined that this type of asylum policy directly impacts the adaptation costs (see Sect. 5.2.).

The 1990s were also the decade of the expulsions. Although incentives were given for voluntary returns, expulsions were also used. As stated in Chap. I, Sect. 3, to increase repatriation, the conditions in the home country did not have to improve “substantially” but only “appreciably.”¹²² Moreover, repatriation no longer had to be a *strictly* voluntary decision

¹¹⁴ Rotte, R., Vogler, M., Zimmermann, K.F. 1996. Asylum migration and Policy coordination in Europe, Discussion Papers, Münchener Wirtschaftswissenschaftliche Beiträge, 96-11, Juli 1996.

¹¹⁵ Hatton, Timothy J. "Seeking asylum in Europe." *Economic Policy* 19.38 (2004): 6-62; Efiionayi-Mäder, Denise, ed. *Asyldestination Europa: eine Geographie der Asylbewegungen*. Seismo-Verlag, 2001; Zetter, Roger, et al. "An assessment of the impact of asylum policies in Europe, 1990-2000." Home Office Online Report 17.03 (2003).

¹¹⁶ Monheim, note 7; Hatton, note 64; Havinga and Böcker, note 34.

¹¹⁷ Monheim, note 7; Hatton, note 115; Efiionayi-Mäder, note 115.

¹¹⁸ Efiionayi-Mäder, note 115.

¹¹⁹ Hatton, note 115.

¹²⁰ Böcker and Havinga, note 89.

¹²¹ Hatton, note 115.

¹²² 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.

by refugees.¹²³ Although not tested empirically, the literature insists on the negative impact of this policy on the decision of refugees.¹²⁴

A critical review of the L&E literature reveals a lack of agreed-upon coherent results due to the application of different methods as well as significant variations in behavior across time and across countries of origin and destination. In addition, the smuggler has an impact role in changing the refugee's decision (see Sect. 2). This suggests that access policies do have an impact on asylum seekers. However, this impact is limited only in the short term since future, alternative, and more costly solutions by smugglers will be found. In addition, the application of the concept of a safe country can be easily avoided by refugees since, as advised by smugglers (see Sect. 2), they will disclose neither their country of origin nor the transition countries. In addition, according to the model used in this chapter, the transformation of living conditions, especially the right to work, does have an impact on the refugee decision process. However, the negative side effect of this policy is the increase in adaptation costs for genuine refugees (see Sect. 4.2 and Chap. V, Sect. 5). Lastly, according to the model used in this chapter, expulsion policy has an impact on the decision-maker since the costly trip will not be compensated by the future permanent utility of living in the host country.

To sum up, among the adaptation costs, border control is one of the few variables that might be controlled by central national Parliaments. Although some types of asylum policies have an impact on the decision-maker by decreasing the number of asylum seekers, this policy has a main side effect of the stipulation of a debt-contract with two phases. The first is a small payment at the origin country and the second is a payment in the host country. By considering that asylum seekers do not have the right to work immediately and smugglers ask immediately the payment of the second part, the result of restriction policies is the rise in the enslavement of potential asylum seekers in the host countries by the smugglers.

5.2. Adaptation Costs

Some of the main adaptation costs are contingent on the level of education, skills, age, expected lifetime utility, individual network relationship in the destination country, national policies regarding the adaptation of foreigners into the national labor market, and also social welfare benefits.

Young and skilled refugees adapt better to a new socio-economic environment. In addition, individual relationship networks in the destination country influence the adaptation

¹²³ *Ibrid.*

¹²⁴ Böcker and Havinga, note 89.

costs: having friends abroad (or simply other immigrants of the same origin) can effectively reduce the time spent searching for a job or dealing with administrative issues.¹²⁵ Therefore, the existence of already present immigrants in the receiving country plays an important role in the adaptation costs.¹²⁶ For instance, the political uncertainty in Turkey in 1980 ended with a massive refugee flow into Germany, partly because of the Turkish guest workers who migrated to Germany in the 1960s and 1970s.¹²⁷

National policies regarding the adaptation of foreigners also depend on government ideology, which is considered by refugees as well.¹²⁸ In fact, national labor market policies have an impact on the adaptation costs: offering language training and several elements of active labor-market programs, such as employment with a wage subsidy in private sector firms, direct employment programs taking place in the public sector, education and training, mixed special programs, counseling and upgrading, and special employment programs in private sector firms. These all positively decrease adaptation costs. Several studies conclude that language skills have large effects on labor-market integration.¹²⁹

The effects of such programs on the hazard rate to employment are significantly positive for private sector subsidized employment programs, but not for the other programs mentioned above. Regarding training, the review of the L&E literature concludes that training has a significant impact on white-collar occupations, but not on blue-collar ones.¹³⁰ Unfortunately, current training programs are based on low-skilled workers. As a result, they are often ineffective.¹³¹ From the empirical studies analyzed, it can be concluded that the main variable influencing the job-finding rate is language courses rather than active labor-market

¹²⁵ Shain, Yossi, and Aharon Barth. "Diasporas and international relations theory." *International Organization* 57.03 (2003): 449-479.

¹²⁶ Esveldt, Ingrid, et al. "Migratiemotieven, migratienetwerken en partnerkeuze van Turken en Marokkanen in Nederland." *Migration motives, migration networks and partner decision making of Turks and Moroccans in the Netherlands*. The Hague, NIDI, 1995. Nevertheless, according to Jennissen and van Wissen, this is not true. However, this was true in case of refugee who left Yugoslavia. Jennissen and van Wissen, note 9.

¹²⁷ Muus, Ph J., Philip J. Muus, and Elsbeth W. van Dam. *Comparative research on international migration and international migration policy: migration from the Maghreb and Turkey to the European Union, and from Mexico, Guatemala, and El Salvador to the United States*. Office for official publications of the European communities, 1998.

¹²⁸ Schneider and Holzer, note 128.

¹²⁹ Clausen, Jens, et al. "The effect of integration policies on the time until regular employment of newly arrived immigrants: Evidence from Denmark." *Labour Economics* 16.4 (2009): 409-417; Chiswick, Barry R., and Paul W. Miller. "The complementarity of language and other human capital: Immigrant earnings in Canada." *Economics of Education Review* 22.5 (2003): 469-480; Chiswick, Barry R., and Paul W. Miller. "The endogeneity between language and earnings: International analyses." *Journal of Labor Economics* 13.2 (1995): 246-288. For instance, the wage penalty for Hispanic living in USA with not English proficiency (with *ceteris paribus* socioeconomic and education) is 17%. Grenier, Gilles. "The effects of language characteristics on the wages of Hispanic-American males." *Journal of Human Resources* (1984): 35-52.

¹³⁰ Cohen-Goldner, Sarit, and Zvi Eckstein. "Estimating the return to training and occupational experience: The case of female immigrants." *Journal of Econometrics* 156.1 (2010): 86-105; Cohen-Goldner, Sarit, and Zvi Eckstein. "Labor Mobility of Immigrants: Training, Experience, Language, and Opportunities." *International Economic Review* 49.3 (2008): 837-872.

¹³¹ Smith, Jeffrey A., and James J. Heckman. *The Pre-Program Earnings Dip and the Determinants of Participation in a Social Program: Implications for Simple Program Evaluation Strategies*. National Bureau of Economic Research, 1999.

programs.¹³² Nevertheless, if the active labor-market programs are combined with sanctions in the case of non-compliance (for instance, as it happened in Finland) there will be a remarkable improvement in the immigrants' job-finding rate.¹³³

By analyzing the literature, my suggestion is to increase the number of different labor programs that incorporate learning the local language and focusing on the needs of the local job market by giving priority to white-color jobs. Thus, both refugees and local communities will benefit from them. Refugees will decrease adaptation costs and will integrate with local communities. In addition, local communities will benefit from the increase of the investment of human capital by refugees, which will result in higher earnings and thus in higher payment of social security. Additionally, States will also benefit from the decrease of the social benefits given to refugees. Indeed, these empirical studies show that the return of States from these labor programs is higher than the investment in these programs. Additionally, refugees benefit from increasing their wage earnings; especially, for young refugees.

These programs are strongly linked to human capital investment. As implied before, also in the case of the current refugee inflow (Chap. V), generally, refugees have low skill transferability.¹³⁴ Thus, in the first period in the host countries, they will have low earnings and low opportunity costs.¹³⁵ However, several studies have demonstrated that they invest high human capital which with time drastically increases their earnings.¹³⁶ Higher earnings are also correlated with the legal status of refugees and with the perception of the host country as a permanent home. Studies have shown that legal immigrants – such as persecuted individuals that have been accepted as asylum migrants – earn more than immigrants without a residence permit. The studies also demonstrate that these refugees stay four times longer at the same job position by investing more human capital in that specific job.¹³⁷ Different studies also show that refugees are considerably less likely to leave the host country (partly as a result of the

¹³² Clausen, Jens, et al., note 129.

¹³³ Hämäläinen, K., and M. Sarvimäki. "Moving Immigrants from Welfare to Work: The Impact of an Integration Program." unpublished paper, Government Institute for Economic Research (VATT), Helsinki (2008).

¹³⁴ Cohen-Goldner and Eckstein, note 130; Cohen-Goldner and Eckstein, note 130.

¹³⁵ This is a combination of the Chiswick's Immigrant Assimilation Model and Duleep and Regets' models. Fellner, note 73; Duleep, Harriet Orcutt, and Mark C. Regets. "Immigrants and human-capital investment." *American Economic Review* 89.2 (1999): 186-191.

¹³⁶ Duleep and Regets, note 135; 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. However, it should be stated that on the contrary, refugees with high skill transferability have a low propensity to invest in host-country human capital.

¹³⁷ Massey, Douglas S. "Do undocumented migrants earn lower wages than legal immigrants? New evidence from Mexico." *International Migration Review* 21.2 (1987): 236-274; Powers, Mary G., William Seltzer, and Jing Shi. "Gender differences in the occupational status of undocumented immigrants in the United States: Experience before and after legalization." *International Migration Review* 32.4 (1998): 1015-1046.

inability to return to the origin country) compared with economic migrants.¹³⁸ Thus, persecuted individuals invest more into human capital, although this will lower their initial earnings since their opportunity costs – e.g. manual jobs – have higher immediate values than the language or skills learnings.¹³⁹

The length of stay in the host countries will also affect the type of job they choose in addition to the decision to specialize in that specific job.¹⁴⁰ For identical levels of human capital, immigrants that anticipate to permanently stay in the host country will earn less in the first phase, but their earning trajectories will increase more sharply, and eventually surpass those of less permanent immigrants as the benefits of initial human capital investments are accrued.¹⁴¹ This theoretical hypothesis has been tested in the USA with migrants coming from China¹⁴² and Mexico.¹⁴³

The first study, based on the data of the China International Migration Project, is a quantitative study that analyzes longitudinal data on immigrants' earnings by focusing on migrants coming from Fujian province. Its findings show that the increase in wages is higher for migrants having a middle-level education. The second study, based on longitudinal data gathered from different periods between 1982-1998, is a qualitative study using ethno-survey methods. Its findings show that legal migrants increase their earning and generally stay longer in the host countries. The result of these studies is that migrants with higher education working with local communities with a different ethnicity increase their earnings. This is also due to the decreasing adaptation costs as they become part of the local community.

First of all, as the typical labor immigrants, the Fujianese are overrepresented in the manual labor and service sectors, the typical peripheral sectors of the U.S. economy; and most of them tend to have meager wages. As it is well-known, it takes time to undertake human capital investments. But, once these investments have been completed (language courses or schooling), the earning trajectories will rapidly increase. This is also connected to the integration of refugees in the host countries. The more refugees that reach the optimal level of

¹³⁸ Aydemir, Abdurrahman, and Chris Robinson. "Global labour markets, return, and onward migration." *Canadian Journal of Economics/Revue Canadienne d'économique* 41.4 (2008): 1285-1311; Klinthäll, Martin. *Immigration, integration and return migration. International symposium on international migration and development*. United Nations Secretariat, 2006; Duleep, Harriet Orcutt. "Social security and the emigration of immigrants." *Social Security and the Emigration of Immigrants* 57 (1994): 37; Lundh, Christer, and Rolf Ohlsson. *Immigration and economic change. Population, Economy, and Welfare in Sweden*. Springer, 1994.

¹³⁹ Chiswick and Miller, note 129.

¹⁴⁰ Piore, note 34.

¹⁴¹ Chiswick and Miller, note 129.

¹⁴² Chunyu, M.D., 2011. Earnings Growth Patterns of Chinese Labor Immigrants in the United States. Chapter presented at the 2011 Annual Meeting of the Population Association of America, Washington, DC.

¹⁴³ Massey, Douglas S., and Rene M. Zenteno. "The dynamics of mass migration." *Proceedings of the National Academy of Sciences* 96.9 (1999): 5328-5335.

decision-making of human capital investment, the higher the probability they will stay in the host countries. This is also shown in the US census data, in particular, with a cohort in 2003.¹⁴⁴ Thus, human capital investments in temporary solutions, such as refugee camps or refugees in neighboring countries, are inefficient. In the cases of temporary solutions, although persecuted individuals thought *ex-ante* that they will stay only for a short time, the data has confirmed that in reality, they have returned to the origin countries after a long time,¹⁴⁵ which is (much) higher than the predicted time that they thought *ex-ante*.

Refugees will also eventually consider the reception facilities, the right to housing, and the right to work,¹⁴⁶ which in recent decades has been limited (see Sect. 5.1.). In addition, social welfare benefits also have an impact on adaptation costs. The 1951 Convention established several rights. Nonetheless, national laws regulate the right to work, spending allowance, housing, or other welfare benefits. These might be some of the main “pull” factors for refugees when they choose the country of destination that maximize their utility. According to a report published in 2015,¹⁴⁷ the spending allowance varies from 70 EUR/month in Slovakia to 1085 EUR/month in Italy. Housing is generally provided in reception centers; however, in some countries, local governments can pay their rents up to a certain time (i.e. Finland for three years or Lithuania for one year). Normally, refugees are entitled to work after a certain time of residence in the host country. Nevertheless, the time varies from country to country, in addition to the fact that some States have established further conditions. The current EU data¹⁴⁸ shows that refugees “choose” the country with the highest social welfare – such as Germany, France, and Spain – since generous welfare decreases the costs of migration.¹⁴⁹ In addition, welfare support helps them to live in the new country since in the first phase of integration they can count on nothing or little to survive.¹⁵⁰

The literature agrees that the higher the benefits are, the more applications for asylum claims will be filed. These policies are important since the employment rate of refugees is much

¹⁴⁴ Chin, Aimee, and Kalena E. Cortes. "The refugee/asylum seeker." *Handbook of the economics of international migration*. North-Holland, 2015. 585-658.

¹⁴⁵ *Ibid.*

¹⁴⁶ Havinga and Böcker, note 34. It should be stated that after the Belgium and the UK governments restricted the right to work for asylum seekers, the number of refugees dropped. This is emphasized in the case of single young males. Moreover, it should be stated that empirical findings have shown that even in regulated labour markets, irregular work is also possible. Koser, Khalid. "Out of the frying pan and into the fire: a case study of illegality amongst asylum seekers." *The New Migration in Europe*. Palgrave Macmillan, 1998.

¹⁴⁷ Euronews. 2015. Which European countries the most social benefits to migrant? available on line: <http://www.euronews.com/2015/09/16/which-european-countries-offer-the-most-social-benefits-to-migrants/> accessed on April 30th, 2020.

¹⁴⁸ Eurostat, note 6.

¹⁴⁹ Robinson and Segrott, note 41.

¹⁵⁰ Zimmermann, note 111.

lower compared to other immigrants.¹⁵¹ But, the lower-income transfer has a positive effect on the job-finding rate.¹⁵² Nearly two decades ago, a “quasi-natural” experiment in Denmark showed the impact of lowering social welfare on the unemployment rate.¹⁵³ Since July 1st, 2002, the public income transfers to refugees obtaining a residence permit have been reduced by approximately 35%, i.e. from €1236/month to €796/month. Those who obtained a residence permit before July 1st, 2002, would still be eligible for the higher social assistance, even after that date. According to this study, the effects of the lower-income transfer are significant after two years of permanence and especially for highly-skilled individuals. This might be explained by the fact that after 24 months, refugees have learned to communicate in the local language. As stated above, language skills have large effects on labor-market integration.¹⁵⁴

To sum up, different variables impact the adaptation costs. The majority of them are non-monetary costs since it mainly depends on the human capital invested in becoming active members of the job market in the destination country. The literature suggests that language programs, as well as the decrease in social welfare, have a positive impact on increasing the level of refugee integration in the labor market.

5.3. The Macro-Economic Variables

Differences in economic opportunities give rise to strong migration incentives.¹⁵⁵ This has been underlined by all migration theories (see Sect. 2). Refugees, distinct from economic migrants, leave their home countries to avoid the possibility of persecution. However, they also respond to economic incentives¹⁵⁶ because migration is costly, and refugees, as with other migrants,

¹⁵¹ Hartog, Joop, and Aslan Zorlu. "How important is homeland education for refugees' economic position in The Netherlands?." *Journal of Population Economics* 22.1 (2009): 219-246; Bloch, Alice. *Refugees' opportunities and barriers in employment and training*. Corporate Document Services, 2002.

¹⁵² Michael, and Rune Vejlin. "Reducing income transfers to refugee immigrants: Does start-help help you start?." *Labour Economics* 17.1 (2010): 258-275; van Ours, Jan C. and Vodopivec, Milan, Shortening the Potential Duration of Unemployment Benefits Does Not Affect the Quality of Post-Unemployment Jobs: Evidence from a Natural Experiment (June 2006). IZA Discussion Paper No. 2171; CentER Discussion Paper No. 2006-56. Available at SSRN: <https://ssrn.com/abstract=915361>; Abbring, Jaap H., Gerard J. Berg, and Jan C. Ours. "The effect of unemployment insurance sanctions on the transition rate from unemployment to employment." *The Economic Journal* 115.505 (2005): 602-630; Van Ours, Jan C., and Milan Vodopivec. "How changes in benefits entitlement affect job-finding: lessons from the Slovenian experiment." Institute of Labor Economics, 2004; Bover, Olympia, Manuel Arellano, and Samuel Bentolila. "Unemployment duration, benefit duration and the business cycle." *The Economic Journal* 112.479 (2002): 223-265; Carling, Kenneth, Bertil Holmlund, and Altin Vejsiu. "Do benefit cuts boost job finding? Swedish evidence from the 1990s." *The Economic Journal* 111.474 (2001): 766-790; In contrast: Bennmarker, Helge, Kenneth Carling, and Bertil Holmlund. "Do benefit hikes damage job finding? Evidence from Swedish unemployment insurance reforms." *Labour* 21.1 (2007): 85-120.

¹⁵³ Rosholm and Vejlin, note 152; Bover, et al., note 152.

¹⁵⁴ Chiswick and Miller, note 129; Chiswick and Miller, note 129. Clausen, Jens, et al., note 129.

¹⁵⁵ Kennan, John, and James R. Walker. "Wages, welfare benefits and migration." *Journal of Econometrics* 156.1 (2010): 229-238; Greenwood, Michael J. "Internal migration in developed countries." *Handbook of population and family economics* 1 (1997): 647-720; Lucas, Robert EB. "Internal migration in developing countries." *Handbook of population and family economics* 1 (1997): 721-798.

¹⁵⁶ Czaika, note 71. It should take into consideration that according to Thielemann there is no association with economic growth rate. Thielemann, note 88.

aim to decrease the total costs of movement to a new country by settling in countries that offer better employment opportunities.

Some of the main economic variables that might impact the refugee decision-making, save social welfare benefits discussed in the previous section, are GDP per capita, economic growth, and unemployment rate.¹⁵⁷

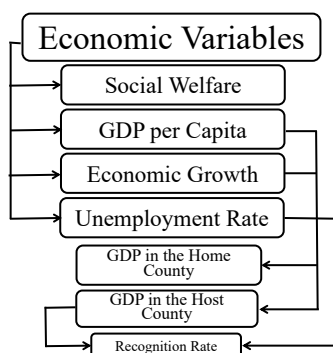


Fig. 5. The Main Economic Variables that Impact the Refugee Decision Process

This figure shows some of the most important economic variables that affect the refugee decision process. Although these variables are important for economic migrants, they can be still be considered refugees since according to the UNHCR, refugees are persons who leave their country not only voluntarily but also *exclusively* for economic considerations.¹⁵⁸ From the use of the word “exclusively,” it follows that if a person flees his country *also* for economic motives (among others), this does not preclude his classification as a refugee (see Chap. II, Sec. 2.2.). Therefore, persecution and economic motivations are not mutually exclusive alternative conditions.

Focusing on the GDP per capita, this variable takes two dimensions: as a reason to leave the home country, and as a variable that attracts refugees in the final host country. In other words, the increase in GDP per capita, income, and economic growth in the origin country may reduce asylum applications up to 20%.¹⁵⁹ This is emphasized in the case of economic discrimination towards ethnic minorities. Thus, economic discrimination towards ethnic minorities increases asylum migration.¹⁶⁰ On the other hand, as for host countries, rich

¹⁵⁷ Day and White, note 32. In contrast: Gilbert, Alan, and Khalid Koser. "Coming to the UK: what do asylum-seekers know about the UK before arrival?." *Journal of Ethnic and Migration Studies* 32.7 (2006): 1209-1225.

¹⁵⁸ UNHCR, note 1, para. 51.

¹⁵⁹ Hatton, note 64.

