The EU & OIC: 
A market-based solution to the European Union’s refugee crisis? 

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Abstract: 
Fallout from conflict and post-conflict States has led to an influx of refugees and irregular migrants into the European Union. Among EU Member States, opposition has grown against hosting in excess of a State’s self-perceived ability to integrate refugees into the political community and labor market. Yet Article 1 of the Refugee Convention is without a numerical ceiling and requires signatory States to protect refugees without consideration to political currents or labor shortages.

This paper argues that if economic and social forces cannot be reconciled with the law, they may very well supersede the law. To avoid dismantling the international refugee regime a new approach to current and future refugee crises is needed. This paper proposes a market-based refugee mechanism between the European Union and the Organisation of Islamic Cooperation. Employing a property rights analysis, it analyzes whether a market for protection will result in an efficient allocation of refugee protection—defined as Member States’ self-perceived optimal annual refugee absorption quota, while simultaneously maximizing protection for refugees. The analysis is guided by the premise that maximizing protection for refugees requires EU Member States to wrest control of their sovereignty from inefficient interpretations of international law. Without this choice, social and economic forces may supersede the law and result in a suboptimal level of protection.

Addressing unrealistic assumptions in the theoretical literature—most notably from Bubb et al. (2011)—my model shows how a joint supranational market can mitigate screening problems from economic migrants, as well as costs to Southern States not captured in dyadic transactions. In equilibrium, this occurs due to the removal of incentives for EU States to raise burdens of proof, as well as stricter removal policies making the cost of economic migration greater than its payoffs. In addition, this paper introduces an ‘Islamic Norms’ utility function. The ability for EU States to reach an efficient annual allocation must account for the cost of shading Islamic norms, as well as the norm leading to over-incentivized trade.

Key Words: refugee law, Organisation of Islamic Cooperation, market-based quotas, dignity
Introduction

In 2015, over 1 million migrants fled into EU territory, frequently overwhelming Member States’ ability to receive and integrate asylum seekers. Lawmakers in Brussels have been at odds on how to confront the mass influx. In one camp are those seeking to confront inefficiencies in the Common European Asylum System (CEAS). Their position is summarized by current Special Rapporteur on Migration, François Crépeau, who has urged state actors to organize rather than resist migration. In the other corner are those who oppose hosting migrants in excess of a privately optimal threshold. Indicative of their position is Hungarian Foreign Minister, Péter Szijjártó, who recently remarked that EU imposed mandates to accept refugees “aren't logical, are not applicable and contravene European laws.” Between these two poles reside policy makers, citizens, and academics displeased with the calculus of the EU’s refugee strategy. Collectively, they have sought alternative solutions.

This study constitutes one such effort. It investigates whether the European Union can efficiently allocate refugee protection through a joint market-based mechanism with the Organisation of Islamic Cooperation (OIC). The proposed mechanism allows the EU to set a bounded annual quota for refugee intake, after which each Member State is allocated a quota. In turn, Refugee Protection Quotas (R PQs) may be traded within the EU or among select OIC Member States.

Despite the hurdles of regulating protection through a centralized agency comprised of two supranational organizations, the comparative advantages of OIC States– lower cost of hosting, less legal hurdles to repatriate former refugees, and an exit strategy for EU Member States who no longer find the refugee regime aligned with their national preferences– makes offering asylum more efficient for EU States. Efficiency, in this context, is defined as maximizing the number of refugees protected without exceeding Member States’ privately optimal absorption rate.

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5 The OIC is the world’s second largest Intergovernmental Organization (IGO) after the United Nations. Founded in 1969 to “safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony” the OIC counts 57 Member States and a number of organs ranging from banking and peacekeeping, to disaster relief and a General Secretariat.

6 After the total number of EU bounded protection quotas have been exceeded, subsequent refugees are temporarily accommodated in a proportional manner, and transferred without responsibility allocated to any individual Member State. In effect, this means that while traded MSPQs are paid for by individual Member States, above the bounded threshold, payments are borne by the EU itself.
Though there exists a rich literature on refugee protection and market-based solutions this paper adds value in two important ways. Firstly, it proposes a specific market structure between the EU and OIC in which the tension between international law and domestic definitions of efficiency may be reconciled; previous studies do not adequately address externalities generated from a boundless definition of protection. In addition, the proposed joint market may also reduce the opportunity cost of purely economic migration to the European Union. Secondly, this paper offers a legally consistent solution that ensures that commodification of protection does not lead to reification. It does so through analyzing the impact a tradable quotas on the dignity of refugees and those that host them.

If it’s so great, why hasn’t it already been done?

With every new regulatory proposal we must ask ourselves why it has yet to be conceived. In the case of an OIC-EU proposal, there are two reasons. The first is context. Never before has the EU experienced an influx of migrants, primarily from OIC countries, unable to be easily absorbed into the existing EU refugee infrastructure. Advances in technology, smuggling networks, and the availability of information have forged a new migration paradigm to Europe and upheaved what was the status quo. More stringent immigration laws, on the other hand, have not been empirically shown to consistently dissuade asylum seekers or economic migrants. Diffusion of information and technological advances have thus spawned incentives to form a collaborative market-based refugee protection mechanism.