¹⁶⁰Neumayer, note 57.

countries are more attractive than poor countries.¹⁶¹ Moreover, GDP per capita also affects the refugee's decision process indirectly since GDP per capita is positively associated with the recognition rate,¹⁶² which is also an important variable in the refugee decision process.¹⁶³ Indeed, studies have demonstrated that GDP per capita is presumed to exert a positive effect.¹⁶⁴

Regarding unemployment, different economic studies yield different results (see Chap. V, Sect. 2). While some studies find no evidence for a causal effect of the rate of unemployment on the number of refugees,¹⁶⁵ other empirical research concludes that unemployment matters.¹⁶⁶ Moreover, the unemployment rate may also impact the refugee's decision process indirectly since, in the case of large-scale unemployment, foreigners are often considered by public opinion as competitors on the labor market.¹⁶⁷ This adverse attitude towards foreigners has an impact on the recognition rate.¹⁶⁸ Indeed, studies have demonstrated that unemployment adversely affects the share of asylum seekers.¹⁶⁹

Regarding the impact of the economic growth rate, the results of the L&E literature vary. While according to economic theories, the economic growth rate should positively influence refugee's decision making of the country of destination,¹⁷⁰ two different studies have reached contradictory results. While according to Thielemann,¹⁷¹ no association is found with the economic growth rate from the top five asylum countries within 20 OECD countries over the period between 1985 to 1999, Neumayer, based on data of Western Europe countries over the period between 1982-1999, concludes that economic growth rate has the opposite effect to

¹⁶¹ This is the result of an analysis of a large date from 1982 to 1999 within the EU. Neumayer, Eric. "Asylum destination choice: what makes some West European countries more attractive than others?." *European Union Politics* 5.2 (2004): 155-180.

¹⁶² Toshkov, Dimiter Doychinov. "The dynamic relationship between asylum applications and recognition rates in Europe (1987–2010)." *European Union Politics* (2013): 1465116513511710.

¹⁶³ Rosenberger, Sieglinde, and Alexandra König. "Welcoming the unwelcome: The politics of minimum reception standards for asylum seekers in Austria." *Journal of Refugee Studies* 25.4 (2012): 537-554.

¹⁶⁴ GDP per capita does not have any significant effect during the period 1997-2006. Hatton, note 64.

¹⁶⁵ Neumayer, note 161; Holzer, Thomas, Gerald Schneider, and Thomas Widmer. "The impact of legislative deterrence measures on the number of asylum applications in Switzerland (1986-1995)." *International Migration Review* (2000): 1182-1216.

¹⁶⁶ Williamson, Jeffrey G., and Timothy J. Hatton. *Refugees, Asylum Seekers and Policy in Europe*. National Bureau of Economic Research, 2004; Thielemann, note 88; Neumayer, Eric. "Asylum Recognition Rates in Western Europe Their Determinants, Variation, and Lack of Convergence." *Journal of Conflict Resolution* 49.1 (2005): 43-66.

¹⁶⁷ 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. Bell, Brian, Stephen Machin, and Rob McNeil. *Immigration and Crime: Evidence for the UK and other countries*. Migration Observatory Briefing, 2013.

¹⁶⁸ Holzer, et al., note 165.

¹⁶⁹ Thielemann, note 88; Neumayer, note 165.

¹⁷⁰ Massey, et al. note 14; Borjas, note 68.

¹⁷¹ Thielemann, note 88.

that predicted by theory.¹⁷² In more concrete terms, a “1% lower economic growth rate in origin countries raises the number of asylum seekers by about 0.02%.”¹⁷³

Both studies use the growth rate in the destination countries as an independent variable and asylum seekers as a dependent variable. Both studies use data published by the UNHCR. In addition, both studies conclude that economic considerations do play a role when it comes to decisions about where to apply for asylum. While Thielemann applies a quantitative analysis by controlling for a particular country and time’s effects, Neumayer uses a dyadic panel data design, which allows to better control fixed effects of origin and destination countries. His explanation of why the economic growth rate has the opposite effect to that predicted by theory deals with the fact that poorer Western European countries tend to grow faster than richer ones.

To sum up, economic variables do affect refugee decisions on where to apply for asylum-seeking. This result confirms the micro-model of individual migration: although they leave their home country due to persecution, refugees aim to increase their utility. Nevertheless, their utility depends on exogenous factors that they cannot control, sometimes influenced by destination countries (i.e. asylum policies). This impact will be higher for a smaller region group close to each other where there is a higher economic growth difference. In such cases, an individual choosing between destination countries in a particular region weighs the net benefits of each of them. The information given by smugglers (see Sect. 2) or by previous asylum seekers (see Sect. 5.1.) plays an important role. This result could also be confirmed by the latest Eurostat data where Germany is the country with the highest number of first-time applicants in the EU, although does not have a non-EUMS as a neighbor country, and it does not share similar language, culture, or historical ties with the asylum seekers.

6. Conclusion

This chapter provided an overview of the different variables affecting the refugee decision process. Although there is a variety of combinations of these factors, two stages of decision-making are commonly involved: immediate departure, where the “push” variables are more important, and the decision to settle in a destination country, where the impact of the “pull” factors increases and where persecuted individuals strive for a durable situation in addition to a safe place.

¹⁷² Neumayer, note 165.

¹⁷³ Neumayer, note 57. Although Neumayer shows clear evidence of the importance of economic variables, he underlines that the economic variables cannot be separated from other factors.

This chapter proposed a micro-model of migration adapted to the refugee movement by applying a nominalist approach. It examined the main factors that refugees take into consideration when they flee and settle. Although these variables are not mutually exclusive nor independent from each other, for expository purposes, these factors have been grouped into four main categories: previous investment costs, emotional costs, migration costs, and adaptation costs. In addition, the role of macro-economic variables has been considered. These costs can further be divided into monetary costs or non-monetary costs. At different stages, persecuted individuals have opportunity costs, although the options available to choose might be limited. Moreover, the decision in the previous step impacts on those that follow.

When deciding to leave the origin country, previous investment costs and emotional costs are the most important factors. In this first phase, refugees usually have all the necessary information and they can make a choice. In the final step and faced with the decision-making process of the destination country, the migration and the adaptation costs become fundamental. In the first step, refugees make a choice, while in the final step, only anticipatory refugees, bogus refugees, and resettlement refugees make a choice. For the other groups of refugees, although information increases during the trip, the literature finds only *partial* support that refugees make a rational choice, for example, to opt for the richest countries to maximize their net benefits by stressing the importance of economic factors, such as social welfare, the GDP per capita, economic growth, and the unemployment rate. For them, the options are much more limited, and the decision is highly influenced by agents or smugglers.¹⁷⁴

This study demonstrated that some of the variables affecting refugee decisions depend on personal characteristics, such as age, skills, and education. Other incentives are exogenous factors controlled by policies of host countries, such as border control, the right to social welfare, and the type of asylum policy. Nevertheless, the majority of the literature suggests that destinations are determined not by personal choices but by the practicalities and demands of the situations that persecuted individuals face during the trip to the destination country.¹⁷⁵

As the UNHCR underlines (see Chap. II, Sec. 2.1.),¹⁷⁶ refugees flee after a calculated consideration of a combination of political, economic, and other reasons. Refugees may be poor and economic variables might have a *partial* impact on their decision-making, but it is the perception of the risk of persecution that is the prime influence on their choice to flee.

¹⁷⁴ Zimmermann, note 111.

¹⁷⁵ Crawley, note 42.

¹⁷⁶ UNHCR, note 20.

Chapter V

The impact of refugee flows on host countries

Abstract

This chapter focuses on the impact which refugees have on host countries. It examines the effects refugees have on the labor market and national security from a positive legal perspective by considering different types of refugees, such as anticipatory or resettled refugees and bogus refugees as well as genuine refugees. The chapter also relates to the conditions in refugee camps which might cause refugees to become terrorists, thus eventually increasing the risk of terrorist acts in the host countries. This can be one of the explanations of the new interpretation of Article 1F (exclusion clauses) of the 1951 Convention relating to the Status of Refugees, following the events of September 11, 2001. In addition, particular attention has been given to the effects of the refugee crisis of 2015-2016 in the European Union, as well as the incorporation of the negative impact of Covid-19 on the European GDP growth for 2020. In the conclusion, the chapter proposes some policy suggestions that might decrease the eventual negative impact that refugees have on host countries.

Key Words: labor market, property crimes, refugee impact, terrorist act ,violent crimes.

1. Introduction

This chapter explores two hypotheses in the context of the effects on host countries as a result of refugees influx. The first hypothesis relates to the refugees' opportunities for finding employment in the labor market of the destination country and their influence on the domestic labor market. The second hypothesis relates to the link between crimes and refugees. Particular attention is given to the relationship between refugees and terrorist events. After briefly investigating the legal analysis of Article 1F (the exclusion clauses) of the 1951 Convention, the main variables that may impact the decision to become a terrorist are explored with particular analysis of refugee conditions. In addition, the main empirical studies regarding the connection between refugees and terrorist acts are reviewed.

For every study cited in this chapter, the specific terminology for each sample that was used is mentioned: refugees, migrants unlawfully staying in a country (illegal migrants), migrants, or foreigners (non-national citizens of the country where the study was conducted). See Figure 1.

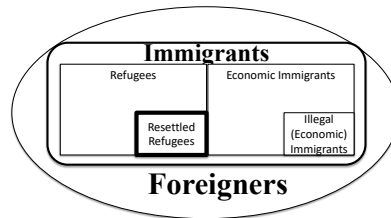


Fig. 1: Definition applied: Refugee, Economic Immigrant, Migrant Unlawfully Staying in a Country (Illegal Economic Migrant), Migrants and Foreigners.

This chapter has the following structure: Section 2 considers the impact of different types of refugees on the labor market in the host countries by conducting a literature review. Section 3 focuses on the relationship between crime rates and migration/asylum shares. That Section proposes the application of the Becker¹ model (expanded by Ehrlich)² in correlation with the micro-model of migration adapted for refugees discussed in Chap. IV. Section 4 deals with the refugee impact on terrorist acts as terrorism is a *dolus specialis crime* related to the conditions in the refugee camps as the main factor that increases the probability of taking part in terrorism. This chapter examines the results of these empirical studies by analyzing only a few of them as representative of the different groups. In the conclusion, several policy recommendations are proposed based on the different types of refugees.

The novel part of this chapter rests on the incorporation of all of these variables into a single study. In addition, in order to lower the refugee impact on the national labor market in host countries, in Section 2, several policy recommendations are suggested as general guidelines for all types of refugees or as specific rules for target groups. In Section 3, I demonstrate that the different types of refugees' impact on crime rates are dissimilar. Additionally, by using the literature review, I hypothesises a negative impact of the current refugee crisis on crime rates in the EUMS during the coming years. I consider Covid-19's negative effect on the employment rate of unskilled jobs, which is already suffering from competition with BRIC countries (Brazil, Russia, India and China) and the introduction of new technologies. Furthermore, a literature search did not find a single scientific

¹ Becker, Gary S. "Crime and punishment: An economic approach." *The Economic Dimensions of Crime*. Palgrave Macmillan UK, 1968. 13-68.

² Ehrlich, Isaac. "Participation in illegitimate activities: A theoretical and empirical investigation." *The Journal of Political Economy* (1973): 521-565.

contribution that incorporates the main variables that affect the decision to become a terrorist by focusing on the conditions in refugee camps.

To summarize, this chapter explores the impact that refugees have on host countries, giving several policy suggestions that focus on the integration of refugees not only in the job market but also in the local culture.

2. Refugees and the Labor Market in the Destination Country

This section studies the refugee impact on the national labor market of host countries by looking at the unemployment and wage rates. The assumption is that refugees also react to economic variables (see Chap. VI, Sect. 5.3.) since the sharp dichotomy of the classical legal literature (i.e. “voluntary economic migrants” versus “involuntary political refugees”) is challenged (see Chap. II, Sect. 2.2.). This Section also reviews the literature regarding the impact of economic migrants on the labor market since some types of refugees act as economic migrants by making a clear choice (see Chap. VI, Sect. 3). This section’s goal is to give policy recommendations according to the different types of refugees.

According to the classic literature, the main characteristic used to classify an individual as an “economic migrant” is the fact that s/he leaves her/his home voluntarily,³ and the main driving incentive is the regional or international wage differentials.⁴ The 1951 Convention does not clearly distinguish between “refugees” and “economic migrants.” Nevertheless, the sharp dichotomy of the classical legal literature (ie. “voluntary economic migrants” versus “involuntary political refugees”) is in contrast with the position taken by the UNHCR according to which economic migrants are persons who leave their country *voluntarily* and *exclusively* for economic considerations (see Chap. II, Sect. 2.2.). Although refugees leave their home countries to avoid persecution, they *also* respond to economic incentives, especially, in the cases of anticipatory refugees, bogus refugees, and resettled refugees. Moreover, according to the economic literature, national policies regarding the integration of foreigners into the national labor market have an impact on the adaptation costs (see Chap. IV, Sect. 5.3.).

However, in the case of significant unemployment, foreigners are often seen by public opinion as competitors in the labor market.⁵ This adverse attitude toward foreigners can have an impact on

³ Jackson, Ivor C. "The 1951 Convention Relating to the Status of Refugees: A universal basis for protection." *International Journal of Refugee Law* 3 (1991): 403.

⁴ Czaika, Mathias. "The political economy of refugee migration." *Jahrbücher für Nationalökonomie und Statistik* 229.6 (2009): 803-824.

⁵ In contrast, the empirical study conducted in 2010 stated that immigrants were not viewed as competitors or as a source that decreases the national wage. This study covered the United States, Canada, United Kingdom, France, Germany, Italy, Spain, and the Netherlands

the asylum seeker recognition rate,⁶ as it was shown in Switzerland.⁷ Studies have also demonstrated that a high unemployment rate exerts an adverse effect on the number of asylum seekers.⁸ Indeed, both qualitative and quantitative studies show a negative attitude that the public opinion has toward refugees and their impact on the national labour market (see Chap. III, Sect. 5).

Regarding the public attitude toward the protection of refugee rights, it is interesting to look at the shift in opinion during two different polls conducted utilizing the same methods within three years of each other. In 2011,⁹ before the Arab Spring of 2011 and the European Refugee Crisis of 2015-2016, the public was quite sympathetic to the plight of individuals who are forced to emigrate due to exogenous reasons, such as the different types of persecutions established in Article 1(A)(2) of the 1951 Convention. The highest support was for citizens leaving their home countries due to armed conflicts (79% in the EU countries part of this research, UK, France, Germany, Italy, and Spain, and 74% in the USA). In contrast, in 2014,¹⁰ after the Arab Spring of Spring 2011 and before the increase of the asylum seekers of 2015-2016, the public opinion agreed with restricting the asylum policies. While the highest number of respondents for more restrictive refugee policies were found in Italy (57%) and in Greece (56%), the highest number of supporters for less restrictive asylum policies were located in Germany (31%) and the Netherlands (26%). The negative attitude about the asylum policies can be seen not only in the EUMS involved in this study (U.K., France, Germany, the Netherlands, Italy, Poland, Portugal, Spain, Sweden, and Greece) but also in the non-EUMS neighbours of the EU, such as Turkey (66%) and Russia (43%).

In a simple supply and demand model of the labor market, refugees cause an outward shift in the labor supply curve. If the supply and demand curves are not elastic, wages will fall and the unemployment rate will increase. Thus, in theory, the impact that refugees have on the labor market of host countries depends on three main variables: 1. the type of economy of the destination country; 2. the substitutability of natives/locals and refugees; and 3. the elasticities associated with the labor market. First, the simplest and most theoretical model states that the self-sufficient economies (i.e. autarky economies) with only one type of job will suffer from the increasing numbers of foreigners.

with approximately 1,000 adults interviewed in each country. Bell, Brian, Stephen Machin, and Rob McNeil. *Immigration and Crime: Evidence for the UK and other countries*. Migration Observatory Briefing. 2013.

⁶ (Asylum) recognition rate is defined as the share of positive decisions in the total number of asylum decisions for each stage of the asylum procedure (i.e. first instance and final on appeal). The total number of decisions consists of the sum of positive and negative decisions.

⁷ 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.

⁸ Thielemann, Eiko R., Does Policy Matter? On Governments' Attempts to Control Unwanted Migration (November 2003). IIS 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.

⁹ Trends, Transatlantic. "Transatlantic trends: immigration-2011 partners." (2011).

¹⁰ Trends, Selected Highlights from Transatlantic. "Transatlantic trends: Mobility, migration and integration." *Key Findings From 2014 and Selected Highlights From Transatlantic Trends and Transatlantic Trends: Immigration 2008* 13 (2014).

In other words, the increase of the labor supply without the increase of the demand will lead to a fall in wages. In contrast, in an open economy, in the long run, the increase in the labor supply will not impact wages, though there will be an increase in the unemployment rate in the first period, especially within refugees. Therefore, in general, national or international flows will offset any changes and their effects will be narrowed only in the cases of disequilibrium.¹¹ Second, in economies with different types of jobs, the negative impact of refugees will be magnified if they can easily substitute locals. As a result, they will decrease wages as well as increase the unemployment rate of locals. However, when local jobs require language skills, the refugees' impact will be narrowed in the short run. This is the case of unskilled jobs if refugees are willing to accept them. Third, rigid labor markets will not be affected by refugees.¹² However, in the case of adverse demand shocks¹³ (e.g. high increase of refugee influx), the negative impact of employment consequences will be felt, too. In addition, rigid labor markets are not considered efficient for local economies.¹⁴ On the contrary, if labor and demand curves are both elastic, native employment will move in the same direction as wages, and the change in wages will be smaller than in the case of a perfect inelastic labor supply.¹⁵

In practice, the empirical studies focusing on the impact that migrants have on the national market are short of giving a unique answer. The majority of the empirical studies reviewed here show that there is no negative impact of the total share of immigrants on the labor market. Some of these studies have been conducted in the USA (with data collected in the 1970s,¹⁶ in the 1980s,¹⁷ in the 2000s,¹⁸ or from 1980-2000),¹⁹ in Britain (with data collected from 1973 to 1983),²⁰ in Germany (with data collected from 1985 to 1989),²¹ in the EU (with data collected from 1983 to 1999),²² in Spain

¹¹ Deardorff, Alan V. "The general validity of the Heckscher-Ohlin theorem." *The American Economic Review* 72.4 (1982): 683-694.

¹² Friedberg, Rachel M. "The impact of mass migration on the Israeli labor market." *The Quarterly Journal of Economics* 116.4 (2001): 1373-1408.

¹³ Blanchard, Olivier, and Justin Wolfers. "The role of shocks and institutions in the rise of European unemployment: the aggregate evidence." *The economic journal* 110.462 (2000): C1-C33.

¹⁴ Boeri, Tito, and Pietro Garibaldi. "Are labor markets in the new member states sufficiently flexible for EMU?." *Journal of Banking & Finance* 30.5 (2006): 1393-1407.

¹⁵ Friedberg, note 12.

¹⁶ Card, David. "Immigrant inflows, native outflows, and the local labor market impacts of higher immigration." *Journal of Labor Economics* 19.1 (2001): 22-64.

¹⁷ Butcher, Kristin F., and David Card. "Immigration and Wages: Evidence from the 1980s." *The American Economic Review* 81.2 (1991): 292-296.

¹⁸ Card, David. "Is the new immigration really so bad?." *The Economic Journal* 115.507 (2005): F300-F323.

¹⁹ Card, David. *Immigration and Inequality*. NBER Working Paper No. 14683. National Bureau of Economic Research, 2009.

²⁰ Dustmann, Christian, Francesca Fabbri, and Ian Preston. "The impact of immigration on the British labor market." *The Economic Journal* 115.507 (2005).

²¹ Pischke, Jörn-Steffen, and Johannes Velling. "Employment effects of immigration to Germany: an analysis based on local labor markets." *Review of Economics and Statistics* 79.4 (1997): 594-604.

²² Angrist, Joshua D., and Adriana D. Kugler. "Protective or counter-productive? Labor market institutions and the effect of immigration on EU natives." *The Economic Journal* 113.488 (2003): F302-F331.

(with data collected for the second half of the 1990s),²³ and in Italy (with data collected from 1980 to 1995).²⁴ These studies demonstrate that migrants and natives are imperfect substitutes.²⁵

But, not all surveys agree. One study conducted in Italy with data collected from 1986 to 1995 suggests that, if their share of the population is below a certain threshold, migrants have a complementary effect for unskilled native workers. Thus, in this case, the salary for unskilled native workers increases.²⁶ However, other research exposes the eventual negative effects of immigration on the national labor market.²⁷ These negative impacts can be observed in various ways. First, the presence of migrant workers may harm young unemployed people with no job experience.²⁸ Second, areas with a high concentration of recent immigrant flows are less attractive, especially for unskilled native workers.²⁹ Third, migrants lower the wages of competing workers or worsen the labor market opportunities for natives. A study conducted in the USA with data collected from 1960 to 2000 indicates that a 10% increase in an immigrant workforce supply reduces wages by 3-4%.³⁰ This has a higher effect in the case of unskilled labor. Therefore, studies that focus on the effect of illegal migrants generally find that illegal migrants negatively impact the wages of competing workers or worsen the labor market opportunities for natives, which is indicated in the case of unskilled jobs.³¹

A literature overview of the impact that immigrants have on the labor market of host countries reveals that migrants might negatively impact the national job market if they are perfect substitutes and/or, for exogenous factors, migrants decrease their expectations. First, if migrants are perfect substitutes for natives (e.g. unskilled jobs without the need for particular qualifications or jobs where there is no language requirement such as artists who can communicate through their art), they will affect job demand by decreasing job opportunities and wages. Second, by applying the traditional

²³ Carrasco, Raquel, Juan F. Jimeno, and A. Carolina Ortega. "The effect of immigration on the labor market performance of native-born workers: some evidence for Spain." *Journal of Population Economics* 21.3 (2008): 627-648.

²⁴ Venturini, Alessandra. "Do immigrants working illegally reduce the natives' legal employment? Evidence from Italy." *Journal of population economics* 12.1 (1999): 135-154.

²⁵ Card, note 19.

²⁶ Venturini, Alessandra, and Claudia Villosio. "Labor market effects of immigration into Italy: An empirical analysis." *International Labor Review* 145.1-2 (2006): 91-118.

²⁷ Dolado et al. show a negative but not significant effect of immigration on destination countries. Dolado, Juan J., Rosa Duce, and Juan F. Jimeno. *The effects of migration on the relative demand of skilled versus unskilled labor: Evidence from Spain*. No. 1476. CEPR Discussion Papers, 1996. Dustmann et al. conclude that there is no strong evidence that immigration has overall effects on aggregate employment, participation, unemployment, and wages but some differences according to education. Dustmann, et al. note 20; Altonji et al. underline the negative effect for less-skilled natives. Altonji, Joseph G., and David Card. "The effects of immigration on the labor market outcomes of less-skilled natives." *Immigration, Trade, and the Labor Market* (1991): 201-234.

²⁸ Venturini and Villosio, note 26.

²⁹ Filer, Randall. "The effect of immigrant arrivals on migratory patterns of native workers." *Immigration and the workforce: Economic consequences for the United States and source areas*. University of Chicago Press, 1992.

³⁰ Borjas, George J. "The labor demand curve is downward sloping: Reexamining the impact of immigration on the labor market." *The Quarterly Journal of Economics* 118.4 (2003): 1335-1374.

³¹ Sarris, Alexander H., and Stavros Zografakis. "A computable general equilibrium assessment of the impact of illegal immigration on the Greek economy." *Journal of Population Economics* 12.1 (1999): 155-182; Djajić, Slobodan. "Illegal immigration and resource allocation." *International Economic Review* (1997): 97-117; Lianos, Theodore P., Alexander H. Sarris, and Louka T. Katseli. "Illegal immigration and local labor markets: The case of Northern Greece." *International migration* 34.3 (1996): 449-484; Simon, Julian Lincoln, Sanford J. Ungar, and Stephen Moore. *The economic consequences of immigration*. University of Michigan press, 1999; Bean, Frank D., B. Lindsay Lowell, and Lowell J. Taylor. "Undocumented Mexican immigrants and the earnings of other workers in the United States." *Demography* 25.1 (1988): 35-52.

micro model of migration of Borjas,³² in the case of illegal migrants, since the first part of the equation ($P_1(t)P_2(t)Y_d(t)$) is 0 when the job market allows it, illegal migrants will accept jobs with wages below the market value. This is typically in sectors that need unskilled laborers. I propose the application of these results to refugees who behave as economic migrants; in other words, to apply these results to anticipatory refugees, bogus refugees, asylum seekers not recognized as refugees, and resettled refugees (see Chap. IV, Sects. 2 and 3). Anticipatory refugees are potential future persecuted individuals with highly skilled backgrounds. Thus, they will ask for a visa and be considered legal economic migrants without impacting the labor market of host countries. Since resettled refugees are part of programs and are considered legal migrants, there should not be any impact on the national labor markets as governments are the “drivers” of their behaviors. In other words, the governments are those that decide the numbers and the qualifications of refugees that will be transferred. In contrast, bogus refugees or asylum seekers who are not recognized as refugees behave as illegal migrants and will negatively impact the labor market; generally, of unskilled jobs.

Despite refugees reacting to economic incentives, they differ from economic migrants (see Chap. II). Indeed, several economic studies, have demonstrated that after some years of residency in the host countries, particularly in the USA, refugees earn more than economic migrants.³³ This might be explained by the fact that refugees invest more human capital since they plan to live in the destination country for an unlimited period (as opposed to many economic migrants). Although in the beginning refugees earn low salaries in the host countries, several studies have demonstrated that in the long term they invest a high amount of human capital. This drastically increases their earnings.³⁴ Additional empirical studies have shown that while refugees will invest their human and economic capital in the host countries, economic migrants will eventually invest their earnings in their countries of origin.³⁵ Hence, economic migrant consumption is higher in their home countries rather than in the host countries.³⁶

³² $ER(0) = \int_0^{\infty} [P_1(t)P_2(t)Y_d(t) - P_3(t)Y_0(t)] e^{-rt} dt - C(0)$ Borjas, George J. Friends or strangers: The impact of immigrants on the US economy. Basic Books, 1990.

³³ 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.

³⁴ Duleep, Harriet Orcutt, and Mark C. Regets. "Immigrants and human-capital investment." *American Economic Review* 89.2 (1999): 186-191. However, it should be stated that on the contrary, refugees with high skill transferability have a low propensity to invest in host-country human capital.

³⁵ 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

³⁶ Djajić, Slobodan, and Ross Milbourne. "A general equilibrium model of guest-worker migration: The source-country perspective." *Journal of international economics* 25.3 (1988): 335-351; Dustmann, Christian. "Return migration, wage differentials, and the optimal migration duration." *European Economic Review* 47.2 (2003): 353-369; Brücker, Herbert, and Philipp JH Schröder. *International migration with heterogeneous agents: theory and evidence*. Leibniz Information Centre for Economics, 2006.

Thus, by narrowing the focus on the relationship between refugees and the labor market, I can focus on some of the most important key historical exogenous shocks of supply of labor demand of the second half of the twentieth century:³⁷ 1. the repatriation of French citizens into France after the Algerian War of Independence in 1962;³⁸ 2. the Cuban refugees in the Mariel boatlift in 1980;³⁹ 3. the flow of Jewish émigrés to Israel in the early 1990s;⁴⁰ and 4. the refugee flow in the EUMS during the Balkan wars.⁴¹ All of them are natural experiments. Thus, quantitative methods can be applied. In addition, they are all considered exogenous supply shocks of demand since these were unpredictable events outside the control of the host countries. Furthermore, two of them deal with unskilled laborers (Cubans and Yugoslavs), and the other two deal with highly skilled workers (Russians and French). A shortcoming is that these studies use different methods.

In 1962, Algeria proclaimed its independence. Within a year, 900,000 French citizens were repatriated in France. The timing of the immigration flow was independent of the French economic conditions without a selection bias among immigrants since all of them were citizens of French origin who left Algeria at the end of the war. As the majority of them relocated in the south of France, their choice was independent of wages and unemployment rates. The data were taken by the censuses of 1962 (just before the arrival of the repatriates) and 1968 from France's 90 departments. The salary data was furnished by employers to the tax service. Thus, domestic servants and the self-employed have been excluded. The majority of the repatriates were younger than the population living in France. Compared to other foreigners, their reintegration was easier since their adaptation costs (i.e. the same language, social benefits, the priority of finding a job) were lower (see Chap. IV, Sect. 5.2) and they had also political rights. Repatriates were over-represented in skilled occupations or mid-level professionals as well in the army and police. Although they suffered a high unemployment rate themselves, the repatriates had little impact on the unemployment of others. A mere 1% increase in repatriates implied an increase of 0.2% in the unemployment rate of non-repatriates. The highest unemployment rate of non-repatriates was 1.4% and was registered in the Var (one of the districts of France). In addition, a 1% increase in repatriates was associated with a 0.8% decrease in the wages of non-repatriates. The highest decrease in wages of non-repatriates was 5.7% and was registered in the Var. Therefore, the labor force participation rates of non-repatriates were unaffected by the

³⁷ Borjas, George J., and Joan Monras. "The labor market consequences of refugee supply shocks." *Economic Policy* 32.91 (2017): 361-413.

³⁸ Hunt, J. (1992). 'The impact of the 1962 repatriates from Algeria on the French labor market', *Industrial and Labor Relations Review*, 45, 556-72.

³⁹ Borjas, George J. "The wage impact of the Marielitos: A reappraisal." *ILR Review* 70.5 (2017): 1077-1110; Borjas, George J. *The wage impact of the Marielitos: Additional evidence*. No. w21850. National Bureau of Economic Research, 2016; Peri, Giovanni, and Vasil Yasenov. *The labor market effects of a refugee wave: Applying the synthetic control method to the Mariel boatlift*. No. w21801. National Bureau of Economic Research, 2015; Card, David. "The impact of the Mariel boatlift on the Miami labor market." *ILR Review* 43.2 (1990): 245-257.

⁴⁰ Friedberg, note 12.

⁴¹ Angrist, note 22.

presence of repatriates. The French labor market was not affected by the repatriation because international migration and repatriation effects offset each other.

The second case is the Cuban migration in Miami (Florida, USA) in 1980. On 20th April 1980, Fidel Castro declared that Cubans wishing to emigrate to the USA were free to leave from the Mariel port. From May to September of 1980, more than 125,000 Cuban immigrants arrived in Miami.⁴² This can be considered a natural experiment for the impact of unskilled immigration on the national labor market. More than half of them, settled in Miami, increasing the labor force by 7% and the Cuban labor force in Miami by 20%. This analysis is based on individual micro-data from 1979 to 1985 from the merged outgoing rotation group samples of the Current Population Survey by examining the 1980 Census. The unemployment rate from April to June of 1980 was increased by 2.1% (from 5% to 7.1%). However, this was common all over the USA. This study suggested that there are no short or long-term effects of the Mariel immigration on the wages or unemployment rates of non-Cubans in Miami (ie. either black communities or unskilled laborers) since the impact was within the Cuban unskilled immigrants. Thus, no effects were registered by the exogenous shock of the labor demand. Even within the Cuban community the impact was not substantial. Nevertheless, it should be noted that Miami is a place with a high concentration of industries that require an unskilled labor force. In addition, as Miami has always been an attractive site for Latin communities, the adaptation costs (see Chap. IV, Sect. 5.2) were low due to the high social capital in the area as well as the lack of the need to speak English.

The third case is the Jewish emigration to Israel between 1991 and 1995. Following the collapse of the USSR in 1991, in the early 1990s, Israel received more than 1.5 million Russian immigrants. This increased its population by 12% and has been studied through the application of Instrumental Variables that allows an understanding of detailed data on immigrants' occupations in their country of origin. This natural experiment is important for several different reasons. First, no other country has ever felt such a large and concentrated immigration flow. Second, Israel removed entry restrictions and waiting periods for the Russian emigration, which is uncommon for other countries. Third, Israel is a small country. Thus, while in other countries, internal migration might reduce the effect of external migration,⁴³ in the case of Israel, this was not possible. Fourth, the emigrants were highly skilled laborers, in particular, engineers. Although in the first part of the 1990s there was an increase in the unemployment rate, this started in mid-1988. In addition, other major events (eg. the Palestinian uprising of 1987, the Persian Gulf War of 1991, or the signing of the Oslo peace of 1993) might also have affected that. The study used variations in immigration with a

⁴² The exact number is difficult to find since the immigration of Mariel had an unauthorized nature.

⁴³ Filer, note 29.

regression analysis conducted on both the occupation- and individual-level data. In order to avoid endogeneity bias, an Instrumental Variables approach was employed. In other words, previous occupations might predict the preferred choice of future occupations. This source of variation is independent of the wages of the locals. The study is based on a random sample of 3,300 new immigrants interviewed by the Israeli Immigrant Employment Survey. The study concluded that a 10% increase in occupational employment due to immigration is associated with a 3-6% decrease in the real hourly earnings of natives in that occupation. There is, at most, weak evidence of a negative impact on native employment levels.

The second millennium ended with the refugee flow in the EUMS due to the Balkan wars. The study is based on data produced by Eurostat for 18 EUMS for the period 1983-1999. These statistics are derived from a series of country-specific labor-force surveys using a similar format across countries and over time. Therefore, consistent cross-country comparisons were possible. The study uses an Instrumental Variables Strategy as well as reporting ordinary least squares and fixed-effects estimates. It shall be noted that during the 1990s, 30% of asylum seekers came from Yugoslavia. This study concluded that although in the short term firing costs will protect locals, this policy will upset natives more than migrants. In addition, higher replacement rates improve the natives' non-work options. Furthermore, rigid wages make native workers less competitive with immigrants. Higher entry costs are also predicted to amplify the negative effects of immigrants on natives. In other words, an increase in the foreign share of 10% reduces native employment rates by 0.2% to 0.7%. Ergo, this study confirms empirically that reduced market flexibility increases the negative impact of refugees in the national market.

All examinations of these four important migration flows of the second half of the twentieth century showed that the refugee impact on the national labor market is extremely insignificant. This might be due to the offset stemming from an internal migration (e.g. Miami case) or an international migration (e.g. French case). A higher impact is also observed for unskilled jobs (e.g. Cuban and Yugoslavs cases) within the same ethnic communities (e.g. Cuban and French cases). However, they use different data sets and methods. In addition, sometimes definitions are dissimilar. For instance, in the EU, there is a distinction between home-country nationals and resident non-nationals, while in the USA, the latter group – resident non-nationals – is called “resident aliens.”⁴⁴ Understanding that different methods may affect the results of an empirical study,⁴⁵ these historical events should be analyzed with an identical approach which would allow the identification of the impact of a specific group of workers. This is because the impact of refugees is higher if they are substitutes for natives.

⁴⁴ Angrist, note 22.

⁴⁵ Borjas, George J., and Joan Monras. "The labor market consequences of refugee supply shocks." *Economic Policy* 32.91 (2017): 361-413.

The use of identical methods on these different historical events may demonstrate that the effect of an increase in the demand supply will only impact workers within the same type of job. However, the increase in the supply of laborers will have a positive effect by increasing the wage of the complementary native groups: for instance, high-skilled groups in Miami and the EU or low-skilled workers in Israel and France. Thus, refugees impact diverse classes differently⁴⁶ since some will lose from their presence (e.g. citizens with similar capabilities) and others will gain from theirs (e.g. citizens with complementary capabilities with refugees).⁴⁷

The data of the recent refugee crisis shows that more than two-thirds are young low-skilled men.⁴⁸ After examining the results of the previous studies, it seems that this influx will negatively affect, although not significantly, unskilled locals. However, in general, these unskilled locals in the EUMS are immigrants that came to the EU years ago.⁴⁹ The unskilled jobs in the EUMS are and have been at risk since before the European refugee crisis due to two main factors. The first is the competition by BRICS countries that offer lower wages for identical jobs. The second is the increase in technology that has replaced the need for unskilled jobs. Nevertheless, the lack of effect on locals has been confirmed by recent studies that have examined the impact of refugees in Germany⁵⁰ or the EU.⁵¹ To quell the insignificant impact that the recent refugee crisis has had, in January 2016, the IMF recommended that employers should differentiate in the short-term the treatment of refugees and EU citizens by paying refugees less than the minimum wage⁵² due to a recent study announcing that refugees are willing to accept lower wages and harsher working conditions than locals.⁵³

To test the IMF's reasoning, a review of the attitude of employers regarding refugee performance is necessary. In general, the literature on refugee integration in the host countries has focused on human capital, such as language skills, cultural differences, other source country characteristics, or the impact of ethnic enclaves.⁵⁴ The survey focusing on the attitude of employers

⁴⁶ Whitaker, E. "Changing opportunities: refugees and host communities in western Tanzania (Working Paper No. 11),(pp. 1–17). UNHCR." (1999).

⁴⁷ Maystadt, Jean-François, and Philip Verwimp. "Winners and losers among a refugee-hosting population." *Economic development and cultural change* 62.4 (2014): 769-809. For instance, in Tanzania, chief accountant in a cooperative union when the refugees came in, his salary was below 100,000 Tzs before the refugee crisis and after it, his salary is more than 200,000 Tzs. In this refugee crisis, the main winners seem to be the skilled workers and the self-employed farmers who could benefit from a very cheap labor force. On the contrary, the main losers are unskilled workers living closer to the refugee camps.

⁴⁸ OECD. International migration outlook. OECD publishing, 2018.

⁴⁹ Barslund, Mikkel, Mattia Di Salvo, and Nadzeya Laurentsyeva. "The impact of refugees on the labor market: a big splash in a small pond? CEPS Working Document No 2018/07, October 2018." (2018).

⁵⁰ Gehrsitz, Markus, and Martin Ungerer. "Jobs, crime, and votes: A short-run evaluation of the refugee crisis in Germany." (2017).

⁵¹ Barslund, et al., note 49.

⁵² International Monetary Fund. 2016. The Refugee Surge in Europe: Economic Challenges.

⁵³ Stave, Svein Erik, and Solveig Hillesund. *Impact of Syrian refugees on the Jordanian labor market*. Geneva: ILO, 2015.

⁵⁴ Blau, Francine D., Lawrence M. Kahn, and Kerry L. Papps. "Gender, source country characteristics, and labor market assimilation among immigrants." *The Review of Economics and Statistics* 93.1 (2011): 43-58; Algan, Yann, et al. "The economic situation of first and second-generation immigrants in France, Germany and the United Kingdom." (2010): F4-F30; Manning, Alan, and Sanchari Roy. "Culture clash or culture club? National identity in Britain." (2010): F72-F100; Damm, Anna Piil. "Ethnic enclaves and immigrant labor market outcomes: Quasi-experimental evidence." *Journal of Labor Economics* 27.2 (2009): 281-314; Bisin, Alberto, et al. "Are Muslim immigrants different in terms of cultural integration?." *Journal of the European Economic Association* 6.2-3 (2008): 445-456; Smith, James P. "Immigrants and the labor market." *Journal of Labor Economics* 24.2 (2006): 203-233; Dustmann, Christian, and

regarding refugee performance was conducted in Sweden,⁵⁵ a country with a particularly high rate of refugee immigration compared to its population size.⁵⁶ After a decade of permanence in Sweden, the majority of refugees (60%) have become self-sufficient by being employed in the national labor market.⁵⁷

The survey was sent via mail to 4,588 firms and more than 1,800 employers (40%) from different industries replied. On average, these firms have several refugees employed (3-5% of the total employees). The socially desirable answer was avoided in two manners. First, the participants are respondents that have participated in other studies conducted by the National Institute of Economic Research. Second, the managers were not asked directly about refugee discrimination. The main goal of this survey was to understand, through multivariate regressions, the attitude of employers toward the refugees' performance by empirically testing the impact of the IMF's recommendation of January 2016.

The result of this survey was that firms are generally satisfied with the refugees' performance (5.66 out of 7 points). But, in the sectors where screening is costly, managers showed a lower appreciation toward refugees' performances. In addition, their integration with locals was not difficult. But, in the sectors that work in small teams and communication was important, the results show that integration was more difficult. An interesting part of the research dealt with the refugee minimum wages, especially for low-skilled jobs (understood as employment that does not require tertiary education). Surprisingly, around half of the employers did not think that cutting minimum wages for refugees in unskilled jobs would not affect their employment rate. However, a correlation was found between firms with a high number of refugee employees and the positive attitude toward the proposal to cut the minimum wages. In other words, according to them, it seems that lowering those wages would increase refugee employment. This cut will not lower the quality of job applicants. Furthermore, an increase in the minimum wage is associated with a reduction in the number of refugees already employed.⁵⁸ Concluding, the IMF's recommendation is useful for sectors that already employ a high number of refugees.

To summarize, anticipatory refugees will not impact the labor market because they behave as legal economic migrants and can be absorbed by the national market since they are a small group of

Francesca Fabbri. "Language proficiency and labor market performance of immigrants in the UK." *The Economic Journal* 113.489 (2003): 695-717; Edin, Per-Anders, Peter Fredriksson, and Olof Åslund. "Ethnic enclaves and the economic success of immigrants—Evidence from a natural experiment." *The quarterly journal of economics* 118.1 (2003): 329-357.

⁵⁵ Lundborg, Per, and Per Skedinger. "Employer attitudes toward refugee immigrants: Findings from a Swedish survey." *International Labor Review* 155.2 (2016): 315-337.

⁵⁶ OECD. 2011. *OECD Factbook 2011–2012: Economic, environmental and social statistics*. Paris.

⁵⁷ Statistics Sweden. 2009. *Integration – utrikes födda på arbetsmarknaden (Integration – foreign-born persons and the labor market)*. Integration report No. 2. Stockholm.

⁵⁸ This is coherent with the results of a previous study conducted by Lundborg and Skedinger. Lundborg, Per, and Per Skedinger. "Minimum wages and the integration of refugee immigrants." (2014).

highly-qualified members. Resettled refugees should not have an impact on host countries as they arrive through programs where the State has the control to affect their behavior. In contrast, bogus refugees or asylum seekers who are not accepted as refugees or residents in host countries will “harm” host countries because they act as illegal migrants. However, their impact is limited to informal (unskilled) jobs (see Chap. II, Sect. 2.2.). Lastly, according to the literature, genuine refugees have an impact on host countries according to the nature of their skills. A literature review of different studies showed that their impact is limited, even in the case of massive influxes of refugees,⁵⁹ and hosts with complementary skills will benefit from the refugee crisis.⁶⁰ Studies have also shown that genuine refugees work to transform and transfer their human capital in the host countries (see Chap. II) by investing in education⁶¹ as well as work experience.⁶² Still, they are more likely to be unemployed or find non-standard (temporary or part-time) jobs.⁶³ This might be due to a lack of language skills⁶⁴ (when needed);⁶⁵ visible minority status;⁶⁶ a lack of work experience in host countries;⁶⁷ or the absence of a recognition of foreign accreditation.⁶⁸

In order to decrease this impact, some policy recommendations focusing on formal market access, which will be beneficial for both refugees and host countries, can be suggested. This strategy is important for three main reasons. First, informal work pays less fiscal contribution and demands lower-skilled labor.⁶⁹ Therefore, refugees will contribute less in the host countries while they will still use some social benefits. Second, refugees will have higher bargaining power in negotiating wages or demanding fair pay.⁷⁰ Therefore, the negative impact on same-skilled jobs will be narrowed. Third, in 2016, the New York Declaration for Migration and Refugees encouraged host governments to consider opening their labor market to refugees.⁷¹

⁵⁹ World Bank. (2018). *Moving for Prosperity: Global Migration and Labor Markets*. Policy Research Report. Washington, DC: World Bank.