Secondly, over time, the laws governing refugee protection have become disconnected from economic forces. The refugee regime’s roots derive from mass displacement at the end of the Second World War, as well as the desire to offer safe haven to those fleeing communist satellites. It was therefore a quasi-political tool that was formed in the post war period, when the positive rights regime was in its infancy and the logistics permitting the Global South to reach Europe in large numbers, limited. The international human rights regime has continued to develop, however, and with it a network of interconnected positive obligations. The result has been a disjuncture between legal and economic forces. A market for protection

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7 Defined as the point where costs outweigh the marginal benefit of protection
may very well reconcile these forces, alleviating the tension between international law and sovereignty. Until recently, that tension has not warranted a market-based intervention. It does now.

A specific solution carved out of a specific problem:

This paper provides an implementable solution to a specific problem: the inability for EU Member States to agree upon and implement a unified system that addresses divergent State preferences and hosting capacities. It employs an economic-inspired approach that operates under certain conditions: (a) that solutions exist which optimize efficiency of protection, but are not implementable unless the refugee law regime is dismantled; (b) the international refugee law regime should not be substantively changed; (c) a market must include the primary actors involved in the crisis; (d) to be politically viable tradable quotas must not only address the rationale choice incentive-structure of primary actors, but their commitment to legal norms. Only when these four criteria are satisfied, will a market-based approach become feasible and implementable.

Methodology

This paper takes the unorthodox step of employing a property rights approach to analyze refugee protection. Provided a market where transaction costs are sufficiently low, protection should result in an efficient allocation. This occurs due to (a) Bertrand like competition in the matching mechanism; (b) individual rationality; (c) lack of incentives for refugees to misrepresent country-specific preferences; (d) and the social value structure guiding refugee protection. The specifics of this methodology are detailed in Part I.

The problem with a property rights analysis of refugee protection is of course the appalling application of human beings as property. In the past, market-based proposals, particularly those commodifying refugees by tradable quotas, have been criticized as “repugnant” and unconscionable. Nevertheless, though an economic framework might work in ‘units of humans protected’ and view human beings as ‘assets’, beyond

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11 As Hatton notes, cooperative EU is more optimal than harmonizing individual MS policies only when taking into account public good effects. Hatton, T. J. (2015). Asylum Policy in the EU: the case for deeper integration. CESifo Economic Studies, 61(3-4), at 632.
the machinations of assigning content to variables, a property rights approach is merely a tool seeking to maximize coverage to those fleeing persecution, thereby enhancing their dignity.  

Trajectory

This study unfolds in four parts. Part I reviews the incentives for EU States to maintain participation in an international refugee regime, then asks how those incentives impact a market mechanism. What follows is the methodology section: an application of property rights to refugee protection. Potential social and economic negative externalities created by the 1951 Convention are discussed in relation to achieving efficiency in a tradable protection quota market. Part II reviews the literature on burden sharing and market-based solutions. It addresses the incentives for joining a market-based system. The choice of an OIC-EU is validated through an analysis of comparative benefits, in particular, the heterogeneity of transaction costs. Part III details the specific market-based solution. Part IV concludes.

1. Refugee Law & Property Rights

1.1 Defining a refugee and the incentives to offer protection

To ground our discussion, it is necessary to understand the law surrounding refugees and the incentives to offer them protection. As defined by Article 1 of the 1951 Refugee Convention, a refugee is an individual that:

owing to well-founded fear of persecution 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.  

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16 Ultimately, the heterogeneity of refugees themselves makes a property rights analysis complicated. Beyond numerical thresholds, States still have preferences for education, language, age, and nationality. Therefore, it is not only the number, but the kind of refugee that determines State capacity. Transaction costs associated with State-interpreted notions of integration must therefore be accounted for in a quota system.

17 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 150 (Hereinafter 1951 Refugee Convention]. The Refugee Convention also classifies people as refugees in pre-1939 terms (Article 1A(1), which is not applicable to our specific context and will not be further discussed.
Asylum seekers are permitted to arrive at EU borders, and may not be penalized for doing so.\textsuperscript{18} They also must be protected from being \textit{refouled} – sent back to a country where they might be tortured or subject to cruel, inhuman and degrading punishment – for the duration of their risk. Non-fundamental rights are granted at an incremental pace to refugees, conditional on levels of economic and social attachment.\textsuperscript{19} These are inescapable obligations enshrined in international instruments and European law.\textsuperscript{20} What is often the most economically efficient solution to a mass influx – turning them away without determining their status – is, in the words of James Hathaway and Thomas Gammeltoft-Hansen, “legally foreclosed.”\textsuperscript{21}

The 1951 Convention, along with the 1967 Protocol Relating to the Status of Refugees\textsuperscript{22} and the UNHCR Statute\textsuperscript{23} are the legal authority for international refugee law.\textsuperscript{24} In addition, the EU has its own network of jurisprudence. Article 78 of the Treaty of the Functioning of the European Union (TEU) provides for a common refugee policy,\textsuperscript{25} with uniform asylum status,\textsuperscript{26} subsidiary protection,\textsuperscript{27} and partnership with third countries to manage inflows of applicants.\textsuperscript{28} This umbrella framework, aptly titled the Common European

\textsuperscript{18} 1951 Refugee Convention, supra 17, at Article 31. “The Contracting States shall not impose penalties, on account of their illegal entry or presence…”


\textsuperscript{20} 1951 Refugee Convention, supra 17, at Article 33(1). “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This includes both direct and indirect \textit{refoulement}. Also see the following human right instruments: ACHR at Article 22(8); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 at Article 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) at Article 7; CAT, at Article 3; Inter-American Convention to Prevent and Punish Torture, at Article 13(4).