⁶⁰ Del Carpio, Ximena V., and Mathis Wagner. *The impact of Syrians refugees on the Turkish labor market*. The World Bank, 2015; Ottaviano, Gianmarco IP, and Giovanni Peri. "Rethinking the effect of immigration on wages." *Journal of the European economic association* 10.1 (2012): 152-197.

⁶¹ Barslund, et al., note 49.

⁶² Krahn, Harvey, et al. "Educated and underemployed: Refugee integration into the Canadian labor market." *Journal of International Migration and Integration/Revue de l'integration et de la migration internationale* 1.1 (2000): 59-84.

⁶³ *Ibid.*

⁶⁴ Wooden, Mark. "The experience of refugees in the Australian labor market." *International Migration Review* 25.3 (1991): 514-535; Samuel, T. John. "Economic adaptation of Indochinese refugees in Canada." *Uprooting, loss, and adaptation: The resettlement of Indochinese refugees in Canada* (1987): 65-75.

⁶⁵ In some jobs in a certain area, language is not an asset. For instance, the case of unskilled jobs in Miami within the same ethnic community.

⁶⁶ Reitz, Jeffrey G., and Sherrilyn M. Sklar. "Culture, race, and the economic assimilation of immigrants." *Sociological Forum*. Vol. 12. No. 2. Kluwer Academic Publishers-Plenum Publishers, 1997; Basavarajappa, K. G., and Ravi BP Verma. "16. Occupational Composition Of Immigrant Women!" *Ethnic demography: Canadian immigrant, racial and cultural variations* 157 (1990): 297.

⁶⁷ Aycan, Zeynep, and John W. Berry. "Impact of employment-related experiences on immigrants' psychological well-being and adaptation to Canada." *Canadian Journal of Behavioural Science/Revue canadienne des sciences du comportement* 28.3 (1996): 240.

⁶⁸ *Ibid.*; Swan, Neil. *Economic and Social Impacts of Immigration: A Research Report Prepared for the Economic Council of Canada*. Canadian Government Pub Centre, 1991.

⁶⁹ La Porta, Rafael, and Andrei Shleifer. "Informality and development." *Journal of Economic Perspectives* 28.3 (2014): 109-2

⁷⁰ Hirsch, Boris, and Elke J. Jahn. "Is there monopsonistic discrimination against immigrants?." *ILR Review* 68.3 (2015): 501-528.

⁷¹ UN. 2016. New York Declaration. available on-line: <https://refugeesmigrants.un.org/declaration> accessed on April 30th, 2020.

Undoubtedly, this strategy depends on the socio-economic conditions of the host country as well as the refugee's skills. The strategy of refugee integration in host countries is divided here between general guidelines and specific rules for particular jobs. In the case of general guidelines, the matching of skills is essential.⁷² Firstly, by filling labor shortages, refugees – independently if refugees are unskilled or skilled laborers – will positively impact the productivity of local industries.⁷³ However, refugee should be placed in different communities since allocation with high refugee share should be avoided since they might be competitors of the locals, especially for jobs with the same skills as the natives.⁷⁴ Secondly, language courses are essential because they decrease adaptation costs (see Chap. VI, Sect. 5.2.). This will lead to quicker access to the national labor market. In other words, the faster refugees can access the labor market, the more successful they will be in the long run.⁷⁵ This will increase their consumption⁷⁶ as well as the formality in the job market.⁷⁷ More specific rules could be uncovered. First, in the case of anticipatory refugees or refugees with a high-skill profile, professional organizations should play an important role in recognizing the refugee credentials related to entering high-level jobs.⁷⁸ This will also decrease the screening costs, which has been a problem.⁷⁹ Second, refugees with entrepreneurial ideas should be encouraged to start a new business in the host country because, according to economic theory, an increase in competition will push existing host firms to become more innovative and productive.⁸⁰

To conclude, the impact on the national labor market depends on the type of refugee. Policy suggestions should consider the socio-economic context of host countries as well as the refugees' skills. Focusing on the recent case of an exogenous supply of foreigners, the EU has faced the financial crisis of 2008, the European migration crisis of 2015-2016, and it is expected to face yet another crisis due to Covid19. Additionally, the majority of the current European migration crisis refugees are unskilled laborers. As a result, they will impact the unskilled labor market, which is already in trouble due to the competition with the BRIC countries as well as due to the increase in new technologies. As a result, some policy suggestions include language courses, skill matches, and

⁷² Another reason for the slow integration of recognized refugees into the labor market might be skill mismatches. Woessmann, L. "Ifo economist Woessmann calls for systematic registration of education levels of refugees." *Munich: Ifo institute*. Retrieved April 20 (2015): 2019.

⁷³ Clemens, Michael A. "The effect of occupational visas on native employment: evidence from labor supply to farm jobs in the Great Recession." (2017).

⁷⁴ Borjas, George J., and Joan Monras. "The labor market consequences of refugee supply shocks." *Economic Policy* 32.91 (2017): 361-413; Clemens, note 73; Braun, Sebastian, and Toman Omar Mahmoud. "The employment effects of immigration: evidence from the mass arrival of German expellees in postwar Germany." *The Journal of Economic History* 74.1 (2014): 69-108.

⁷⁵ Marbach, Moritz, Jens Hainmueller, and Dominik Hangartner. "The long-term impact of employment bans on the economic integration of refugees." *Science advances* 4.9 (2018): eaap9519.

⁷⁶ Fasani, FM, Christian Dustmann, and Biagio Speciale. "Illegal migration and consumption behavior of immigrant households." *Journal of the European Economic Association* (2016).

⁷⁷ El-Zoghbi, Mayada, et al. *The role of financial services in humanitarian crises*. World Bank, 2017.

⁷⁸ Basran, Gurcharn S., and Li Zong. "Devaluation of foreign credentials as perceived by visible minority professional immigrants.(1)." *Canadian Ethnic Studies Journal* 30.3 (1998): 6-26.

⁷⁹ Lundborg and Skedinger, note 55.

⁸⁰ Aghion, Philippe, et al. "Industrial policy and competition." *American Economic Journal: Macroeconomics* 7.4 (2015): 1-32.

formal employment in geographic areas with a low concentration of unskilled jobs where there is a need for higher supply.

3. Refugees and the Crime Rates in the Destination Country

National governments, who are skeptical about migration, have traditionally linked migration and asylum policies with issues of national security.⁸¹ Indeed, the impact that migration might have on national security depends on the efficacy of a State's policy to shape migration flows according to its national interests.⁸²

This has also been confirmed by an analysis of data dealing with the representation of foreigners in the prisons. In all of the OECD countries,⁸³ except the USA, migrants are over-represented in prison populations.⁸⁴ The most extreme case was recorded in Switzerland in mid-2009 where the foreigner share in the total prison population was 23%; and 71% of those prisoners were migrants.⁸⁵ However, a potential explanation of that is that the probability to go to prison is higher for young and poorly educated males. Since the majority of migrants fit these characteristics, they are disproportionately represented. Other factors might explain these findings as well. For instance, being an undocumented immigrant is usually considered a crime *per se* (i.e. article 10-bis of the Italian Legislative Decree no. 286 of 25 July 1998⁸⁶ or Section 14 German Act on the Residence, Economic Activity, and Integration of Foreigners in the Federal Territory) or asylum seekers can commit some types of crimes that natives cannot commit (e.g. the violation of residence act, the asylum procedure act or the law on free movement).

Although the public opinion toward refugees is negative (see Chap. III, Sect. 3), with respect to the recent and ongoing refugee crisis of 2015-2016, the recent report of Amnesty International⁸⁷ shows a positive attitude toward refugees.⁸⁸ More than 80% of the people interviewed have a favorable opinion concerning the intake of refugees. However, this survey might be criticized for the

⁸¹ Mogire, Edward. "Refugee realities: Refugee rights versus state security in Kenya and Tanzania." *Transformation* 26.1 (2009): 15-29; Adamson, Fiona B. "Crossing borders: international migration and national security." *International Security* 31.1 (2006): 165-199; Bigo, Didier. "Security and immigration: toward a critique of the governmentality of unease." *Alternatives* 27.1_suppl (2002): 63-92.

⁸² Adamson, note 81.

⁸³ OECD. 2007. *Society at a Glance: OECD Social Indicators – 2006 Edition*.

⁸⁴ Bell and Machin, note 5.

⁸⁵ Bell, Brian, and Stephen Machin. *The Impact of Migration on Crime and Victimization: A Report for the Migration Advisory Committee*. London, London School of Economics, 2011.

⁸⁶ This article was included with the Law no. 94 of 15 July 2009. Legislative Decree is a decree having the force of law (article 87 of the Italian Constitution). This was also conferenced with the Law no. 132 of 1 December 2018.

⁸⁷ Amnesty International. 2016. *Refugees Welcome Index shows government refugee policies out of touch with public opinion*, available on-line: <https://www.amnesty.org/en/latest/news/2016/05/refugees-welcome-index-shows-government-refugee-policies-out-of-touch/>, accessed on April 30th, 2020.

⁸⁸ *Ibid.*

so-called socially desirable answer since the questions were direct⁸⁹ and no known measures were taken to avoid it.

This Section explores the impact that refugees have on the national crime rates, against the background that most recent refugee crisis of 2015-2016 shows that more than two-thirds are young low-skilled men⁹⁰. This Section reviews empirical studies coming from Sweden and Germany because these two countries, relatively speaking, were those that received a higher level of refugees. Section 3 applies the Becker⁹¹ model (expanded by Ehrlich)⁹² in correlation with the micro-model of migration discussed in Chap. IV, Sect. 2. In addition, this Section considers the correlation between immigration and crimes for two main reasons. First, by applying a nominalist approach, refugees have similar characteristics with economic migrants. Second, some types of refugees act as economic migrants (see Chap. II, Sect. 2). This Section's goal is to demonstrate that different types of refugees affect crime rates dissimilarly. Thus, policy recommendations should also take it into account.

Rational individuals undertake a cost-benefit analysis when they consider whether or not to participate in criminal activities. The standard model, which was introduced by Becker and then expanded by Ehrlich, argues that individuals participate in crimes if their expected utility (or return) from the illegal activity is higher than the expected utility (or return) from the competing legal activity, or in other words, if the expected net benefits from the illegal activity exceed those of the legal alternative.

The total net utility from illegal activity is defined as:

$$U_{Tot;Net;IL} = (1-p) U_{IL} - p U_{Sanc} \quad (1)$$

Where:

U_{IL} defines the utility from the illegal activity,
 p describes the probability of being caught,
 U_{Sanc} describes the utility from the expected sanction.

The utility from a competing legal alternative U_L is the wage coming from employment.

A rational individual will commit a crime if:

$$U_{Tot;Net;IL} > U(L) \quad (2)$$

⁸⁹ For instance, 1- would you personally accept people fleeing war or persecution into your country? Or 2- Should people be able to take refugee in other countries to escape from war or persecution?

⁹⁰ OECD, note 48.

⁹¹ Becker, note 1.

⁹² Ehrlich, note 2.

In the case of refugees, this model should also consider the model in Chap. IV. The number of legal job opportunities in the labor market affects the crime rate for refugees as well. Thus, although restrictive policies toward migrants increase the migrant crime rate although they have the positive effect of increasing the migration cost. In other words, if criminals conduct a cost-benefit analysis, they will commit more (property) crimes if the benefits of the legal alternative decrease. Quite simply, there is a relationship between (property) crimes and legal job opportunities.

Regarding the relationship between immigration and crime rates, unfortunately, different studies show varying results regarding the correlation between migrant levels and crime. For example, the first study of this kind was conducted over the period from 1981 to 1990 across 43 cities in the United States and concluded that there is no significant correlation between the number of migrants and crimes.⁹³ Another was a survey that focused on the migration wave post-2004 in the UK, after the EU-enlargement, which included several Eastern European countries, and it concluded as well that there is no correlation between migration and crime rates.⁹⁴ However, other surveys show the opposite. One study conducted in Spain between 1999 and 2006 stated that there exists a positive relationship between immigration share and crime rates.⁹⁵ Another empirical study conducted in Italy from 1990 to 2003 estimated that a 1% increase in the total number of migrants is associated with a 0.1% increase in total crime.⁹⁶

In light of the dissimilar results of these studies, it is meaningful to distinguish the research data between two types of crime: violent crime vs. property crime. In general, all surveys examined agreed that migrants do not have an impact on violent crimes.⁹⁷ However, there is a significant impact on property crime. According to one US study, a 10% increase in the share of migrants leads to an increase in the property crime rate of 1.2%.⁹⁸ This same result can be found in a survey focused on the migration wave post-1990 in the UK, *if* the focus is on male migrants.⁹⁹ However, there is no such correlation between migration and property crimes *if* the focus is on female migrants.¹⁰⁰ This study shows that the impact of migration on property crimes is higher in cases of migrants with low attachment to the local community or when legal job opportunities are poor. Additionally, when

⁹³ Butcher, Kristin F., and Anne Morrison Piehl. "Cross-city evidence on the relationship between immigration and crime." *Journal of Policy Analysis and Management: The Journal of the Association for Public Policy Analysis and Management* 17.3 (1998): 457-493.

⁹⁴ Bell, et al, note 5.

⁹⁵ Alonso, C., N. Garupa, M. Perera and P. Vazquez. *Immigration and Crime in Spain, 1999–2006*. Fundación de Estudios de Economía Aplicada, 2008.

⁹⁶ Milo Bianchi, Paolo Buonanno, Paolo Pinotti "Do immigrants cause crime." *Journal of the European Economic Association*, TD 698 (2008).

⁹⁷ This study was conducted in England and Wales over the period 2002 to 2009; Bell, et al, note 56; Spenkuch, Jörg L. "Understanding the impact of immigration on crime." *American Law and Economics Review* 16.1 (2013): 177-219; Bell and Machin, note 5. An exception of this result is violent crimes connected with the distribution of drugs in the USA. Blumstein, Alfred, Joel Wallman, and David Farrington, eds. *The crime drop in America*. Cambridge University Press, 2006.

⁹⁸ This survey uses panel data on US counties across the three Census years 1980, 1990 and 2000. Spenkuch, note 61.

⁹⁹ Bell, et al, note 5.

¹⁰⁰ Ibid.

illegal migrants have less opportunity to obtain legal employment, they are not entitled to social welfare. These facts positively affect the probability of committing property crimes. Indeed, this has been confirmed by two different empirical studies. The first one, conducted in the USA before and after the introduction of the *Immigration Reform and Control Act* in the 1970s, maintained that a 1% increase in the number of legalized migrants (foreigners that received resident permits) per capita is associated with a fall in overall crime of 1.6%.¹⁰¹ Another study conducted with Romanian and Bulgarian citizens in Italy before and after their EU membership concluded that the crime rate decreased.¹⁰² However, while both these studies have similar results in general, they have contrasting results regarding the types of crime. The Italian survey concluded that the legalization of illegal migration has a positive effect only on property crimes and no effect on violent crimes. The American study, on the other hand, concluded that although the effect is larger with regard to property crime, both violent and property crime rates fell as a result of the legalization of migrants residing in the US territory. Lastly, migrants might increase the crime rates by also being victims. In general, empirical studies agree that there is no evidence of an increase in the victimization of immigrants (eg. the study conducted in the UK with post-1990s migrants)¹⁰³ or there is little evidence regarding migrants as victims of crimes (eg. the study conducted in Germany after unification).¹⁰⁴

The application of these results is valid for refugees who behave as economic migrants (see Chap. IV, Sects. 2 and 3). As defined earlier, anticipatory refugees are potentially future persecuted individuals with a highly-skilled background. Thus, as legal economic migrants, the combination of the Borjas and Becker's models suggests that anticipatory refugees will not affect the national crime rates. In contrast, bogus refugees and asylum seekers not recognized as refugees are illegal migrants and will negatively affect the crime rates. Both Borjas and Becker models would suggest an increase in property crime. However, legalization would reduce property crime rates. To avoid an increase in property crimes another policy suggestion might be the immediate expulsion. Regarding resettled refugees, in general, they are relocated close to their family members, or if they do not have family in the new host country, they are distributed based on local capacity. The State is the "driver" of their behavior. Thus, they do not affect crime rates since there is a high vetting process for their selection. This has been confirmed in two different studies conducted in the USA. The first study¹⁰⁵ examines

¹⁰¹ Baker, Scott. "Effects of the 1986 immigration reform and control act on crime." (2011); DOI: 10.2139/ssrn.1829368

¹⁰² Pinotti, Paolo. "Clicking on heaven's door: The effect of immigrant legalization on crime." *American Economic Review* 107.1 (2017): 138-68; Mastrobuoni, Giovanni and Pinotti, Paolo, *Migration Restrictions and Criminal Behavior: Evidence from a Natural Experiment* (July 21, 2011). FEEM Working Paper No. 53.2011. Available at SSRN: <https://ssrn.com/abstract=1891689> or <http://dx.doi.org/10.2139/ssrn.1891689>

¹⁰³ Bell, et al, note 5.

¹⁰⁴ Krueger, Alan, and Joÿn-Steffen Pischke, "A Statistical Analysis of Crime against Foreigners in Unified Germany," *Journal of Human Resources* 32:1 (1997), 182-209.

¹⁰⁵ Amuedo-Dorantes, Catalina, Cynthia Bansak, and Susan Pozo. "Refugee Admissions and Public Safety: Are Refugee Settlement Areas More Prone to Crime?." (2018).

data from 2006 through 2014 and finds no evidence of an effect of refugee resettlement on crime. The second study¹⁰⁶ looks at the implementation of Section 5 of the Executive Order #13769 for the year 2017. On January 27, 2017, President Trump suspended for 120 days resettlement programs in the USA by dropping the number of refugees resettled to 65.6%. This study concludes as well that there is no discernible effect on country-level crime rates and this Order created a null effect for the crime rates.

However, refugees, as stated above (Chap. V, Sec. 2), differ from economic migrants (see Chap. II). Thus, I should narrow the focus to the relationship between refugees and crime rates, and I use data from the two countries that have received a high number of refugees - Germany and Sweden. The first study¹⁰⁷ observed the correlation between the share of asylum seekers/recognized refugees¹⁰⁸ and crime rates between 2010-2015 in Germany by using the Becker and Ehrlich models. The data was taken from the Central Register of Foreigners and the German Federal Police Office.¹⁰⁹ While asylum seekers are located in certain areas, refugees can freely move. To prevent endogeneity issues in migrants' location choice, the study used a shift-share instrument. This study applied instrumental variables and considered the ordinary least squares results. The results confirm that a 1% increase in asylum seekers increases with 2% of the respective ratio of suspects in these crimes. However, this is only connected to crimes related to their status (ie. undocumented entry or circulation outside the asylum centers). In addition, the research finds a correlation between property crime and fraud and recognized refugees. Since they have lower educational achievements, according to the Becker model, they increase the ratio of non-violent crimes. Moreover, Germans neither react to the presence of asylum seekers nor recognized refugees through increased criminal behavior.

The second study¹¹⁰ obtained data on criminal activity by the Federal Criminal Police Office between 2014 and 2015. To check the refugee/asylum seekers' correlation, the results are compared with data from 2013 and 2016 (ie. one year before and after the increase in refugees). In the short term, the study concludes that crime rates have largely remained flat. However, locations closer to asylum centers have an increase in crime, in particular: violent crime, street crime, and drug offenses. In fact, in these locations a one standard deviation increase in migrant inflow is associated with about 95 additional crimes per 100,000. In addition, an extra 200 beds are associated with about one extra non-native suspect or an increase of 2-2.5% of drug offenses. However, it should be noted that since

¹⁰⁶ Masterson, Daniel, and Vasil Yasenov. "Does Halting Refugee Resettlement Reduce Crime? Evidence from the United States Refugee Ban." (2018).

¹⁰⁷ Dehos, Fabian T. *The refugee wave to Germany and its impact on crime*. No. 737. Ruhr Economic Papers, 2017.

¹⁰⁸ In this study the focus are persecuted individuals who either registered, are waiting to file an asylum claim or are waiting for a decision,

¹⁰⁹ Notice that minor infractions and petty crimes are not recorded. In addition, this is only about suspects and not convicted citizens. However, in order to be registered here, substantial evidence should be present.

¹¹⁰ Gehrsitz, Markus, and Martin Ungerer. "Jobs, crime, and votes: A short-run evaluation of the refugee crisis in Germany." (2017).

refugees have the right to freely circulate within the country and the data do not show an increase in national crime, there is a correlation between asylum seekers and crime rates, but not between refugees and crime rates. This might be because in these areas, governments spend more human capital for the investigation of different crimes.

The third study¹¹¹ investigates the same period (2014-2015), examining the xenophobic hate crime in Germany since this type of crime carries economic and social costs. The data was taken from the Criminal Police Offices of the German States and by the Federal Criminal Police Office. The study shows an increase in hate crime in areas that now have large inflows of asylum seekers but previously only had a limited number of foreigners.¹¹² The study concludes that hate crime increases due to the defense of neighborhoods and the legacy of hate crime and are not connected with economic hardship.

The fourth study¹¹³ investigates the impact of refugees toward crimes against citizens in Germany in the latter half of 2015 by analyzing data from the Statistic on Asylum Seekers' Benefits, the Central Register of Foreigners, the Police Crime Statistic, and the Federal Criminal Police Office. Thus, the data includes only the cases where refugees are suspects, and German citizens are victims. The robustness of the study lies in its control of data from the years 2014 and 2016 by applying instrumental variables and inspecting the ordinary least squares results. The paper finds evidence for a bell curve relationship between the scale of refugee immigration and both the crime rate and overall victimization in a county. However, this does not demonstrate a systematic link between refugee immigration or refugee accommodation and the risk of Germans to become victims of a crime in which refugees are suspects.

The last study¹¹⁴ reviewed here deals with the refugee impact on crime rates in Sweden between 2002-2017 using data from Statistics Sweden and the Swedish Migration Agency in 287 municipalities by also applying instrumental variables and again examining the ordinary least squares results. On average, refugees earn around 9,000 Swedish Kronor per month, which is low for living standards in Sweden.¹¹⁵ Included in the analysis are aggregate crime, violence, crimes against the public, theft, and sexual assaults. The study concludes that there was an increase in crime rates—mainly in violent crimes. In fact, an increase of 1% in immigration caused an increase of 0.035 in the

¹¹¹ Entorf, Horst, and Martin Lange. "Refugees welcome? Understanding the regional heterogeneity of anti-foreigner hate crimes in Germany." *Understanding the Regional Heterogeneity of Anti-Foreigner Hate Crimes in Germany (January 30, 2019)*. ZEW-Centre for European Economic Research Discussion Paper 19-005 (2019).

¹¹² It should be mentioned that this trend is similar to the situation of the 1990s or with the hate crimes in the UK (Corcoran, Hannah, Deborah Lader, and Kevin Smith. "Hate Crime, England and Wales." *Statistical bulletin* 5 (2015): 15) or in other EUMS (Van Kesteren, John. "Assessing the risk and prevalence of hate crime victimization in Western Europe." *International review of victimology* 22.2 (2016): 139-160).

¹¹³ Huang, Yue, and Michael Kvasnicka. "Immigration and Crimes against Natives: The 2015 Refugee Crisis in Germany." (2019).

¹¹⁴ Kaddoura, Yousef. "Crime, Refugees and Politics In Sweden." (2019).

¹¹⁵ Kirmayer, Laurence J., et al. "Common mental health problems in immigrants and refugees: general approach in primary care." *Cmaj* 183.12 (2011): E959-E967.

ratio of aggregate crime to the population in Sweden. However, higher education and employment rates led to lower crime rates.

Thus, these studies conclude that persecuted individuals negatively affect crime rates of host countries, independently if they are asylum seekers¹¹⁶ or refugees,¹¹⁷ in either violent¹¹⁸ or non-violent crimes,¹¹⁹ by increasing victimization of local citizens¹²⁰ or hate crimes toward refugees.¹²¹

These results might be used to predict the potential effect of refugees on future crime rates due to Covid-19's anticipated economic recession. In 2020, Covid-19 is negatively impacting the European economy in three main ways.¹²² First, the lockdown led to the shutdown of financial markets, corporate offices, businesses, and events.¹²³ Second, the uncertainty about the future leads to safety in consumption.¹²⁴ Third, Covid-19 is affecting tourism.¹²⁵ According to Oxford Economics,¹²⁶ world GDP will shrink by 2.8% in 2020 overall.¹²⁷ While in 2009, the global GDP fall was 1.1%, in 2020, this figure is more than double. In addition, while the annual global GDP growth is projected to drop from 2.9% in 2019 to 2.4% in 2020, the annual EU GDP growth is projected to drop from 1.2% in 2019 to 0.8% in 2020.¹²⁸

Covid-19 will increase unemployment, which might result in two side effects. First, refugees might lose their jobs. As stated above, the data shows that more than two-thirds are young low-skilled men.¹²⁹ As it is well-known, the unskilled labor market is already in crisis due to the competition with the BRIC countries as well as the increase of new technologies. As a result, according to the Becker model, there will be an increase in property crime. Indeed, research in Germany that applied the Becker model has confirmed this outcome.¹³⁰ Second, in the case of large-scale unemployment,

¹¹⁶ Gehrsitz, Markus, and Martin Ungerer. "Jobs, crime, and votes: A short-run evaluation of the refugee crisis in Germany." (2017).

¹¹⁷ Kaddoura, Yousef. "Crime, Refugees and Politics In Sweden." (2019); Dehos, Fabian T. *The refugee wave to Germany and its impact on crime*. No. 737. Ruhr Economic Papers, 2017.

¹¹⁸ Kaddoura, note 117.

¹¹⁹ Dehos, note 117.

¹²⁰ Huang and Kvasnicka, note 113.

¹²¹ Entorf and Lange, note 111.

¹²² Ruiz Estrada, Mario Arturo. "Economic Waves: The Effect of the Wuhan COVID-19 On the World Economy (2019-2020)." Available at SSRN 3545758 (2020); De Vito, Antonio, and Juan-Pedro Gomez. "Estimating the COVID-19 Cash Crunch: Global Evidence and Policy." Available at SSRN 3560612 (2020).

¹²³ Ozili, Peterson K., and Thankom Arun. "Spillover of COVID-19: impact on the Global Economy." Available at SSRN 3562570(2020).

¹²⁴ *Ibid.*

¹²⁵ Hoque, Ashikul, et al. "The Effect of Coronavirus (COVID-19) in the Tourism Industry in China." *Asian Journal of Multidisciplinary Studies* 3.1 (2020).

¹²⁶ Oxford Economics. 2020. World GDP to fall 2.8% in 2020, exceeding financial crisis toll, available on-line: http://resources.oxfordsci.com/world-gdp-to-fall-2.8-in-2020-exceeding-financial-crisis-toll?oe_most_recent_content_download_id=000021&interests_trending_topics=coronavirus accessed on April 30th, 2020.

¹²⁷ However, in 2021, the world GDP growth will rise to almost 6%.

¹²⁸ OECD. 2020. Interim Economic Assessment Coronavirus: The world economy at risk <https://www.oecd-ilibrary.org/docserver/7969896b-en.pdf?expires=1587161779&id=id&accname=guest&checksum=520E2A11ABFDEB27BA7CE084FAF38B8E> accessed on April 30th, 2020.

¹²⁹ OECD, note 48.

¹³⁰ Dehos, note 117.

foreigners are often considered by public opinion as competitors in the labor market.¹³¹ Although this adverse attitude has an impact on the recognition rate,¹³² locals (citizens or previous economic migrants) might increase their negative stance toward refugees or asylum seekers already present in the EU. This might increase violent crimes toward them or towards second-generation migrants. Although low income, education, and young are risk factors for victimization,¹³³ the economic hardship does not affect the increase in hate crimes from natives to foreigners.¹³⁴ But, since refugees are willing to accept lower wages and/or harsher working hours,¹³⁵ and refugees can substitute previously unskilled economic migrants, it might be that this will affect victimization by local unskilled laborers. Regarding second-generation migrants, empirical research conducted in Sweden suggests that migrants are exposed more often to violence and threats of violence than native Swedes, with the second-generation migrants appearing to be the most vulnerable.¹³⁶

In summary, the application of the Borjas and Becker models reveals that different types of refugees face different regulations, which also impact their decision whether to commit crimes. According to these models, anticipatory refugees will not affect crime rates since they have high education profiles and behave as legal economic migrants. The literature agrees that higher education and employment rates lead to lower crime rates.¹³⁷ As also proved by empirical studies, resettled refugees do not affect crime rates of host countries as they arrive through programs where the State conducts deep vetting processes.¹³⁸ On the contrary, bogus refugees or asylum seekers not accepted as refugees and residents in host countries will negatively affect host countries since they act as illegal migrants. However, their impact is limited to property crime. Lastly, according to the literature, genuine refugees will negatively impact the aggregated crime rates.

To minimize this impact, some policy recommendations could be suggested. For bogus refugees or asylum seekers not accepted as refugees, legalization of their status will reduce crime rates. This has been confirmed by several studies.¹³⁹ Otherwise, to avoid the increase in property crime by them, an immediate expulsion might be proposed. Yet for genuine refugees, active labor programs and language courses can be implemented instead which would serve to decrease adaptation costs and reduce refugee crime rates. One study partially focused on the refugee wave after the 1990s

¹³¹ 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. Bell, et al. note 5.

¹³² Thielemann, note 8; Neumayer, note 8; Holzer, et al. note 7.

¹³³ Van Kesteren, note 112.

¹³⁴ Entorf and Lange, note 111.

¹³⁵ Stave and Hillesund, note 53.

¹³⁶ Tonry, Michael. *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives*, University of Chicago Press, 1997.

¹³⁷ Kaddoura, note 114.

¹³⁸ Amuedo-Dorantes, et al., note 105; Masterson and Yassenov, note 106.

¹³⁹ Pinotti, note 102; Mastrobuoni, et al., note 102.

in the UK confirmed this result.¹⁴⁰ This policy might also be suggested for asylum seekers. However, this policy has a negative externality since, in this case, several economic migrants would migrate for short-term contracts in richer countries. Lastly, cultural courses based on the mutual understanding of multiculturalism and integration for both locals and refugees would reduce xenophobic hate crimes toward refugees or the victimization of locals.

To conclude, the impact on the national crime rate depends on the different types of refugees. While anticipatory refugees or resettled refugees do not affect the crime rates, asylum seekers, bogus refugees, asylum seekers not recognized as refugees, and genuine refugees, in general, negatively affect crime rates in the host countries. The policy suggestions should take into consideration not only the right to work and language courses for refugees, but also cultural courses for both locals and refugees.

4. Refugees and Terrorism

In recent decades, terrorism has become an important global concern. According to the Global Terrorist Database, the highest peak of terrorist acts was recorded in 2014 at nearly 17.000 attacks and more than 45.000 total deaths. Between 2015 and 2017, there has been a decrease in terrorist acts.¹⁴¹ The large number of terrorist events have impacted the economy negatively. For instance, in 2016 alone, terrorism caused losses (destruction of buildings, health care costs, etc.) that were equal to 12.6% of global GDP.¹⁴²

As previously stated, some national lawmakers have claimed that there is a link between migration and security.¹⁴³ Refugees are considered part of the global migration influx. Although refugees are victims of violence, they might bring security externalities as well. For instance, the conflict in the Democratic Republic of the Congo led to a migration flow into Rwanda, thus increasing the violence and instability there.¹⁴⁴

This Section focuses on the relationship between refugees and terrorist acts. Although terrorism is a criminal offense and therefore adds to the available crime statistics, identifying the relationship between terrorist attacks and refugees in general is challenging for two main reasons – definition of terrorism and quantifying its effects. There is no commonly agreed-upon international

¹⁴⁰ Bell, et al, note 5.

¹⁴¹ Global Terrorism Database. 2017. Global Terrorism in 2017, available on-line: https://www.start.umd.edu/pubs/START_GTD_Overview2017_July2018.pdf accessed on April 30th, 2020.

¹⁴² *Ibid.*

¹⁴³ Lischer, Sarah Kenyon. *Dangerous sanctuaries: refugee camps, civil war, and the dilemmas of humanitarian aid*. Cornell University Press, 2015; Crisp, Jeff. "A state of insecurity: The political economy of violence in Kenya's refugee camps." *African Affairs* 99.397 (2000): 601-632.

¹⁴⁴ Prunier, Gérard. *Africa's world war: Congo, the Rwandan genocide, and the making of a continental catastrophe*. Oxford University Press, 2008.

definition of terrorism;¹⁴⁵ more than 100 diplomatic or scholarly definitions exist.¹⁴⁶ In addition, terrorism is a *dolus specialis crime*.¹⁴⁷ That is, it not only requires the *mens rea* as understood in criminal law but also an additional special intent, which refers to spreading the feeling of terror. Thus, terrorists aim not only to create damage but also to gain publicity and media attention in addition to destabilizing the political situation.¹⁴⁸ Furthermore, in general, terrorists do not act in isolation. Thus, the agency problems, including coordination or team issues, should also be considered.¹⁴⁹ Terrorism negatively impacts economic development¹⁵⁰ and decreases the individual and collective life satisfaction of native citizens, which are much more difficult to measure.¹⁵¹ Be that as it may, in recent years, many European citizens believe that there is a strong correlation between the refugee crisis and the threat of terrorism.¹⁵² In fact, in eight of the ten European nations surveyed, half or more of the respondents strongly highlighted this connection.¹⁵³

The following sub-section 4.1 examines the correlation between Article 1F of the 1951 Convention and terrorism while also briefly considers a case-law study in the UK, the USA, and Canada. Sub-section 4.2 exposes the “push” factors to become a terrorist by dedicating particular attention to the current refugee situation. Sub-section 4.3, investigates the relationship between terrorism and refugees, by showing the different empirical studies conducted. Refugees are, by definition, victims of persecution (Article 1A of the 1951 Convention) (see Chap. II, Sec. 2). Nevertheless, the literature has identified that refugees have a positive impact on the increase in civil

¹⁴⁵ Krueger, Alan B., and Jitka Malečková. "Education, poverty and terrorism: Is there a causal connection?." *Journal of Economic Perspectives* 17.4 (2003): 119-144. Although there exists the absence of a unique definition of terrorism, a consensus has emerged on the objective and subjective elements of an international terrorism crime. In concrete, 1. acts normally criminalised under national penal systems; 2. which are intended to provoke a state of terror in the population or coerce a state or international organisation to take (or abstain from) some sort of action; and 3. are politically or ideologically motivated. Cassese, Antonio. "The multifaceted criminal notion of terrorism in international law." *Journal of International Criminal Justice* 4.5 (2006): 933-958.

¹⁴⁶ Krueger and Malečková, note 145. According to Bjørge, it exists more than 200 different definitions. Bjørge, Tore. *Root causes of terrorism: Myths, reality and ways forward*. Routledge, 2004.

¹⁴⁷ Singh, Sameera. "Will Acceptance of a Universally Approved Definition of Terrorism Make Article 1 F of the 1951 Refugee Convention More Effective in Excluding Terrorists." *Journal Migration & Refugee Issues* 2.3 (2006): 91.

¹⁴⁸ Tavares, Jose. "The open society assesses its enemies: shocks, disasters, and terrorist attacks." *Journal of Monetary Economics* 51.5 (2004): 1039-1070.

¹⁴⁹ Garoupa, Nuno, Jonathan Klick, and Francesco Parisi. "A law and economics perspective on terrorism." *Public Choice* 128.1-2 (2006): 147-168.

¹⁵⁰ Mirza, Daniel, and Thierry Verdier. "International trade, security and transnational terrorism: Theory and a survey of empirics." *Journal of Comparative Economics* 36.2 (2008): 179-194; Abadie, Alberto, and Javier Gardeazabal. "Terrorism and the world economy." *European Economic Review* 52.1 (2008): 1-27; Crain, Nicole V., and W. Mark Crain. "Terrorized economies." *Public Choice* 128.1-2 (2006): 317-349; Nitsch, Volker, and Dieter Schumacher. "Terrorism and international trade: an empirical investigation." *European Journal of Political Economy* 20.2 (2004): 423-433.

¹⁵¹ Frey, Bruno S., Simon Luechinger, and Alois Stutzer. "The life satisfaction approach to valuing public goods: The case of terrorism." *Public Choice* 138.3-4 (2009): 317-345.

¹⁵² Wike, Richard, Bruce Stokes, and Katie Simmons. "Europeans fear wave of refugees will mean more terrorism, fewer jobs." *Pew Research Center* 11 (2016): 2016.

¹⁵³ The survey was conducted in 10 EU member states and the USA from April 4 to May 12, 2016, with 11,494 respondents. The EU countries of the survey are UK, Spain, Poland, Greece, France, Germany, the Netherlands, Hungary, Italy, and Sweden. The two countries that believe refugees will increase the likelihood of terrorism in the country less than 50% are Spain (40%) and France (46%). The highest fear has been established in Hungary (76%) and in Poland (71%). This negative attitude is underlined in the case of older people, less educated individuals, or citizens with the right ideological spectrum.

war¹⁵⁴ or interstate conflicts.¹⁵⁵ This Section describes the correlation between terrorist acts, which require less organization and costs compared to civil war or interstate conflicts, and refugees. Again, the different methodologies, in addition to the dissimilar collection of data, and the disparate definitions applied have shown the absence of a uniform results.

According to the different types of refugees, this Section focuses on the conditions of refugee camps as the main factor for radicalization¹⁵⁶ which leads to terrorist acts. Thus, persecuted individuals who were staying in refugee camps would have a higher probability to become terrorists than anticipatory refugees or resettled refugees. Anticipatory refugees are future potential victims of persecution and have a high level of education. By applying the Becker model,¹⁵⁷ which was also confirmed in one empirical study,¹⁵⁸ an increase in wealth and the level of education is negatively correlated with the involvement in terrorist acts.¹⁵⁹ In addition, resettled refugees pass a rigorous vetting process. Thus, they do not affect terrorist acts. This has also been confirmed by another empirical study.¹⁶⁰ Other refugee types (ie. bogus refugees, genuine refugees, asylum seekers, or asylum seekers not recognized as refugees) pass through refugee camps. Furthermore, their permanence there is higher than they imagined.¹⁶¹ This might also cause an increase in their dissatisfaction with host countries and might bring radicalization.

4.1. The Exclusion Causes of Refugee Protection: Article 1F

Although providing one single legal definition of terrorism is not the goal here, it is important to explore Article 1F of the 1951 Convention, which excludes the protection of the convention from certain individuals, vis-à-vis terrorism, which is not mentioned specifically in the exclusion clauses of Article 1F. However, examining the application of Article 1F before and after the events of September 11, 2001, exposes an eventual increase in the use of Article 1F as a cause for exclusion of refugee protection. Through this investigation, this new approach toward refugees of the UN Security

¹⁵⁴ Salehyan, Idean, and Kristian Skrede Gleditsch. "Refugees and the spread of civil war." *International Organization* 60.2 (2006): 335-366.

¹⁵⁵ Salehyan, Idean. "The externalities of civil strife: Refugees as a source of international conflict." *American Journal of Political Science* 52.4 (2008): 787-801.

¹⁵⁶ Doosje, Bertjan, et al. "Terrorism, radicalization and de-radicalization." *Current Opinion in Psychology* 11 (2016): 79-84; Horgan, John. "From profiles to pathways and roots to routes: Perspectives from psychology on radicalization into terrorism." *The ANNALS of the American Academy of Political and Social Science* 618.1 (2008): 80-94.

¹⁵⁷ Becker, note 1.

¹⁵⁸ Azam, Jean-Paul, and Véronique Thelen. "The roles of foreign aid and education in the war on terror." *Public Choice* 135.3-4 (2008): 375-397.

¹⁵⁹ Section 4.2. discusses the correlation between education and terrorism by finding conflicting results. However, I suggest that there is no correlation between anticipatory refugees and terrorism since they are future persecuted individuals. Once in the host countries, they will be integrated in the local culture by avoiding radicalization.

¹⁶⁰ Amuedo-Dorantes, et al., note 105.

¹⁶¹ Chin, Aimee, and Kalena E. Cortes. "The refugee/asylum seeker." *Handbook of the economics of international migration*. North-Holland, 2015. 585-658.

Council and the EU institution is explored. Eventually, there might be a need to modify Article 1F by including the notion of terrorism.

Citizens that have committed crimes listed within Article 1F are not eligible for the refugee protection.¹⁶² Therefore, Article 1F protects countries from dangerous criminals.¹⁶³ In other words, refugee status is an option given only to victims of persecution who cannot threaten the security of host countries. Article 1F does not include the notion of terrorism. However, other supranational norms include terrorism as an exclusion provision. For instance, Article 2 (1) of the Arab Convention on Regulating Status of Refugees in the Arab Countries of 1994 (which is not yet ratified) or other rules within the CEAS.¹⁶⁴

Article 1F(a) states that refugee protection does not apply to any person for whom there are serious reasons to suspect that they have committed a crime against peace, a war crime, or a crime against humanity. This text includes events that are terrorist acts by nature (such as internationally directing attacks against civilians and civilian objects, using indiscriminate means of warfare and taking hostages) that have also been established in other international treaties.¹⁶⁵ In addition, Article 1F(b) embraces serious non-political crimes, which refers to all acts that are disproportionate to the alleged objective,¹⁶⁶ and Article 1F(c) includes all acts against the purposes and principles of the UN, which have been mentioned by several recommendations¹⁶⁷ and by the doctrine.¹⁶⁸

All types of criminal offenses established in Article 1F refer to international treaties. There are at least thirteen international treaties that identify acts that amount to terrorism,¹⁶⁹ including

¹⁶² Hathaway, James C. *The law of refugee status*. Butterworths, 1991.

¹⁶³ Hathaway, James C., and Colin J. Harvey. "Framing Refugee Protection in the New World Disorder." *Immigration and Nationality Law Review* 22 (2001): 191.