\textsuperscript{24} It is essential to note that the 1951 and 1967 refugee conventions bind States, while the UNHCR Statute does not. Nevertheless, Article 35(1) of the 1951 Convention states that, “The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” Courts have taken this to mean that a limitation is placed upon how UNHCR documents can be interpreted as binding. English Court of Appeal has found that the UNHCR is to be regarded as “a source of assistance and information” should be “accorded considerable weight,” [Secretary of State for the Home Department v. Khalif Mohamed Abdi, English Court of Appeal (Civil Division), [1994] Imm AR 402, 20 April 1994, Gibson LJ] and that “although without binding force in domestic or international law… is a useful recourse on doubtful questions” [T. v. Secretary of State for the Home Department, UK House of Lords, 22 May 1996, [1996] 2 All ER 865, [1996] 2 WLR 766] while the U.S. Supreme Court, while acknowledging the its non-binding nature, nevertheless mentioned that the UNHCR “provides significant guidance in construing the Protocol, to which Congress sought to conform.” [Immigration and Naturalization Service v. Cardoza-Fonseca, US Supreme Court, 480 US 421; 107 S.Ct. 1207]. All the above cases as cited from Kälin, W. (2001). Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond at 626. Last accessed 26 December 2015 from <www.unhcr.org/419de0084.pdf>.


\textsuperscript{26} TEU, supra 25, at Article 78(2)(a).

\textsuperscript{27} TEU, supra 25, at Article 78(2)(b).

\textsuperscript{28} TEU, supra 25, at Article 78(2)(g).
Asylum System (CEAS) is guided by “the principle of solidarity and fair sharing of responsibility.” A failsafe mechanism for “an emergency situation” exists and has been activated for Italy and Greece. In addition to primary law, several EU instruments aim at harmonizing levels of refugee protection. These include the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin Regulation, and the EURODAC Regulation. These Regulations have been implemented, and Directives transposed to varying extents into domestic laws. How they impact a market-based solution will be detailed in Part II. For now, it is sufficient to know that a comprehensive EU refugee framework exists in consonance with international law, which aims at Community-wide harmonization, and is in the process of being refined. It is also noteworthy that many of these EU instruments have been widely criticized by scholars as being ineffective.

1.2 Incentives-Disincentives

Despite these legal frameworks, in reality, each State determines which individuals or groups of migrants will be afforded refugee status. And it has powerful disincentives to offer them protection. Not only must it provide a minimum core dignified existence, – Germany, for example, spent approximately 10 billion euro for housing and food in 2015 with real costs as high as 21 billion Euro – but it must confront social issues concerning integration, national identity, labor competition and opportunity costs from expensive and often ineffective procedures. In this sense, the 1951 Convention is akin to an incomplete contract, because, while protection is contracted, how protection is engaged (i.e., status determination) is not fully contracted.

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29 As per the TEU, supra 25, the CEAS, which has a multi-billion euro budget through 2020.
30 TEU, supra 25, at Article 80.
32 Also, several Ministerial Conclusions of uniformity and reform in dealing with the asylum system. For example: Council (of Ministers) of the European Union, Conclusions on a Common Framework for Genuine and Practical Solidarity Towards Member States Facing Particular Pressures on their Asylum Systems, Including Through Mixed Migration Flows, 8 March 2012
35 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
38 Hatton, T. (2014). The Slump and Immigration Policy in Europe (No. 7985). Institute for the Study of Labor (IZA). Note: a common criticism is the Dublin System of first country processing, which disincentives Member States, as well as refugees who want to move northbound.
41 Moraga & Rapoport., supra 12, 646.
The law and economics literature is rife with examples of State ignoring or discounting foreigners outside their policy calculus, which is why free-riding – taken to mean signing and ratifying refugee treaties, but allowing other States to do the actual hosting – should be the dominant strategy to an obligatory protection regime even one viewed by many scholars as a global public good. And it frequently is, leading to a level of protection below what is considered socially optimal. Moreover, when free-riding is not possible amending the law is a rational strategy. Danish prime minister, Lars Løkke Rasmussen, for example, recently spoke of wanting to “change the rules of the game” by amending the 1951 Refugee Convention. Denmark and Switzerland, two of the wealthier nations in Europe, have both begun seizing refugees’ assets to offset processing costs, in flagrant violation of European and International Treaties.

From an economic perspective then, it is not at all obvious, why an EU Member State would in the first place become party to a legally binding refugee regime without an upper boundary. Understanding why helps us to respond with a viable solution. One incentive to remain in the refugee regime is a commitment to international norms. Though amending the law or jockeying the General Assembly to curtail the UNHCR’s mandate would have many economic, perhaps even social benefits, Member States are signatory to treaties because they derive utility from being part of an interconnected network of international human rights law. Simply put, there exists a State preference for upholding human rights undergirding their norm commitment. To amend or abridge commitments to refugee protection would have far-reaching repercussions for Member States and the EU as a whole. It is not simply a matter of optimizing the law. Refugee protection is layered in several universal fundamental rights, and grounded in human dignity. To deny shelter for those fleeing persecution, or place an ex ante limit on the notion of protection would begin to dismantle the post-World War II value system and Europe’s place at the vanguard of human rights law.