¹⁶⁴ Article 12 of the Qualification Directive 2004 confirmed also in article 12 of the Qualification Directive of 2011.

¹⁶⁵ In order to give some examples of these events established in international treaties: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 unts 31 (Geneva Convention I), Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 unts 85 (Geneva Convention II), Art. 51; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 unts 135 (Geneva Convention III), Art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 unts 287 (Geneva Convention IV), Art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 unts 13 (Additional Protocol I), Articles 11 and 85; Rome Statute of the International Criminal Court (17 July 1998) 2187 unts 3 (Rome Statute), Art. 8.

¹⁶⁶ unhr 'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees (unhcr Guidelines)' (4 September 2003) HCR/GIP/03/05UNHCR 5; unhr 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (unhcr Handbook)' (January 1992) HCR/IP/4/Eng/REV.1, para 152.

¹⁶⁷ UNGA Dec 1994, para 2; UNGA Dec 1996, para 2; UNSC Res 1373, para 5; UNSC Res 1377, preamble role 5; UNSC Res 1624, preamble role 8.

¹⁶⁸ Goodwin-Gill, Guy. "Forced migration: Refugees, rights and security." *Forced migration, human rights and security* (2008): 1-18.

¹⁶⁹ Convention on Offences and certain other Acts committed on Board Aircraft of 1963; Convention for the Suppression of Unlawful Seizure of aircraft of 1971; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic agents of 1974; International Convention against the Taking of Hostages of 1979; Convention on the Physical Protection of Nuclear Material of 1979; Protocol for the Suppression of Unlawful Acts of Violence, Airports Serving International Civil Aviation of 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detention of 1991; International Convention for the Suppression of Terrorist Bombings of 1998; International Convention for the Suppression of Financing of Terrorism of 2000; and International Convention for the Suppression of Acts of Nuclear Terrorism of 2005.

hostage-taking as well as financing terrorist offenses, hijacking, and terrorist bombings. For example, the meaning of “crime against humanity” is derived from the International Military Tribunal at Nuremberg. Although Article 1F applies criminal concepts, it requires a very low standard of proof, calling for “serious reasons for considering.” This standard is lower than the civil law standard of “balance of probabilities” and far below the standard of the criminal law of “beyond any reasonable doubt.” Although the 1951 Convention does not recognize the concept of “terrorism,” several important resolutions or declarations have incorporated the term “terrorism” in regard to refugees.¹⁷⁰ The first resolution to use the term “terrorism” was the SC Res 579 of 1985, in response to the terrorist acts in the preceding year.

In 2004, for the first time, the SC Res 1566 of October 2004 provided a general definition of terrorism.¹⁷¹ One of the most important innovations of this definition is that some of the distinctiveness of terrorism as political violence is lost since it also now includes private acts like intimidation and coercion without any political agenda. While before 2001, terrorism acts were limited to specific situations, this is the first attempt to provide a general and broader definition of terrorism.

These declarations and resolutions have been criticized for denying asylum to alleged “terrorists” without providing a legal definition of a “terrorist act” in a binding international treaty, which might increase political considerations into the refugee status determination process.¹⁷² In order to include terrorist acts in Article 1F, a modification of the 1951 Convention should be made since recommendations and declarations cannot be considered additional criteria of exclusion.¹⁷³ However, part of the doctrine has stressed that the UN Security Council has considered that even non-binding resolutions may influence State behavior.¹⁷⁴

After the events of September 11, 2001, not only has the UN Security Council applied a new approach to terrorism but also the EU institutions. However, this was not a direct result of the US reaction to the events of September 11, 2001, but rather the result of the implementation of the Tampere conclusions of October 1999, which included measures to fight against terrorism.¹⁷⁵

¹⁷⁰ Some of these declarations and resolutions are: Security Council Resolution 1624 (Sept 14, 2005); Security Council Resolution 1377 (Dec 12, 2001). Security Council Resolution 1373 (Sept 28, 2001); Security Council Resolution 1269 (October 19, 1999); General Assembly Resolution 51/210 (December 17, 1996); General Assembly Resolution 49/60 (Dec 9, 1994).

¹⁷¹ SC Res 1566 (2004), para. 3 states: ‘criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.’

¹⁷² Nyinah, Michael Kingsley. “Exclusion Under Article 1F: Some Reflections on Context, Principles and Practice.” *International Journal of Refugee Law* 12 (2000): 295.

¹⁷³ Singh, note 147.

¹⁷⁴ Schachter, Oscar. “The quasi-judicial role of the Security Council and the General Assembly.” *American Journal of International Law* 58.4 (1964): 960-965.

¹⁷⁵ Brouwer, Evelien. “Immigration, asylum and terrorism: A changing dynamic legal and practical developments in the EU in response to the terrorist attacks of 11.09.” *European Journal of Migration and Law* 4 (2002): 1-26.

In the absence of an international legal definition in a legally-binding document, domestic lawmakers are free to adopt dissimilar broad definitions of terrorism, thus making the definition of terrorism a country-specific phenomenon. In some countries, for instance in the UK or the USA, this includes defining a terrorist to be an individual with “links” to a terrorist group¹⁷⁶ or providing “material support” such as a safe house, transportation, communication, funds, or training.¹⁷⁷ This new broad definition of terrorism has created some problems as well. For instance, the support of groups engaged in armed resistance against a government that is violating the human rights of minorities is considered an act of terrorism, eventually leading to the non-recognition of refugee status to such supporters.¹⁷⁸ In addition, it seems that these States have delegated the power to control their citizens by creating a group liability.¹⁷⁹

The post-September 11, 2001, period has increased the doubts that refugees who come from countries that have many terrorists are not accepted because the destination country considers them a security risk. Legal ontology in Canada¹⁸⁰ and the UK¹⁸¹ has confirmed this hypothesis. While before the simple membership in a terrorist organization was not *per se* sufficient to exclude a person from refugee status¹⁸² and active participation was required,¹⁸³ after September 11, 2001, also a “link” to a terrorist group might exclude citizens from the international protection of refugees.¹⁸⁴

Article 1F ensures the exclusion of all terrorist suspects since it does not focus on their intention but rather their involvement in certain specific acts.¹⁸⁵ Accordingly, the focus of the 1951 Convention in the past was to answer the question of who qualified for refugee status, and now, the more difficult question for the courts is who *does not* merit international protection.¹⁸⁶ Thus, if judges intend not to grant to persecuted individuals the right to residency in the host countries, they should mention one of the cases codified in Article 1F of the 1951 Convention without mentioning the term “terrorism” since this term is used mainly in declarations and resolutions which are *soft-laws* and are not considered by States as legally-binding documents.

To sum up, Article 1F recognizes the causes of exclusions from refugee protection. Although it does not specifically mention terrorist acts, a majority of the crimes established in Article 1F are

¹⁷⁶ United Kingdom, Anti-Terrorism, Crime and Security Act, 2001, c. 24, s. 21(2)(c) and s. 21(4).

¹⁷⁷ USA, REAL ID Act of 2005 §103(b)(cc)(VI)

¹⁷⁸ This is the case of Burma where asylum seekers supported groups that advocate the overthrow of the military rules in Burma. RIC Query - Burma [Myanmar] (26 February 2004)

¹⁷⁹ Mattiacci, Giuseppe Dari, and Francesco Parisi. "The cost of delegated control: vicarious liability, secondary liability and mandatory insurance." *International Review of Law and Economics* 23.4 (2003): 453-475.

¹⁸⁰ Kaushal, Asha, and Catherine Dauvergne. "The growing culture of exclusion: Trends in Canadian refugee exclusions." *International Journal of Refugee Law* 23.1 (2011): 54-92.

¹⁸¹ Juss, Satvinder Singh. "Terrorism and the Exclusion of Refugee Status in the UK." *Journal of Conflict & Security Law* 17.3 (2012): 465-499.

¹⁸² Hennegan J. in *Siddiqui Mahmood v. Minister of Citizenship and Immigration* (2000) Federal Court IMM-5050-98

¹⁸³ *Oamirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, 317&428

¹⁸⁴ United Kingdom, Anti-Terrorism, Crime and Security Act, 2001, c. 24, s. 21(2)(c) and s. 21(4).

¹⁸⁵ Singh, note 181.

¹⁸⁶ *Ibid.*

per se terrorist acts. Following the events of September 11, 2001, both the UN Security Council and the EU institutions have applied a new approach toward refugees. Likewise, national judges have increased the references to terrorism in interpreting Article 1F of the 1951 Convention. However, it should be stated that Article 1F ensures exclusion from refugee protection only for the specific crimes clearly established. As a result, I agree with some scholars who suggest that the absence of a unique international definition of terrorism does not impact the cases of exclusion using Article 1F.¹⁸⁷

4.2. The “Push” Factors to become a Terrorist

Terrorists can be analyzed as rational agents who behave more or less as *homo economicus*.¹⁸⁸ Thus, by applying the Becker model,¹⁸⁹ individuals will commit terrorist acts when the level of marginal costs is lower than the marginal benefits. In fact, the “benefits” of terrorist attacks are the spread of propaganda, the actual damage inflicted (deaths, injuries and destruction) and the advancement of ideological or political goals,¹⁹⁰ while, costs are the resources used and the opportunity costs of violent behaviour,¹⁹¹ as well as sanction and probability of being caught.

An overview here of the major studies demonstrates the main “push” factors which impact the decision whether to become a terrorist. Such factors to be considered are the situation of refugees (level of education and personal welfare), the situation of a country (the geographic size, the education of the population and the number of population in a certain area in addition to the economic development) and its political order, and the conditions in the camps.

According to theories of criminal behaviour, an increase in wealth and level of education should be negatively correlated with the involvement in terrorist acts.¹⁹² This has been confirmed in one empirical study.¹⁹³ However, the majority of the literature reviewed here has produced results which contradict this relationship.¹⁹⁴ Indeed, well-educated individuals may increase their involvement in terrorist organizations if they identify strongly with that organization’s goals or when they believe they can assume leadership positions if they succeed. In addition, terrorist organizations may prefer to select those who have a better education since a high level of education attainment is

¹⁸⁷ Singh, note 147. According to the deductive approach, a person who has committed a crime considered as terrorism act but does not fall into the categories of article 1F will receive refugee protection.

¹⁸⁸ Caplan, Bryan. "Terrorism: The relevance of the rational choice model." *Public Choice* 128.1-2 (2006): 91-107.

¹⁸⁹ Becker, note 1.

¹⁹⁰ Tavares, note 148.

¹⁹¹ Frey, Bruno S., and Simon Luechinger. "Decentralization as a Disincentive for Terror." *European Journal of Political Economy* 20.2 (2004): 509-515.

¹⁹² Becker, note 1.

¹⁹³ Azam and Thelen, note 158.

¹⁹⁴ Berrebi, note 82; Rehman, Faiz Ur. *Essays on the Law and Economics of Terrorism in Pakistan*. Diss. alma, 2015; Krueger and Maleckova, note 145. Both these studies were conducted by sample of Palestinian terrorists in Israel and were based on their biographical information, which might not provide sufficient information regarding the economic indicators. Saleh, B. "Economic Conditions as a Determinant of Political Violence in the Palestinian Territories." World Institute for Development Economic Research (WIDER) Conference, Helsinki, Finland. 2004. This paper also focusing on the Israeli-Palestinian conflict is not focusing only on suicide incidents.

probably a signal of one's commitment and coherence with the organization's goals.¹⁹⁵ Certainly, alignment with the organization's goals entails some kind of political involvement which requires sufficient education and income.¹⁹⁶ This can be observed in the case of suicide bombers, as they are clearly not motivated by the prospect of their own individual economic gain. Thus, decreasing poverty or increasing secondary education are unlikely to positively impact on the reduction of terrorist attacks.¹⁹⁷

The main critiques of these studies have been that they were mainly based on the Israeli-Palestinian conflict, which might make it difficult to extrapolate and transfer the results to other contexts due to the particular nature of that conflict.¹⁹⁸ Be that as it may, other studies have shown similar results.¹⁹⁹ More interestingly, a study looking at more than 350 individuals involved in terrorist acts from 1966 to 1976 in different parts of the world, including the Red Army in Japan and the Irish Republican Army in Northern Ireland, arrives at the same result.²⁰⁰

Another variable that may affect the decision to become a terrorist is connected with ethnicity and with the longevity of war. In fact, ethnic conflicts and longevity of war positively impact on terrorism.²⁰¹ In addition, ethnic and/or linguistic diversity may encourage terrorist attacks significantly.²⁰² Further, religious diversity positively impacts on terrorism.²⁰³ In general, refugees have a different ethnicity than the host society, they do not share the same religious background and they do not speak the same language. This may "push" them to join terrorist groups.

A third variable that may contribute to terrorism is the situation of the country, that is, the geographic size, the density of the population living in the same area, and the economic development. Countries with larger population sizes generate more terrorists.²⁰⁴ In addition, population size is a

¹⁹⁵ Hassan, Nasra. "Letter from Gaza: An arsenal of believers." *The New Yorker* 19 (2001).

¹⁹⁶ Krueger and Malečková, note 145.

¹⁹⁷ *Ibid.*

¹⁹⁸ Ekey, Amanda. *The Effect of the Refugee Experience on Terrorist Activity: An Investigation of how the Humanitarian Refugee Crisis is Impacting Global Terrorism: Honors Thesis*. New York University, 2007.

¹⁹⁹ Blomberg, S. Brock, and Gregory D. Hess. "From (no) butter to guns? Understanding the economic role in transnational terrorism." *Terrorism, economic development, and political openness* (2008): 83-115; Drakos, Konstantinos, and Andreas Gofas. "In search of the average transnational terrorist attack venue." *Defence and Peace Economics* 17.02 (2006): 73-93; Kurrild-Klitgaard, Peter, Mogens K. Justesen, and Robert Klemmensen. "The political economy of freedom, democracy and transnational terrorism." *Public Choice* 128.1-2 (2006): 289-315.

²⁰⁰ Russell, Charles, and Bowman Miller. "Profile of a Terrorist in Perspectives on Terrorism." *Wilmington, Del.: Scholarly Resources Inc* (1983): 45-60.

²⁰¹ Cornell, Svante E. "The war against terrorism and the conflict in Chechnya: a case for distinction." *The Fletcher Forum of World Affairs* 27 (2003): 167. In contrast, another empirical study concludes that there is no significant relationship between prolonged conflicts and terrorism. Ekey, note 198.

²⁰² Piazza, James A. "Incubators of terror: Do failed and failing states promote transnational terrorism?." *International Studies Quarterly* 52.3 (2008): 469-488; Tavares, note 148.

²⁰³ Piazza, James A. "Rooted in poverty?: Terrorism, poor economic development, and social cleavages." *Terrorism and political Violence* 18.1 (2006): 159-177. In contrast: Blomberg, S. Brock, and Gregory D. Hess. *The Lexus and the olive branch: Globalization, democratization and terrorism*. Democratization and Terrorism, 2005; Blomberg and D. Hess, note 199; Kurrild-Klitgaard, et al., note 199; Tavares, note 148.

²⁰⁴ Krueger and Malečková, note 145.

strong and positive predictor of transnational attacks.²⁰⁵ There is a significant positive correlation between the size of the refugee population and terrorism.²⁰⁶ However, this relationship is weakened when refugee populations receive aid from international humanitarian organizations.²⁰⁷ In general, refugees ask for refugee protection in countries with a large population of refugees already living there,²⁰⁸ because this decreases their integration costs (see Chap. IV, Sec. 4). In addition, unfortunately, in the last 15 years, the humanitarian aid for refugees has been cut.²⁰⁹ This may positively affect the increase in terrorist acts committed by refugees.

Economic deprivation may also affect the decision to become a terrorist. However, the literature does not give a coherent conclusion in this regard. While some studies show either a significant²¹⁰ or a weak²¹¹ link between economic development and terrorism, one empirical study²¹² shows no significant links at all between income poverty, income inequality, and terrorism. In addition, international markets may have an impact on the production of terrorism. Empirical studies demonstrate that higher levels of global economic integration significantly reduce the formation of terrorism.²¹³ While economic openness reduces terrorism in less-developed economies, it may increase terrorism in more-developed countries.²¹⁴ Furthermore, there is a negative relationship between GDP per capita and the number of terrorists escaping from a country.²¹⁵

²⁰⁵ Campos, Nauro F., and Martin Gassebner. "International terrorism, domestic political instability, and the escalation effect." *Economics & Politics* 25.1 (2013): 27-47; Plümpner, Thomas, and Eric Neumayer. "The friend of my enemy is my enemy: International alliances and international terrorism." *European Journal of Political Research* 49.1 (2010): 75-96; Dreher, Axel, and Justina AV Fischer. "Government decentralization as a disincentive for transnational terror? An empirical analysis." *International Economic Review* 51.4 (2010): 981-1002; Dreher, Axel, and Martin Gassebner. "Does political proximity to the US cause terror?." *Economics Letters* 99.1 (2008): 27-29; Koch, Michael T., and Skyler Cranmer. "Testing the "Dick Cheney" hypothesis: do governments of the left attract more terrorism than governments of the right?." *Conflict Management and Peace Science* 24.4 (2007): 311-326; Piazza, note 199; Braithwaite, Alex, and Quan Li. "Transnational terrorism hot spots: Identification and impact evaluation." *Conflict Management and Peace Science* 24.4 (2007): 281-296; Burgoon, Brian. "On welfare and terror: Social welfare policies and political-economic roots of terrorism." *Journal of Conflict Resolution* 50.2 (2006): 176-203; Li, Quan. "Does democracy promote or reduce transnational terrorist incidents?." *Journal of Conflict resolution* 49.2 (2005): 278-297; Li, Quan, and Drew Schaub. "Economic globalization and transnational terrorism: A pooled time-series analysis." *Journal of Conflict Resolution* 48.2 (2004): 230-258; Piazza, note 199.

²⁰⁶ Ekey, Ekey, note 198.

²⁰⁷ UNHCR. 2008. UNHCR Income and Expenditure Trend 1990-2005.

²⁰⁸ UNHCR. 2019. Statistics Database, Statistical Yearbook and data files, complemented by statistics on Palestinian refugees under the mandate of the UNRWA as published on its website. Data from UNHCR are available online at: [unhcr.org/en-us/figures-at-a-glance.html](https://www.unhcr.org/en-us/figures-at-a-glance.html), accessed on April 30th, 2020.

²⁰⁹ UNHCR, note 207.

²¹⁰ Hess and Blomberg, note 199; Azam and Thelen, note 158; Lai, Brian. "'Draining the Swamp': An Empirical Examination of the Production of International Terrorism, 1968—1998." *Conflict Management and Peace Science* 24.4 (2007): 297-310; Azam, Jean-Paul, and Alexandra Delacroix. "Aid and the delegated fight against terrorism." *Review of Development Economics* 10.2 (2006): 330-344;

²¹¹ Plümpner and Neumayer, note 205; Basuchoudhary, Atin, and William F. Shughart. "On ethnic conflict and the origins of transnational terrorism." *Defence and Peace Economics* 21.1 (2010): 65-87; Keefer, Philip, and Norman Loayza. *Terrorism, economic development, and political openness*. Cambridge University Press, 2008; Kurrild-Klitgaard, et al., note 199; Krueger and Malečková, note 145.

²¹² Kurrild-Klitgaard, et al., note 199.

²¹³ Keefer and Loayza, note 211; Kurrild-Klitgaard, et al., note 199.

²¹⁴ Freytag, Andreas, et al. "The origins of terrorism: Cross-country estimates of socio-economic determinants of terrorism." *European Journal of Political Economy* 27 (2011): S5-S16.

²¹⁵ Krueger and Malečková, note 145.

A fourth important variable that might push refugees to become terrorists is the condition in the refugee camps. Severe economic hardship and victimization among refugees can increase the recruitment of terrorist organizations²¹⁶ since terrorism is connected with radicalization.²¹⁷ Unemployment, restricted travel, and the lack of access to a well-rounded education are all factors that increase radicalization. Eventually, this also leads to the result that poverty-stricken young males with few legal economic opportunities are more likely to join violent groups²¹⁸ since they provide economic support to themselves and/or their families. Indeed, several countries have limited the right to work to asylum seekers in order to decrease the abuse of refugee rights by bogus refugees.²¹⁹

In addition, most refugee camps suffer from inadequate sanitation, health care infrastructure, or shelter, and resources.²²⁰ Better medical conditions during this pandemic are now more essential than ever.²²¹ Persecuted individuals leave all their belongings, their families, relatives, and friends for fear of persecution and are hosted in places where minimum standards are lacking. In general, refugee camps are located close to the borders, which is increasing violence,²²² since border regions are considered a fertile place for radicalization.²²³ Sometimes, host countries, although they promise to protect refugees, do not do that because of a lack of sanctions or incentives.²²⁴ This is, for instance, the case in Lebanon, where Palestinian refugees aimed to hasten their emigration from the country.²²⁵

A fifth variable that might have an impact on the decision to become a terrorist is related to the political stability and institutional order. Political transformation and instability are also one of the main causes of terrorism. Political change may create a political vacuum that terrorists can use according to their agenda. Weak Governments make terrorist activities less costly since terrorist groups spend less avoiding governmental controls. In addition, individuals may join terrorist groups since there are lower legal opportunity costs and high payoffs from terrorist success.²²⁶ Furthermore, international political integration decreases the production of terrorism.²²⁷ Institutional and political orders have an effect on the production of terrorists. All empirical studies agree that more liberal and

²¹⁶ Salehyan, Idean. "Transnational rebels: Neighboring states as sanctuary for rebel groups." *World Politics* 59.2 (2007): 217-242; Salehyan and Skrede Gleditsch, note 154.