Inter-Union solidarity may also constitute an incentive for offering protection. In consonance with the TEU, refugee matters are governed “by the principle of solidarity and fair sharing of responsibility, including its financial implications” and are to be “achieved by means of the principle of solidarity.” Partaking in a Community-wide burden-sharing regime plays into a narrative in which freedom of movement and other reciprocal benefits are realized. Moreover, remaining in the current regime reduces transaction costs

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43 Among others, Hatton (2015), supra 11, at 632.


46 1951 Refugee Convention, supra ??, at Article 29.


48 As cited in Thielemann, supra 44, at 13.
resulting from inefficiencies in the CEAS, such as asylum-shopping, or future proposals for an EU-wide positive status recognition.\textsuperscript{49}

Then there are incentives grounded in State interests. The majority of refugees are protected outside the borders of Europe.\textsuperscript{50} A July 2016 study from Oxfam finds that the six wealthiest economies host less than 9\% of the world’s refugee population.\textsuperscript{51} Breaking with international refugee law norms would destabilize the incentive structure by which non-European countries host refugees, thereby increasing migration flows nor\thoward.\textsuperscript{52} Upheaving the protection regime is therefore not in the interests of economic efficiency for the EU, or in general, developed States, who “see value in showing their commitment to refugee law but would prefer – to the greatest extent possible – to avoid being subject to its practical strictures.”\textsuperscript{53} Retaining the status quo is of particular importance in light of the lack of a binding obligation for the EU to share in the cost of protecting the nearly 15 million refugees outside of its borders.\textsuperscript{54}

There are also incentive-entailing benefits that may be unobservable. Protecting displaced persons positively impacts security,\textsuperscript{55} which is why some scholars have argued that refugee protection is a public good, non-excludible and non-rival.\textsuperscript{56} In this sense, offering protection is akin to timely catastrophic insurance payments: uncertainty leads to a situation in which low risk participants would rather suffer regular predictable payments than test the unknown.\textsuperscript{57} While security will naturally have a private component as well, influenced by geographical proximity and risk of transnational terrorism, uncertainty is typically above a threshold that eliminates a risk differential.\textsuperscript{58} Security benefits must also be considered in light of the nearly 85\% of refugees protected outside of EU borders.

\textsuperscript{49} Though harmonization of protection standards is far from a reality, such steps as mutual recognition of positive status, and indeed, a uniform status of asylum is a defined goal [Council of the European Union, Presidency Conclusions, Tampere 16 October 1999, at para 15.] and one in line with Article 28 of the 1951 Convention, obliging Stats to issue travel documents to refugees “for the purpose of travel outside their territory” 1951 Convention, supra 17, at Art. 28. Though admittedly, this criteria is satisfied in part by Visa Regulation 539/2001 which permits many nationalities afforded refugee status Schengen travel for three months. The line with Article 28 of the 1951 Convention, obliging Stats to issue travel documents to refugees “for the purpose of travel outside their territory”

\textsuperscript{50} Of the world’s estimated 15 million refugees, Europe hosts nearly 3.5 million. UNHCR. ‘Mid-Year Trends 2015. Accessed last January 10, 2015 from http://www.unhcr.org/56701b969.html. As of February 2016, Turkey, for example hosts 2.2 million Syrian refugees, Lebanon over 1 million, and Jordan nearly 700,000.


\textsuperscript{52} There are countries not party to international refugee instruments that continue to host large amount of refugees. Pakistan, for example, a non-party to the 1951 Convention, hosts the second largest refugee population. See UNHCR, Mid-Term Trends 2015, supra 50.

\textsuperscript{53} Hathaway & Gammeltoft-Hansen, supra 21, at 5.

\textsuperscript{54} Volker Türk, “Address to the 60th Meeting of the UNHCR Standing Committee,” U.N. Doc. EC/65/SC/CRP.101 (July 1, 2014); Hathaway & Gammeltoft-Hansen, supra 21?, at 8.

\textsuperscript{55} Statistical evidence reveals that refugee flows predict who contributes to peacekeeping forces, while democracy and state need are not statistically significant indicators of who contributes troops. Uzonyi, G. (2015). Refugee flows and state contributions to post-Cold War UN peacekeeping missions. Journal of Peace Research, 52(6), 749-752.


\textsuperscript{57} Schuck relates burden-sharing to purchasing catastrophic health insurance, with small predictable payments preventing a large-scale shock of refugee inflows. Schuck 1997, infra 249, at 249.

Why it matters if refugee protection is a pure public good

From the abovementioned incentives, the question arises whether refugee protection is a pure global public good or whether it has private components that make it rival and excludable. The distinction is crucial in validating the choice of a centralized market. If refugee protection is a pure public good, it may be better served through a centralized market, where marginal costs and benefits are regulated. However, if it has private benefits, then excludability may result in internalizing benefits from joint output, thereby bridging the disjuncture large State’s face between benefit and cost, making free-riding and in general, sub-optimality, less of a factor.

Basing his analysis on the work of Economist Todd Sandler, Bettis (2003) tests whether refugee protection is a pure public goof or is best served through a joint-product model, where a single good has components that vary in their excludability and rivalry. Ultimately, Bettis substantiates several private components to refugee protection that dispute its role as a public good. These are: ‘inter-subjective norms’ factored into the benefits of hosting; earmarking contributions to UNHCR; and a correlation between contributions to refugee protection and state-specific security interests. Rather than being epiphenomenal, the author’s conclusions still hold more than a decade later. Sweden, Germany, and the Netherlands still host and fund disproportionate to their GDP. Lower GDP countries such as The Netherlands still host proportionately higher than many of their high GDP neighbors (i.e., France). Roper & Barria (2010) further question the public good premise, instead finding that private benefits suggest, at best, an impure public good.

Moreover, the fact that there is clearly a marginal cost to hosting above an as yet unidentified threshold immediately suggests that refugee protection cannot be considered a pure public good.

Here we must make a distinction between protection and hosting, one not clearly demarcated in the literature. The public good component of refugee protection is not necessarily derived from hosting, but rather protecting refugees from persecution. Protection, generally speaking has several subcomponents, including altruism; partnership in a community of norms; and global poverty concerns. Such is why States gain utility from other States offering protection. Absent spillover effects (a legitimate concern in Schengen

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59 The literature on public goods reveals that Pareto sub-optimality is frequently attained by an individual player understating her valuation of a public good in a non-centralized group setting. Along these lines, Shurke (1998) argues that the cleavage between individual and group incentives to offer protection result in suboptimal protection (i.e., Prisoner’s Dilemma) and freeriding.


61 This point speaks to how non-static norms are formed. If hosting becomes a benefit, it does so in relation to the costs of hosting at any given time – that is to say, the reservoir of norm-based altruism and goodwill is not exhaustive.

62 As to what proportion of the overall good public and private components take is another question, one beyond the scope of this paper to evaluate empirically.

63 Employing a Heckman selection model, Roper and Berria test the determinants of state contributions to UNHCR. Although concluding that refugee protection is an impure public good, the authors do not find that private benefits lead to an optimal level of protection. Roper, S. D., & Barria, L. A. (2010). Burden sharing in the funding of the UNHCR: refugee protection as an impure public good. Journal of Conflict Resolution.

countries) hosting produces a positive externality on all global States with private costs and benefits internalized. Hosting, by contrast, is predominately a private good. It is beneficial so long as the benefits of protection are greater than their costs. Since costs depend heavily on the ability to effectively integrate refugees, the cost function is rarely (if ever) static.

If protection and in particular hosting is not a pure public good, how do its private components influence the choice of market structure? To answer this question we must first understand how the costs and benefits of protection interface. Let us begin with the benefits. Amongst heterogeneous EU States, even those whose norm-commitment is firmly entrenched in a global-in-scope ethical allegiance, many private benefits (i.e., excludable altruistic and excludable prestige-generated benefits)\(^65\) are gleaned from protecting refugees. Meaning, that when considering components of protection typically regarded as public, a private, more elastic domain must be factored. Simply put: States may derive private benefit from protecting the persecuted.

As to States whose humanitarian norms are –at any given moment– ‘more narrowly communitarian’ the “marginal private benefits from asylum reception, deriving from such norms, will be lower and so equal the marginal cost of asylum within that society at a lower level of provision.”\(^66\) This means that in a decentralized refugee system, as the marginal benefits of humanitarian norms decrease, private benefits will need to increase to provide an optimal level of protection. Prima facie, it is extremely doubtful this can happen in an unregulated market. State interests simply do not allow for an increase in marginal benefits of humanitarian norms, as the recipients of those norms are perceived to have an increasing marginal cost on society. Such is why, despite the direction of alliance theory, a decentralized market will not privatize nor generate incentives to offer protection.\(^67\) The marginal utility from hosting refugees is simply too unpredictable. This makes reaching an optimal provision difficult in a decentralized market.

The question that immediately follows is whether humanitarian norms are static, and if not, how they are formed. If rival or excludability are derived from nonstatic valuations, such as fluctuations in the labor market or intra-State subjective perceptions of the social and political community, this will impact the pure public goods components of protection (i.e., protecting the persecuted, reducing global poverty). This likewise impacts the theoretical literature where refugee protection is typically modelled as a global public good with the cost of shading normative commitments figuring prominently into any equilibria of socially

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\(^{66}\) Ibid.

optimal protection. In a market mechanism with absolute boundaries and the ability to transfer hosting obligations, marginal benefits and costs will not adversely impact the optimal level of protection, since at the threshold where marginal costs exceed marginal benefits, an EU Member State can simply transfer its quota.

Along these lines is the issue of subjective shifts to consider. Perception guides a significant component of utility and disutility. More specifically, if the public component of protection (i.e., altruism, normative commitment) is frequently perception based, then it comes as little surprise that the private components are as well. The private cost of hosting refugees, as opposed to paying for their protection elsewhere, is largely based on how members of the political and social community view absorption. Ultimately, the optimal provision of collective goods must account for both perception and hard facts (i.e., labor markets) without imposing normative valuations. Moreover, the component of the benefit function that is perception-based will shift depending on the perception-based component of the cost function.

To address the non-static formation of ethical commitments, as well as shifting perceptions of both costs and benefits, a joint-market good like refugee hosting must be part of a centralized regulated market in order to achieve an optimal level of provision. Of course there is always a danger the market will get glutted during times of severe emergency, or that third party countries will hold out (if the protection quota price is not uniform, see infra 3.2). There is also the cost of paying for the quota, which may be perceived as a negative externality generated from the market mechanism and by extension, 1951 Convention. Yet I argue that this externality is far less significant than ignoring the private components of protection and how they interface, both in terms of costs and benefits, with States’ preferences for hosting.