²¹⁷ Doosje, note 156.

²¹⁸ Humphreys, Macartan, and Jeremy M. Weinstein. "Who fights? The determinants of participation in civil war." *American Journal of Political Science* 52.2 (2008): 436-455.

²¹⁹ Butler, Avril. "A strengths approach to building futures: UK students and refugees together." *Community Development Journal* 40.2 (2005): 147-157.

²²⁰ Ekey, note 198; Milton, Daniel, Megan Spencer, and Michael Findley. "Radicalism of the hopeless: Refugee flows and transnational terrorism." *International Interactions* 39.5 (2013): 621-645.

²²¹ International Rescue Committee. 2020. COVID-19 threatens refugee camps, available on-line: <https://www.rescue.org/covid-19-threatens-refugee-camps> accessed on April 30th, 2020.

²²² Crisp, note 80.

²²³ Salehyan, note 147.

²²⁴ Jacobsen, Karen. "Can refugees benefit the state? Refugee resources and African statebuilding." *The Journal of Modern African Studies* 40.4 (2002): 577-596.

²²⁵ Khashan, Hilal. "Collective Palestinian frustration and suicide bombings." *Third World Quarterly* 24.6 (2003): 1049-1067.

²²⁶ Krieger, Tim, and Daniel Meierrieks. "What causes terrorism?." *Public Choice* 147.1-2 (2011): 3-27. However, this is not applicable in the case of suicide bombers.

²²⁷ Sandler, Todd. "Collective versus unilateral responses to terrorism." *Policy Challenges and Political Responses*. Springer, 2005.

democratic countries are, they are significantly less likely to produce transnational terrorism.²²⁸ The role of domestic institutions has an impact on the legal opportunity costs and also on the payoff of terrorism.²²⁹

In short, several variables might factor into the decision of a refugee to become a terrorist. Some of these variables, which are not mutually exclusive, depend on the personal situation of refugees and others depend on objective factors, such as the situation of a country and the conditions in the refugee camps.

4.3. The Connection between Refugees and Terrorism

The connections between terrorism and refugees is a complicated one. While the focus has been given to the question of whether accepting refugees increases the risk of terrorism, it should be remembered that increased refugees are also affected by terrorism. Refugees are victims of persecution (Article 1(A)(2) of the 1951 Convention) and indeed terrorist acts are a “push” factor for persecuted individuals to leave their home countries since terrorist activities worsen their living conditions.²³⁰ Here is an overview of the main empirical studies focusing on the connection between refugees and terrorism, where different methodologies have yielded different results.

Despite the clear link between migration and security,²³¹ to my knowledge, there are only three main studies which focus on the correlation between refugees and terrorism: Choi and Salehyan of 2013,²³² Milton, Spencer, and Findley of 2013,²³³ and of Randahl of 2016.²³⁴ While the first two studies provide evidence that countries with many refugees are more likely to experience both domestic and international terrorism, the most recent empirical study found that there is little or no support regarding this hypothesis.

The first two studies are consistent with the theoretical approach. Indeed, refugees might cause an increase in political violence and terrorism in the host countries in four different ways: 1) Violence of locals toward refugees; 2) Violence of refugees toward locals; 3) Refugees helping group

²²⁸Plümper and Neumayer, note 205; Piazza, note 133; Burgoon, note 205; Kurrild-Klitgaard, et al., note 199; Krueger and Maleckova, note 125.

²²⁹Sandler, Todd, and Harvey E. Lapan. "The calculus of dissent: An analysis of terrorists' choice of targets." *Synthese* 76.2 (1988): 245-261.

²³⁰Dreher, Axel, Tim Krieger, and Daniel Meierrieks. "Hit and (they will) run: The impact of terrorism on migration." *Economics Letters* 113.1 (2011): 42-46.

²³¹Lischer, note 143; Crisp, note 143.

²³²Choi, Seung-Whan, and Idean Salehyan. "No good deed goes unpunished: refugees, humanitarian aid, and terrorism." *Conflict Management and Peace Science* 30.1 (2013): 53-75. This study data analysis of 154 countries for the years 1970–2007. The data for terrorism come from the Global Terrorism Database while the data about refugees come from World Refugee Survey from the Population Data Unit of the United States Committee for Refugees and Immigration.

²³³Milton, et al., note 151. This study uses the data obtained from the UNHCR and the ITERAATE Terrorism Data from the years 1969-2001.

²³⁴Randahl, David. "Refugees and Terrorism." *PAX et Bellum Journal* 3.1 (2016): 46-56. This study uses the panel data for 161 countries during the time period 2002-2012. The data about terrorism are taken by the Global Terrorism Database; the data on population was drawn by the World Bank 2015; the data about refugees area taken by the UNHCR Statistical Online Population Database 2015.

minorities in the host countries against other locals; 4) Violence of locals toward foreigners bringing in international aids.

First, refugees can be the object of terrorist attacks by local communities. In recent years, there was an increase in negative attitudes toward Muslims in EU countries²³⁵ in addition to an increase in right-wing supporters.²³⁶ As stated in Sect. 3, hate crimes have increased due to refugee influx.²³⁷ Second, refugee camps are fertile places for terrorist recruitment. As stated above, severe economic hardship and victimization among refugees can increase the recruitment of terrorist organizations.²³⁸ Host countries can be the object of terrorist crimes. The sovereignty of host countries may be threatened by cross-border activities by the rebel groups.²³⁹ This has happened, for example, in the case of Black September of 1970.²⁴⁰ Third, refugees may be used for fighting against the government of host countries. Refugees have a different ethnicity from the local communities in the host countries, which might turn into ethnopolitical conflicts.²⁴¹ Rebel groups can use the flow of refugees to import weapons or ideas on how to fight a government.²⁴² For example, when Palestinians went to Lebanon, they sparked reactions from the other ethnic groups within the country and led to the Lebanese civil war.²⁴³ It is more likely that refugees would engage in types of political violence, such as terrorism, that require less organization and fewer resources than civil war.²⁴⁴ Fourth, rebels will increase their attacks toward international organizations to plunder the humanitarian aid intended for refugees.²⁴⁵ This was the case, for example, of the increase in attacks toward Danish organizations operating in Muslim countries after the publication of offensive cartoons of the Prophet Muhammad by a Danish newspaper.²⁴⁶

The third empirical research – the study conducted by Randahl²⁴⁷ – argues that empirical studies should also consider where the country is located. In particular, the first study conducted by Choi and Salehyan does not take into consideration if the country itself is in a conflict region, making

²³⁵ Wike, et al., note 152.

²³⁶ 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, Roberto. "The rebirth of populism in Italy and France." *Telos* 1991.90 (1991): 43-56. 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.

²³⁷ Entorf and Lange, note 111.

²³⁸ Salehyan, note 147; Salehyan and Skrede Gleditsch, note 154.

²³⁹ Weiner, Myron. "Security, stability, and international migration." *International Security* 17.3 (1992): 91-126.

²⁴⁰ This was the conflict fought in Jordan between the Jordanian Armed Forces (JAF) and the Palestine Liberation Organization primarily between 16 and 27 September 1970, with certain actions continuing until 17 July 1971. Salehyan and Skrede Gleditsch, note 154; Weiner, note 239.

²⁴¹ Gurr, Ted Robert. *Peoples versus states: Minorities at risk in the new century*. US Institute of Peace Press, 2000.

²⁴² Salehyan and Gleditsch, note 154.

²⁴³ Ibid.

²⁴⁴ Buhaug, Halvard, and Kristian Skrede Gleditsch. "Contagion or confusion? Why conflicts cluster in space." *International Studies Quarterly* 52.2 (2008): 215-233.

²⁴⁵ Choi and Salehyan, note 232.

²⁴⁶ McLaughlin, K., and J. Kilner. "Danish aid workers stay away from Muslim ceremony." *Reuters*. (2006): 1968-2008.

²⁴⁷ Randahl, note 234.

it challenging to separate the effects of refugee influx from other effects. Thus, they do not separate terrorist attacks by refugees from terrorist attacks within an armed conflict.²⁴⁸ According to Randahl,²⁴⁹ the increase in refugees has little or no effect on the number of terrorist attacks perpetrated in the same country if State-specific effects and causalities in the previous years have been considered. In addition, autocracies experience fewer terrorist attacks than other regimes and particularly democracies.²⁵⁰ However, this could be the result of a “reporting bias” since autocracies are better able to suppress news of terrorist attacks than democracies where a free press exists.²⁵¹

In summary, while the first two studies demonstrate a connection between an increase in the refugee population and terrorist acts, the third study does not confirm it. The different results might be explained by the fact that they examine different data sets and periods. By considering the different types of refugees, I conclude that the potential higher number of terrorism acts might come from persecuted individuals staying in refugee camps. In order to decrease this impact, some policy recommendations could be suggested. First, a detailed background check should be conducted. Indeed, it is thought that resettled refugees do not impact on terrorism acts since they pass an exhaustive vetting process. Second, and more importantly, better conditions in refugee camps should be applied since the studies agree that the poor conditions found in refugee camps that create or contribute to radicalization are within the main factors that “push” refugees to become terrorists.

5. Conclusions

The impact which refugees have on host countries was revealed through by examining current empirical studies on the effects refugees have on the labor market and national security, with a division of different types of refugees. The impact of the current pandemic situation has also been included.

Regarding the impact that refugees have on the labor market, while anticipatory or resettled refugees will not affect the labor market of host countries, other types of refugees will negatively affect it. By taking into account the skills of the migrants part of the recent European migration crisis of 2015-2016 as well as the effects of Covid-19, I predict a negative impact on unskilled jobs, which is already in crisis due to the competition with the BRIC countries and the increase of the new technologies. Several policy recommendations are suggested, including job matching and avoiding the over-representation of refugees in concentrated areas.

²⁴⁸ Buhaug and Gleditsch, note 244.

²⁴⁹ Randahl, note 234.

²⁵⁰ *Ibid.*

²⁵¹ Drakos, Konstantinos, and Andreas Gofas. "The devil you know but are afraid to face: Underreporting bias and its distorting effects on the study of terrorism." *Journal of Conflict Resolution* 50.5 (2006): 714-735.

According to economic literature concerning the impact that refugees have on crimes, although the literature has confirmed that anticipatory or resettled refugees will not affect host countries, in general, refugees have a negative effect regarding aggregated crimes. Two reasons that might explain this conclusion. First, by applying the Becker model, this impact is higher when the benefits from the legal labor market opportunities are poor or lower. In general, in the current refugee crisis, refugees are young males with low skills. The economic impact of Covid-19 is expected to increase the unemployment rate of (unskilled) labor and foreigners will be seen as competitors in the job market. Additionally, to avoid bogus refugees, national laws predominantly do not recognize the right to work for asylum seekers. This increases the lack of integration in the local community, which then increases the ratio of violent crimes toward natives or against persecuted individuals. Second, the empirical studies have shown that property crime increased in cases of low attachment to the local community. In the recent “European Refugee Crisis,” refugees come from different socio-economic conditions and do not share similar legal, cultural, or historical background with the host countries. My proposal is to legalize or immediately expel bogus refugees or asylum seekers not recognized as refugees. For genuine refugees, a decrease in aggregated crime rates might come from a better integration policy in the job market as well as the local cultural environment and the reduced time in the refugee camps.

Refugees may negatively impact the national security of host countries. Focusing on the terrorist acts, several variables might have an impact on the decision of a refugee to become a terrorist. Within them, conditions in camps which increase radicalization is one of the most important factors. Refugee dissatisfaction toward host countries may increase due to the absence of medical conditions, now that during Covid-19 these are perceived imperative. Although refugees leave their home countries for reasons of persecution and they are themselves victims of terrorism, some studies have shown that an increase in the refugee population positively correlates with the rise of terrorist acts. As a result, after the events of September 11, 2001, both the UN Security Council and the EU institutions have applied a new approach toward refugees. National judges are more inclined to make references to terrorism with Article 1F (exclusion causes) of the 1951 Convention. Nevertheless, while anticipatory or resettled refugees do not affect terrorist acts, persecuted individuals who stayed in refugee camps might eventually increase the negative impact on terrorism acts. Highlighted here is the importance of better conditions in the refugee camps as well as a better integration within the local community. Additionally, the time spent in these camps should be minimized as much as possible, as these are places of radicalization,²⁵² Furthermore, rigorous inspection of asylum seeker profiles should be underlined. This policy has been confirmed to be efficient. National governments

²⁵² Doosje, note 156.

should spend more on human capital to achieve the quickest turnaround time possible of background checks of asylum seekers.

The increase in legal opportunities, including the right to work, would positively affect the reduction of the negative effects of refugees on the national labor market and national security. This strategy is also in line with Goal 5.7 “Achievement of Self-Reliance for Refugees” of the Agenda for Protection published by the UNHCR in 2002. Refugees will compete fairly with native workers by decreasing or eliminating the negative effect irregular workers have on national average wages; especially, in some sectors such as in agriculture, food-processing, construction, and textile. In addition, by applying the Becker model, the right to work increases the legal opportunity costs by also decreasing the marginal net utility from illegal activities, specifically, in the case of property crimes. Furthermore, the right to work will positively affect refugees’ integration in the host community. The decrease in radicalization and also the increase in the level of personal conditions in refugee camps correlate with refugees and terrorist acts by decreasing the terrorist acts performed by refugees.

However, the recognition of the right to work for asylum seekers increases the abuse of refugee rights by bogus refugees, who will seek a regular contract until the rejection of their asylum applications. A good policy that also takes into consideration this negative externality might be to accelerate the asylum procedures and increase the integration into the labor market as well as the local culture. Furthermore, to avoid victimization of refugees or their descendants, cultural courses addressing multiculturalism should be required for the local population as well, especially when the share of refugees increases significantly in communities with low immigration.

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,

*The academic materials of this chapter have also been used for the scientific paper Veshi, Denard. "The EU Regulatory Competition in Asylum Law." *Central European Journal of Public Policy* 1.ahead-of-print (2020).

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,

⁵Peters, note 3.

⁶Weber, Max, Siegmund Hellmann, and Melchior Palyi. *Wirtschaftsgeschichte. Abriss Der Universalen Sozial-und Wirtschafts-Geschichte*. 1923.

⁷Olson, Mancur. "The logic of collective action: Public goods and the theory of groups, second printing with new preface and appendix (Harvard Economic Studies)." (1971).

⁸Peters, note 3.

⁹Kirchhof, Paul. *Gemeinwohl und Wettbewerb*. Gedruckt, 2005.

¹⁰Bubb, 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 Directive¹² and the Qualification Directive.¹³ In addition, procedural harmonisation is set out in the Asylum Procedures Directive¹⁴ 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 literature¹⁹ 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 coercion²⁸ or the persuasion²⁹ 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 institutions³² since these institutions are important for the actual implementation of international HRs. For instance, the ECHR has established the “individual justice”

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 *Ibid.*

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 inclined 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 deployed³⁶ 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

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 relevance⁴⁷ 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 procedural⁵⁴ and substantive⁵⁵ 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 argument⁵⁷ 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

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-makers⁶⁷ through their choices, adding a disciplinary effect or enhancing effectiveness to the regulatory competition between legal orders⁶⁸ 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 system⁷⁷ 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 States⁹³ and complete centralization will eliminate the advantages of regulatory competition,⁹⁴ under certain conditions, the stimulation of interstate agreements has some comparative advantages.

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 authors⁹⁹ in the context of the EU relocation system established in 2015¹⁰⁰ which establishes a quota-trading among Member States. Nevertheless, this might lead to some problems. First, refugees may be seen as commodities in interstate 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." *CEifo 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 Shacknov. "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 behaviour¹⁰⁷ and the “free-riding” incentive¹⁰⁸ 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 States¹¹² 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 study¹¹⁶ shows that refugees have information about economic variables and there is clear evidence that economic factors matter in refugee decision making. Another study¹¹⁷ 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 factor¹¹⁹ 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

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 Swiss¹³⁴ and the Canadian¹³⁵ 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 Ibid.

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. [11]

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 law¹⁴¹ 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 study¹⁴² 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

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 budgeted 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 led 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;

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 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

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 It 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*, QEJ 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

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.

²⁰¹ des Places, et al. 191.

²⁰² Ibid.

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

²⁰⁸ Hatton, Timothy J. (2004), “Seeking Asylum in Europe”, *Economic Policy*, 19 (38), 5-62; Efonayi-Mäder, Denise, Chimienti, Milena, Dahinden, Janine, Piguët, Etienne (2001), *Asyldestination Europa: Eine Geographie der Asylbewegungen*, Zürich, 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 Böcker, 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 Böcker, note 210.

²¹³ Hatton, note 208.

²¹⁴ Böcker, 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

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 unhr.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 maximisation²³⁹ 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

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, forthcoming 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 Commission²⁶¹ 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.

Conclusion

1. Summary of the Main Findings

From 2012 to 2016 and also during 2019¹ the amount of irregular migrant flows in Europe has increased rapidly. Although during 2017 and 2018 the number of asylum seekers in the EU Member States has decreased,² the arrival of irregular migrants remains a controversial political issue.³ Here, refugee flow was analyzed through a L&E lens in the context of HRs. Chapter I gave a short overview of some of the most important international organizations protecting refugee rights during the twentieth century. It underlined the importance of having a permanent international organization to deal with refugee protection by examining the different benefits coming from international cooperation. This part of the thesis featured the different international organizations protecting refugee rights during the first part of the twentieth century, such as the SHAEF, the UNRRA, the IRO, and the current UNHCR. In addition, it showed the UNHCR's phase of expansion in the 1950s and 1960s, the phase of migration restrictions, and the repatriation in the 1980s and the 1990s. Moreover, the chapter stressed the role of the UNHCR in managing various refugee crises. The shift toward a refugee sustainable solution and the enactment of State interests is more clearly explained by looking at the L&E's perspective of the twentieth century's events.

Chapter II provided an exhaustive critical legal analysis of Article 1 [Definition of the term "refugee"] and Article 33 [Prohibition of expulsion or return ("refoulement")] of the 1951 Convention through the application of a case-law study and a HRs approach in the context of the L&E literature. A solution was suggested in Chapter II by presenting refugee-sharing as a scheme to avoid the Coasean bargaining between countries after analyzing some of the reasons for the "refugee market failure" and investigating the cases of State intervention to reach a quasi-stable outcome. The chapter also showed that although the 1951 Convention aims to protect refugee rights, part of its rules might also be explained by an economic analysis of refugee law, showing that these two types of methodological frameworks are not mutually exclusive.⁴ For instance, to create disincentives for refugees to seek asylum protection, persecuted individuals shall *objectively* prove the "well-founded" fear. In addition, in the case of expulsion, Article 32 establishes some legal presumptions, which through the tools of game theory⁵ can explain State preferences to protect their national security.

¹ Eurostat. 2019. Asylum statistics, available on-line: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics accessed on April 30th, 2020.

² 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.

³ 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.

⁴ Chen Shi Hai v. Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 308 (Kirby J).

⁵ Bernardo, Antonio E., Eric Talley, and Ivo Welch. "A theory of legal presumptions." *Journal of Law, Economics, and Organization* 16.1 (2000): 1-49.

Moreover, according to the preparatory work of the 1951 Convention, Article 33 is not applied in the case of massive refugee flows since the protection of refugee rights entails high economic costs.

Chapter III examined the main “push” factors to ratify and comply with the 1951 Convention. It concluded that a rational States will, in the case of *ceteris paribus*, ratify but not comply with the 1951 Convention if they estimate that the surplus obtained by the deviation (the public expenditure for the protection and promotion of refugee rights) is higher than the opportunity costs (the reputational costs of non-compliance that impact on future international agreements and the retaliation costs) since this strategy maximizes its payoffs. However, States’ self-interested behavior is shaped by the fact that their policies generate negative externalities for other countries, although States benefit more from the non-compliance strategy. In other words, States also take into consideration the political costs of their immigration policies towards the other States since the protection of refugees is considered a public good.⁶ Moreover, by stressing the importance of the WTO model for trade liberalization, the chapter questions – through a L&E approach – if it is possible to build a WTO model for the refugees’ movement.

Chapter IV and Chapter V studied the “demand” and “supply” sides of the “refugee market.” Chapter IV, by applying a nominalist approach and by considering a micro-model of migration adapted for the refugee movement, provided an overview of the different variables affecting the refugee decision process. Although there is a variety of combinations of these factors, two stages of decision-making are commonly involved: the immediate flight and the decision to settle in a destination country. In accordance with the UNHCR approach,⁷ the chapter demonstrated that refugees flee after a calculated consideration of a combination of political, economic and other reasons. Refugees may be poor, and economic variables might have *partial* impact on their decision making. Nevertheless, it is the persecution risk perception the prime influence on their decision to flee.

Chapter V focused on the costs that refugees have on host countries and included also discussion of the economic impact that Covid-19 will have on their integration. The chapter distinguished different types of refugees (anticipatory refugees, resettled refugees, bogus refugees, asylum seekers not recognized as refugees and genuine refugees) and explored their effects on the host countries. While anticipatory or resettled refugees do not affect host countries, the other types of refugees might negatively affect the labor demand or crime rate. Refugee impact was shown to depend on their skills as well as on the economic conditions of the host countries. Asylum seekers

⁶ Bubb, Ryan, Michael Kremer, and David I. Levine. "The economics of international refugee law." *The Journal of Legal Studies* 40.2 (2011): 367-404; Kremer, Michael, Ryan Bubb, and David Levine. "The Economics of International Refugee Law." *Journal of Legal Studies* 40.2 (2011); 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.