1.3 Methodology: applying an economic property-rights analysis to refugee protection

If there are incentives to remain in the refugee regime, a market might facilitate a distribution in consonance with individual Member State preferences. To understand how a market achieves an efficient distribution, it is first necessary to map out the parameters by which the good or service in question is bounded. Let us clear the air though, before proceeding: to speak of refugee protection within a property rights is uncomfortable –to put it mildly– and tempts several controversial analogies: humans as property, slave trade markets, trading the untradeable. Putting aside for a moment these objections, a property rights framework is a useful analytic tool to understand how a thing –be that a person, car, or swath of land– can be allocated efficiently within a formal or informal market structure.

At its core, a property right "is a socially enforced right to select uses of an economic good." As such, enforcement does not always presuppose ownership. Pedestrians are an asset for taxi drivers, for example, as is street access in front of luxury hotels. On the other hand, customers own rights to themselves and may choose which taxi to enter. In a similar manner, refugees are never owned by EU Member States any more than any citizen. What is owned is the mandate to protect them, a property right derived from the 1951 Convention.

Property rights, in a general sense, consist of possessory and transfer rights. Employing Shavell’s user friendly definitions, possessory rights “allow individuals to use things and to prevent others from using them” while transfer rights entail “the option of a person who holds a possessory right to give it to another person (usually, in exchange for something).” The combination of these rights enables individuals to increase wealth, social welfare, and negotiate – either privately or through the law – a desirable outcome.

An important aspect of possessory rights is a lack of absolute control. One may own a farm, but be unable to house a nuclear waste facility or even extensively renovate without government permission. Similarly, an owner may rent out his home, and not be permitted to enter the premises once the tenant has occupied them. When applying the notion of property rights to refugee protection, ownership does not entail control over a human being any more than typical rule of law measures proscribe. Rather, ownership is taken to mean responsibility for a unit of protection as defined by the 1951 Convention and its Optional Protocol. The State derives ownership of protection from its legal obligations. Nothing more.

### 1.4 Externalities

At the heart of an economic analysis of property rights is the notion of externalities. Given an assignment of property rights, an externality occurs if a phenomenon influences, positively or negatively, the comfort of the rights holder. Any effect occurs against a reference point. In our analysis, this point is the number of refugees that each EU Member State decides is optimal. Offering protection in excess of a privately

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70 Now let us extrapolate a bit: take the scenario common in front of train terminals where customers queue up for registered taxis. Though administrators managing the queue own the right to choose a taxi for the customer, the customer in turn may refuse, or be excluded based on taxi company regulations. Companies may own the rights to stand in a particular queue, access a particular taxi, they own the right to set the fare, districts the cab may travel, and much more. Customers, though assets to the company, are never entirely owned.


72 Ibid.

73 More in line with child custody than slavery.

optimal number may constitute a negative externality imposed by the 1951 Convention, which mandates that protection be offered to all asylum seekers determined to be refugees.\textsuperscript{75}

From a property rights point of view, externalities may be generated from the congestion of mutual property rights. If we take a nation state as an organization attempting to maximize value for its members, then the marginal benefit per a member is reduced by additional members unable to contribute value equal or greater than those generated by incumbent members. In these cases, the marginal yield of social utility becomes less than the marginal cost of hosting. It is notable that whilst discussing social utility or social welfare, in addition to natural resources, the primary intragroup resource are the members themselves whose interaction generates social utility and is impacted by social compatibility.\textsuperscript{76} When the 1951 Convention results in a number of refugees in excess of what is determined to be socially optimal, the universal social value (as derived from the consensus social good of protecting refugees) results in a marginally decreasing value per an incumbent member.\textsuperscript{77}

If past a certain threshold refugee protection constitutes a negative externality, the obvious question to follow is threshold of what? In current policy debates, three externalities feature most prominently: security, labor market concerns, and national identity. Security matters are omitted from this paper as they are not


\textsuperscript{76} Alchian, supra 68, at 6.

\textsuperscript{77} As Jeffrey Sachs has noted, “Migration should be encouraged but not at the expense of the well-being of the population of the destination country.” Sachs, J. (2016). Toward an International Migration Regime. American Economic Review. Pp. 453.
well served by an economic analysis. Below follows a brief description of the latter two potential externalities and how they relate to a refugee protection market mechanism.

1.5 Labor Market Congestion and the Benefit Conundrum

“it is difficult to predict their impact on the sustainability of welfare systems across countries...Any assessment of the (net) fiscal impact of migration is surrounded by uncertainty and even more so as regards the recent surge in asylum seekers in Europe.”


By benefits this paper focuses on redistributive entitlements and not schemes derived from contributive taxation. Once an individual because a lawful resident she may not be excluded from entitlements, though conditions may be legislated in a non-discriminatory fashion. The crystallization of norms related to right to family, health, have arguably produced a self-inflicted cat’s cradle where an inability to upskill and integrate new members into the job market disallows a decrease in provisions below a pre-set minimum, thus dislocating usage and fee.