⁷ UNHCR. 2000. The State of the World’s Refugees 2000Fifty Years of Humanitarian Action.

not recognized as refugees and genuine refugees with low skills are the groups that have a higher impact on the host countries. Focusing on the terrorist acts, although refugees leave their home countries for reasons of persecution and they are themselves victims of terrorism, some studies have shown that an increase in the refugee population positively correlates with the rise of terrorist acts. As a result, national judges are more inclined to make references to terrorism with Article 1F (exclusion causes) of the 1951 Convention.

Chapter VI looked at the principle of subsidiarity in asylum law within the EU context for two main reasons. First, a regionally-structured system is closer to Pareto optimality as compared to the global approach.⁸ Second, the European refugee crisis of 2015-2016 is the most recent in the shock supply of foreigners.⁹ It uncovered some of the most important “push” factors that have been considered by the EU as arguments for the centralization of asylum law. Its central research question dealt with the topic of allocative efficiency by comparing the static economic analysis of the Tiebout theory with the dynamic view of competition between legal orders. The presumptions of the Tiebout argument in favor of competition between legal orders are: (1) a large number of suppliers of legal rules, (2) no information deficiencies, and (3) no externalities, which brings along a problem with economies of scale. These are not all fulfilled in the case of asylum law. In addition, the EU’s authority in asylum law has several other advantages. However, a total EU capability in asylum law without legal competition between the EU Member States would increase sovereignty costs (to be understood as a loss of “legislative power” in a certain area of law) while therefore, fully pre-empting national capabilities to take independent actions. A strategy that considers both the advantages and disadvantages of the centralization of refugee law is the minimum standard. 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 policy. Thus, the integration of laws and competition between legal rules are not necessarily mutually exclusive.

To sum up, the thesis considered the flow of irregular migration through a multidisciplinary approach by taking into consideration the L&E standpoint. It considered not only the historical contexts and the reasons for the ratification of and compliance with the 1951 Convention, but it also offered a critical legal analysis of the main articles of the 1951 Convention by also employing L&E methods as well as legal ontology. Accordingly, through a nominalist approach, it presented the literature regarding the main factors that affect refugee decision-making as well as the impact they have on the host countries. The last chapter offered a detailed analysis of the principle of subsidiarity in asylum law by applying some of the most important economic methods.

⁸ Schuck, Peter H. "Refugee burden-sharing: a modest proposal." *Yale Journal of International Law* 22 (1997): 243.

⁹ Koka and Veshi, note 2.

2. Answering to the Research Question

The 1951 Convention reflects a HRs approach. However, parts of its rules can be explained as reflecting national interests. The externalities caused by the continued flow of displaced persons that negatively impact on political agendas of different governments have been highlighted. In other words, these two types of interpretations can coexist because they are not mutually exclusive.¹⁰ Indeed, States' cooperation is fundamental to enhance refugee rights and to share the burden of refugee protection.¹¹ Thus, States have ratified the 1951 Convention by considering several "push" factors, such as the historical context and the geographic position as well as the classification of this international treaty as a non-consequential treaty with flexible clauses, which would have increased the reputation of (the newly created) nations as States based on democratic institutions that protect "western" ideology. National governments have continued to comply with the 1951 Convention to maintain their reputation and lower the retaliation costs. However, until now, a WTO model for the refugee movement has not yet been structured not only because this would raise moral objections, but also because, from an L&E approach, the trade of goods is different from asylum protection.

Refugees are victims of persecution (Article 1(A)(2) of the 1951 Convention). Although refugees are victims of violence, they *might* seek to maximize their net benefits as well as bring security externalities. On the "demand" side, anticipatory refugees (persecuted individuals, generally with a high level of education and skills, who can anticipate the future events that are going to lead to their persecution), resettlement refugees (persecuted individuals protected in a country who ask to be transferred to another country) and bogus refugees make a choice regarding their final destination country. For the other groups of refugees, which constitute the highest share, the literature finds only *partial* support that refugees make a rational choice such as opting for the richest countries to maximize their net benefits by underlining the importance of economic factors, such as social welfare, GDP per capita, economic growth, and unemployment rate. For them, the options are much more limited, and the decision is highly influenced by agents or smugglers.¹² This conclusion is aligned with the UNHCR position. Quite simply, as the UNHCR affirms,¹³ refugees flee after a calculated consideration of a combination of political, economic, and other reasons.

On the "supply" side, the protection of domestic interests by national parliaments has been examined utilizing current empirical studies on the effects refugees have on the labor market and

¹⁰ Chen Shi Hai, note 4.

¹¹ 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.

¹² Zimmermann, Susan. "Why seek asylum? The roles of integration and financial support." *International migration* 48.1 (2010): 199-231.

¹³ UNHCR. note 7.

national security. Focusing on the impact that refugees have on the job market, in general, there is no negative effect of anticipatory or resettled refugees on the labor market. However, bogus refugees, asylum seekers not recognized as refugees, and unskilled genuine refugees might reduce the average wages of the native workers, especially with respect to unskilled jobs in sectors such as agriculture, food processing, construction, and textile industries. In matters of national security, refugees that were staying in refugee camps of host countries, in general, negatively affect the aggregated crime rate. This is especially true when observing young unskilled male refugees. Regarding terrorist acts, some studies, not all, have shown that an increase in the refugee population positively correlates with the rise of terrorist acts. As a result, after the events of September 11, 2001, both the UN Security Council and EU institutions have applied new approaches toward refugees. Additionally, national judges are more inclined to make references to terrorism with Article 1F (Exclusion Causes) of the 1951 Convention.

To balance both the “demand” and the “supply” sides within the EU countries, the EU institutions have applied Article 5 TEU (Principle of Subsidiarity). This thesis discussed the advantages and the disadvantages of centralized decision-making by looking at the criteria of economic efficiency and employing some of the most important legal reasoning, public choice literature, and the economic analysis of legal harmonization. The result of this showed that the presumptions of the Tiebout argument in favor of competition between legal orders in asylum law are not applied. The EU’s competence in asylum law has two other advantages. First, the centralization of law leads to a reduction in transaction costs. Second, the EU competence in asylum law intends to bring about an equality of protection of refugee rights within EUMS. However, total EU competence in asylum law without legal competition between EUMS will increase sovereignty costs as well as limit the heterogeneous preferences of different EU member states.

Both gender and sex have been examined. As stated in Chapter II, one type of persecution is on the grounds of membership of a specific social group (article 1A 1951 Convention). This is a residual notion intended 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,¹⁴ people with HIV-positive status in paternalistic or conservative societies,¹⁵ a Chinese family that had more than one child when China had the one-child policy,¹⁶ and a woman who “voluntarily” agreed to be smuggled into a foreign country as part of a

¹⁴ New Zealand: Refugee Status Appeals Authority of New Zealand, decision of 7 July 2004, *Refugee Appeal No. 74665*; UK: Vraciu Immigration Appeal Tribunal (11559) (1994, unreported).

¹⁵ Canada OPK (Re), No. U95-04575 [1996] CRDD No 88, 24 May 1996

¹⁶ Alston, Philip. "Conjuring up new human rights: A thesis for quality control." *The American Journal of International Law* 78.3 (1984): 607-621. Australia: Chen Shi Hai, note 4. In contrast: Canada: Cheung [1993] 2 FC 314; 153 NR 145; 19 Imm LR (2d) 81 (FCA), at 325.

prostitution trafficking operation since it was the only option for her survival.¹⁷ Chapter IV revealed that the effect that refugees have on national security does depend on individuals' sex. For instance, while there is no correlation between female migration and property crime, a negative correlation has been demonstrated between the post-1990 male migration wave and property crimes.¹⁸ A potential explanation of that is that the probability to commit crimes is higher for young and poorly educated males where adaptation costs to the host country are high. Since the majority of refugees fit these characteristics, migrants are also disproportionately represented in the prisons of Western Countries. As a result, they commit more crimes because their opportunity cost (finding a legal source of income such as a job) is lower than the costs coming from illegal activities.

In summary, this thesis focused on L&E methods to the refugee crisis by investigating both sides of the "refugee market" as well as considering gender and sex dimensions. In the end, the research gives some policy suggestions that might be useful not only to academia but also to other actors, such as lawmakers, judges, NGOs, and public civil servants charged with the protection and the promotion of refugee rights in case of future migration crises (e.g. environmental migration).

3. Contribution to the Literature

Climate change might bring a new flow of refugees. Therefore, the importance of this research goes beyond the current ongoing refugee crisis and could be helpful for different target groups, including academia and policymakers.

Chapter I presented the importance of international cooperation by considering three different standpoints: political science, L&E, and economics. In addition, some historical events regarding the protection of refugee rights could also be explained by considering the economic burden of the protection of refugee rights and the interest of national States, which was also codified in the UNHCR Executive Committee's Conclusion 22 (XXXII)-1981, UNHCR Executive Committee's Conclusion No. 40 (XXXVI)-1985, and the UNHCR Executive Committee's Conclusion 58 (XL)-1989.

Chapter II investigated some of the L&E arguments in the application of the 1951 Convention. While the majority of the classical legal literature focuses on the HRs approach to the 1951 Convention, this chapter demonstrated some of the most interesting economic analysis of international refugee law. In addition, the chapter included some potential positive economic effects

¹⁷ 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.

¹⁸ Andersen, Synøve N., Bjart Holtmark, and Sigmund B. Mohn. "Kriminalitet blant innvandrere og norskfødte med innvandrereforeldre. En analyse av registerdata for perioden 1992-2015." (2017); Bell, Brian, and Stephen Machin. *The Impact of Migration on Crime and Victimization: A Report for the Migration Advisory Committee*. London, London School of Economics, 2011; Cousineau, D. F., and Jane E. Veivers. "Incarceration as a response to crime: the utilization of Canadian prisons." *Canadian Journal Criminology & Corrections* 14 (1972): 10.

of accepting refugees, which might become visible in the long run. Refugees could also be a significant economic factor for an increase in national GDP.¹⁹ In general, refugees have a young average age, which might positively affect the labor market of non-qualified jobs²⁰ since their employability is closely linked to their exploitability.²¹ This chapter's summary of the various interpretations of constitutions of countries in the EU-27 results in an original, innovative analysis. By taking into account the different critiques and side effects of the 1951 Convention, a possible solution that approaches Pareto optimality was suggested.

Chapter III answered the research questions: why States sign the 1951 Convention and why States comply with it. 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 another State. The thesis has taken into account the work of various scholars who have critically examined these aspects for other international HRs or commercial treaties. This chapter fills the gap in the current literature since no other scientific contribution has examined the main reasons for the ratification and for the compliance with the 1951 Convention through an innovative L&E approach as well as reviewing and organizing the different "push" factors. Given the beginning of this chapter, the last section investigated the possibility to build a WTO model concerning the free movement of refugees. Currently, at the time of publication, a literature review did not find any other study that has proposed such a model or reviewed and/or adapted the ratification or compliance of the 1951 Convention to liberate refugee movement.

Chapter IV systematically organized all the different empirical studies dealing with the main variables that impact the refugee's decision to leave and then reside in the final destination countries. Its main innovative part is the organization of these variables into different groups, such as the adaptation costs, migration costs, non-monetary costs, and previous investment costs. The chapter studied not only variables that depend on personal characteristics, such as age, skills, and education but also other incentives, which are totally controlled by policies of host countries, such as border control, the right to social welfare, and the type of immigration policy. Furthermore, based on information costs, the Chapter identifies different types of refugees. The chapter innovatively interprets the migration formula adapted to different groups of refugees.

Chapter V focused on some of the most important empirical studies that demonstrate the impact that refugees have on the national security and job market by presenting the diversity of the impact according to the type of refugees (anticipatory refugees, resettled refugees, asylum seekers,

¹⁹ International Monetary Fund. 2016. *The Refugee Surge in Europe: Economic Challenges*.

²⁰ Legomsky, Stephen H. "Immigration, Federalism, and the Welfare State." *University California Los Angeles Law Review* 42 (1994): 1453; Taran, Patrick A., and Eduardo Geronimi. *Globalization, labour and migration: Protection is paramount*. International Labour Office, 2003.

²¹ Neuman, Gerald L. *Strangers to the Constitution: immigrants, borders, and fundamental law*. Princeton University Press, 2010.

bogus refugees, asylum seekers not recognized as refugees and resident in the host country as well as genuine refugees). Based upon the literature review, the socio-economic context of the EUMS, and the characteristics of the refugees that arrived in the EU in recent years, Chapter V included the effect of Covid-19 on the refugees/asylum seekers already present in the EU. It also looked at the dimension of sex by showing that female migrants do not have an effect at all on the national security of the host countries. The chapter reviewed and organized the main factors that do have an impact on the refugee decision to become a terrorist in the host countries. The chapter also highlighted the importance of quicker asylum proceedings as well as better cultural and socio-economic integration of refugees in the host countries.

Chapter VI studies the role of the EU in asylum law by applying economic methods to the principle of subsidiarity. The chapter showed, after reviewing selected essential theories, that a strategy that considers both the advantages and disadvantages of the centralization of refugee law is the minimum standard for harmonization. This policy is also in accordance with the evolution of EU law and the principle of subsidiarity established in the Treaty of Amsterdam, which aimed to increase the community's capabilities and offer more autonomy to the Member States.

The thesis applied a L&E approach to refugee law by contributing to the literature in different aspects. Its results can also be used for future refugee flows.

4. Policy Recommendations

This research also suggests some policy recommendations. First, States shall ratify and also comply with the 1951 Convention because although the 1951 Convention reflects a HRs approach, parts of it can also be interpreted through an L&E lens that underlines the interests of national states. Thus, these two approaches can also coexist together within the 1951 Convention. Quite simply, when a State enacts or modifies asylum law, it can consider both its national interests as well as the protection of refugee rights. Second, although some economic variables may have affected the refugee decision process, this does not *automatically* classify the applicant as an economic migrant or as a bogus refugee since economic motives are also part of a calculated consideration of different reasons. Thus, policy actors should not make general absolute presumptions regarding individuals where the economic variables play a role as economic migrants. Third, some type of refugees has an impact on the labor market and national security. However, an increase in legal opportunities, as well as better integration in the host countries will positively affect reducing the negative effects of refugees on the national labor market and national security. By allowing them to fairly compete with native workers, this will entail an increase in the legal opportunity costs, specifically, in the case of property crime. Additionally, the right to work will increase their adaptation in the host countries thereby decreasing

their radicalization, which is considered one of the main variables for refugees to participate in terrorist crimes. However, it should also be noted that the recognition of the right to work for asylum seekers increases the abuse of refugee rights by bogus refugees, who will seek a regular contract until the rejection of their asylum applications. Some policies might apply to all refugees/ However, specific policies should be implemented for target refugee groups (i.e. quicker recognition of educational credentials for highly skilled refugees or stimulation of innovation and business ideas for business-oriented refugees).

Last, by taking into consideration Covid-19 and the emergency needs of the agricultural sector in the EU, asylum seekers, unemployed recognized refugees, bogus refugees, as well as persecuted individuals not recognized as refugees already present in the EU can be part of specific policy recommendations. As it is well known, there is an economic discrepancy within the EUMS as well as between EUMS and non-EUMS. Some non-EU citizens or EU citizens of poorer EUMS are employed as seasonal workers on farms. Since March 2020 due to the pandemic situation, borders have been closed and free movement in the EU has been suspended. The data of the European refugee crisis shows that more than two-thirds are young low-skilled men.²² Thus, persecuted persons already present in the EU can work as farmhands in the agricultural sector, which now is facing an extreme shortage of workers. Undoubtedly, EU governments cannot require forced labor of their residents, whether or not they entered the EU with a visa. As a result, some incentives to work in the agricultural sector should be given. For instance, social benefits given to asylum seekers or unemployed recognized refugees working in the agricultural sector should be commensurate with market rates with the social benefits they already receive. Additionally, bogus refugees as well as persecuted individuals not recognized as refugees already present in the EU should have the right to apply for seasonal work permits. These policies will serve to minimize or avoid any negative impact on the national wages of unskilled jobs since they will compete by having a work permit.

As stated in Chap V, the literature agrees that only illegal migrants (migrants unlawfully staying) negatively affect unskilled jobs. In addition, it might be of interest for national States to connect some priorities in the asylum applications to asylum seekers working in this sector: i.e. asylum applications of persecuted individuals already working will have priorities in the evaluations as well as some extra “points” for their contribution to the national economy, thus adapting their human and capital resources to the “new” socio-economic environment. Moreover, these policies could also be used for other sectors, where, due to the pandemic situation, there are workforce shortages. Last, it should be stated that once employed, all WHO as well as national policies regarding social distance measures at work and the protection of the right to health shall be followed.

²² OECD. International migration outlook. OECD publishing, 2018.

Fourth, in asylum law, a strategy that considers both the advantages and disadvantages of the centralization is the minimum standard harmonization. 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 option. The minimum standard harmonization is in accordance with the evolution of EU law and the principle of subsidiarity established in the Treaty of Amsterdam, which aspired to increase the Community's competence and offer more autonomy to Member States.

5. Limits of the Research

This thesis has some limitations. However, the thesis also attempted to narrow some of these.

First, the thesis applied a L&E approach. It considered the significance of HRs literature, without going into a detailed analysis of it. The thesis acknowledged the importance of the HRs perspective and the case-law study by incorporating parts of it in Chapter II.

Second, the thesis took into account the different L&E views of rational choice theory. To avoid the doctrinal discussion about the rational choice model, Chapter IV discusses the different variables that affect refugee decision-making without implying that refugees are rational agents. Specifically, Section 3 focused on the role of information by highlighting that "choice" is a contentious term, except in the cases of "anticipatory refugees," "resettled refugees," or bogus refugees. To further expand the multidisciplinary perspectives of this thesis, Chapter IV also reviewed the empirical studies offered in the social sciences literature. Indeed, through these studies, the chapter concluded that asylum seekers know nothing or have little information regarding the final destination country. As a result, they cannot be considered as rational actors.

Third, the difference between economic migrants and refugees is blurry and varies from case to case. Chapter II, Section 2.1. disclosed various cases of citizens leaving their home country due to economic reasons that several judges have ruled in favor of refugee status. In order to also include this issue, Chapters IV applied a nominalist approach which stresses the similar structural position of refugees and other migrants.

Fourth, the motives influencing the behavior of the persecuted individuals are personal as is the balance between the different variables. Evidently, the aggregated data is not able to reveal them. In addition, this data should not be viewed as representative. Moreover, the various methods applied by scholars in addition to dissimilar data test subjects used have resulted in varied and inconsistent conclusions. However, empirical studies examined can be used as illustrative data. Additionally, similar conclusions could be found for the results exposed in Chapters IV and V.

Fifth, Chapter VI compares the principle of subsidiarity with some of the most important economic methods. This chapter does not execute a comprehensive normative analysis but rather

uncovers the advantages of regulating asylum policy at the EU level. It does not apply a case-law study either, which is considered fundamental by the CJEU, in both procedural and substantive meanings.

The thesis has several limitations; their impact on the results of this thesis have been minimized through the application of a multidisciplinary approach.

6. Suggestions for Future Research

This thesis can be the background for future research. For instance, new empirical studies could be done with the current refugees to better understand the impact that economic variables have had on their decision to settle in the final destination countries, by also applying this study to the pandemic situation of 2020. Second, the quasi-stable outcome could be empirically tested in the EUMS by incorporating the EU quota refugee proposal. Third, this thesis can be applied to additionally understand the reasons why some EUMS receive a higher number of asylum seeker applications than the others. Fourth, the suspension of the Dublin Regulation to Greece by some of the EU Member States could be investigated with the background of this thesis by also considering the principle of subsidiarity as well as the principle of solidarity, which are both codified in the TEU. Fifth, the new restrictive Italian policy of summer 2019 can be examined in the view of the L&E methods, included in this thesis.

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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 supranational 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.

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 vluchtelingenbesluitvormingsproces 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.

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 השתתפות 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 הסובססדיריות (subsidiarity) באמצעות בחינת אמות מידה כלכליות מרכזיות לריכוז לעומת ביזור ובאמצעות יישום הממצאים בתחום דיני המקלט. התיזה מתמקדת במודל טיפו, 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 גישה 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 שקילות ההעדפות בדבר מדינות היעד וההגנה על זכויות הפליטים.

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.

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 considerata 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.

Curriculum vitae

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| Short bio | |
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| <p>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.</p> | |
| 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 |

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|---|------|
| 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, Istanbul, Turkey – Erasmus + ICM program | 2019 |
| Visiting fellow at University of Basel, Basel, Switzerland – Visiting fellow Program of the Institute for European Global Studies | 2018 |

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

| <i>Bologna courses</i> | | <i>year</i> |
|--|--|-------------|
| Modeling private law | | 2015 |
| Experimental economics | | 2015 |
| Law enforcement and behavioural economics | | 2015 |
| European competition law | | 2015 |
| <i>Specific courses</i> | | <i>year</i> |
| 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 |
| <i>Seminars and workshops</i> | | <i>year</i> |
| 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 |
| <i>Presentations</i> | | <i>year</i> |
| 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 |
| <i>Attendance (international) conferences</i> | | <i>year</i> |
| Veshi, Denard, 'The different variables that impact on the refugee decision process' Europe Day 2019 (Haifa, Israel, 2019) | | 2019 |

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|---|-------------|
| 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, Istanbul, 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 |