Typically, a non-finite public good increases its utility as the number of contributing members increase. In the case of benefits, however, positive congestion is largely dependent on a usage toll. In a scheme where less people pay membership fees (taxes) yet provisions (distributive entitlements) must be offered regardless of membership fees, optimization can only occur when exclusion is tied to the rate of gainful employment. If new members (e.g., refugees) cannot be functionally assimilated into the labor market, congestion may provide a measure of dignity to new members, provision per a member would most likely decrease.

For members’ net utility to be positive there must therefore be a limitation on free riders. This typically requires access to gainful employment and often upskilling to increase employability. This is certainly not to suggest that all refugees are free riders. Far from it. Several studies have shown that immigration has a negligible or small positive effect on long-term growth. This is particularly true in generous social welfare

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79 Usage in this case must account for intergenerational usage, which might depreciate the quality of other overlapping goods. Sandler, supra ??, at 290.

80 In this sense, receiving refugees is no different than increasing citizens’ birth rate: each individual must be integrated into the labor market. Section 2.5 discusses how citizens and refugees differ per distributive benefits.

81 While it is true that a deficit of say, social security allocation could be usurped from other budgetary allotments, this paper is unable to explore hypothetical overlapping goods. We thus assume the entitlement scheme as a marginal constant.

82 European Commission. ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.’ Brussels, 7.6.2016 COM(2016) 377 final at 3. "From a purely macroeconomic point of view, the impact appears moderate; stemming in the short term from increased public spending and, over time, a slight rise in labour supply.”
States with aging populations. However, the current numbers speak for themselves. In 2013, EU-wide numbers for unemployment of nationals in their country of citizenship was 9.4%. EU non-nationals had an 11.4% rate, while non EU citizens, 19.9%. In Germany, for example, those numbers were 4.5, 6.5, 11.9, respectively, for the same time period. Whereas for Portugal, the line went: 13.8, 24.2, 21.2. Clearly the ability to effectively integrate migrants into the labor market is dependent on myriad factors, not the least, industry. Since the general trajectory of employment in the EU is moving towards high-skilled labor –projections for higher-education labor are a 23% increase with shortages in the science, healthcare, and technology sectors—upskilling can provide the social welfare system with sustainability, if these sectors are filled by qualified applicants.

Then there is the overall cost. Taking Germany as an example, 2015 cost approximately 10 billion euro for housing and food, with a cost of nearly 13,000 per a refugee. Some figures put the real cost as high as 21

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billion Euro. In addition, as per OECD figures, "50% of adult men who are coming without a spouse are assumed to reunite with their family within a period of 12 months." Likewise noteworthy is the 5 percent annual GDP of public spending is projected for needs and integration into the German labor market over the next two years. Attenuating the expansion of Hertz IV and other social welfare benefits largely depends on integration into the job market, specifically upskilling and language immersion.

Liberal estimates from an IMF study project that refugees will raise government spending within two years in Sweden (from .3 to 1% of GDP), Denmark (.24% to .57%), Finland (.09% to .37%) Germany (from .08% to .35%), Austria (.08% to .37%), among other Member States. Whether these figures will increase in upcoming years largely depends on intake quantity and integration measures; to use the popular expression: the verdict is not out yet. What this paper argues is that Member States, perhaps in conjunction with EU structures, are best able to determine an annual number.

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85 CESifo Group Munich, supra ??.
At what rate integration into the labor market can be accomplished is the topic for a different paper, as is the scenario when individuals not provided refugee status remain in the informal labor sector. For our purposes, it is sufficient that uncertainty is undergirded by hard figures and worth exploring as a potential negative affect of the protection regime. Those who have undertaken such studies have come to very different conclusions, dependent on not only the dynamic in question, but the author’s policy orientation. Experts, such as Hans Werner-Sim, predict a negative impact on low-skilled workers. Similarly, studies have found a small negative affect, particularly when low-skilled labor encountered impediments towards entering the labor market and negative cost on the net GDP.

On the other hand, scholarship has shown refugees increasing the demand for local goods, a positive effect on local unskilled wage and occupational mobility, as well as a host of context-laden tradeoffs. Skilled immigrants have been shown to increase capital accumulation revealing why skill level is a crucial determinant in reception attitude towards new arrivals. Administrative and State capacity have also been shown to be decisive factors in labor integration, more so as to the level of contribution the welfare system.

Two comprehensive case-studies on Syrian refugees in Turkey found mixed results, depending on the sector involved, as have studies in highly concentrated hosting areas in Western Africa shown highly differentiated welfare implications depending on labor sectors and demographics.

A May 2016 report by Philippe Legrain for an NGO, Tent, finds that investing one Euro on refugees now “can yield nearly two euros in economic benefits within five years.” Criticizing general equilibrium models for their static, unrealistic approach, Legrain provides a dynamic account that includes entrepreneurship, diversity dividends, development in the form of remittances, payment the pensions for

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101 Legrain, supra 88, Executive Summary.
102 Legrain, supra 88, at 15.
Europe’s aging population by a younger refugee population, and refugees pushing locals into higher wage occupations.\footnote{Based on studies in Denmark and Turkey. Respectively: Foged, M., & Peri, G. (2013). \textit{Immigrants' and Native Workers: New Analysis on Longitudinal Data} (No. w19315). National Bureau of Economic Research; Del Carpio, X. V., & Wagner, M. C. (2015). The impact of Syrians refugees on the Turkish labor market. \textit{World Bank Policy Research Working Paper}, (7402).} To foster its prediction of refugees increasing GDP, the study recommends that labor markets be made more flexible, with less excessive employee protection, and near immediate integration into the labor market in locations where skills match opportunities.

Legrain’s numbers are largely based on a DIW Berlin report by Marcel Fratzscher and Simon Junker whose simple investment model predicts a .5 increase in average income to the current German population by 2030.\footnote{DIW, supra, 88.} Fratzscher & Junker, however, are careful to note that their figures are simulations not forecasts, requiring more detailed studies to corroborate.\footnote{DIW, supra, 88, at 612} What’s more, several of Legrain’s conclusions lack serious scholastic rigor and are based on anecdotal conjecture (i.e., “a hard-working Syrian nurse may boost the productivity of a Swedish doctor”).\footnote{Legrain, supra 88, at 27.}

Since all Member States do not offer the identical services (there is no homogeneity), compounded by free movement within the Schengen zone,\footnote{Though there are at present temporal and financial criteria for refugees to move from the country providing them refugee status, in the long-term, without effective integration into the job market, it is doubtful whether those formerly designated as refugees will be able to be confined to a single State. Remedies might entail a restrictive domestic policy on labor and benefit movement, although this would ultimately be challenged by the EU itself.} a Pareto efficient refugee framework would have to consider each Member State’s absorption capacity. From an EU institutional perspective, one remedy might come from the spatial club theory literature, subsidization: balancing congestion costs with the benefits of sharing through land rent tax.\footnote{Scotchmer, S. (2002). \textit{Local public goods and clubs. Handbook of public economics, 4}, at 2027.} In this scenario, the EU would pay a marginal tax to Member States who exceed the level of benefit provision congestion. This rate would vary in accordance with how many new members (refugees) are able to pay into the entitlement scheme. In the respect, the marginal production cost would be distributed throughout EU countries. This solution might allay labor market and benefit concerns.\footnote{Dustmann, C., & Preston, I. (2001). \textit{Attitudes to ethnic minorities, ethnic context and location decisions. The Economic Journal, 111}(470), 353-373; Mayda, A. M. (2006). \textit{Who is against immigration? A cross-country investigation of individual attitudes toward immigrants. The Review of Economics and Statistics, 88}(3), 510-530; Hopkins, D. J. (2010). \textit{Politicalized places: Explaining where and when immigrants provoke local opposition. American Political Science Review, 104}(01), 40-60.} However, there remain social concerns that EU subsidization cannot mitigate.\footnote{The unforeseen provisions clause in the Stability and Growth Pact might also be used \textit{ex post} to mitigate financial burdens. See: COM(2015) 800 final, \textit{2016 Draft Budgetary Plans: Overall Assessment}, of 16.11.2015.}
1.6 National Identity

We asked for workers. We got people instead. - Max Frisch

National identity may also suffer from congestion. In European law national identity can be separated into two distinct categories: political and socio-anthropological. The latter is what Article 3(3) of the TEU addresses: respect of cultural and linguistic heritage. The underlying notion is that of community and the ability of a group, not necessarily homogenous, to pool collective values into a forward-looking orientation. The TFEU has implicitly acknowledged this with regards to social groups, education, culture, and trade.

The ECJ has confirmed language as a component of unique national identity in several recent cases. In Anton Las v. PSA Antwerp NV, the ECJ found that EU laws “do not preclude the adoption of a policy for the protection and promotion of one or more official languages of a Member State” in consonance with Article 3(3) and 4(2) of the TEU and that such protection may, in some circumstances constitute “a legitimate objective in the public interest” which validates limiting fundamental freedoms of the TEU.

In Runevič-Vardyn, the Court emphasized the Union’s role in respecting and protecting a Member States’ official language. This protection constituted “a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU” if the protection could not be achieved in a less restrictive manner. The language-culture-rights interface case law suggests that a Member State may regulate the intake of non-EU nationals who may reasonably acquire full rights...

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111 As qtd in Sachs, supra 72, at 452.
112 Also see Article 165 concerning cultural and linguistic diversity in a pedagogical framework;
113 Culture can be defined as inclusive of “includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of society.” Tylor, E. B. (1971). Primitive culture: researches into the development of mythology, philosophy, religion, art, and custom (Vol. 2). Murray. For an economic perspective see Petakis, P., & Kostis, P. (2013). Economic growth and cultural change. The Journal of Socio-Economics, 47, 147-157 which separate culture into efficiency orientation and social orientation. The authors conclude that there is a positive impact of cultural background on growth rates.
114 Article 152 TFEU: “The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of its cultures.”
115 Article 165(1) TFEU: “...fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.”; Article 165(2) TFEU: “conservation and safeguarding of cultural heritage of European significance”;
116 Article 165(4) TFEU “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”
117 Article 167(1) TFEU: “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”
118 Article 207(4) TFEU “The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity.”
119 Case C-391/09 Runevič-Vardyn [2011] ECR-I-3787; Case C-202/11 Las v PSA Antwerp NV; (Court of Justice, 16 April 2013); Case C-51/08 Commission v Luxembourg, [2011] ECR I-04231; Case C-222/07, Unión de Televisores Comerciales Asociadas (UTECA), [2009] ECR I-140, para 33.
122 Runevič-Vardyn, supra ??, at 87.
123 Runevič-Vardyn, supra ??, At para 88, referencing Sayn-Wittgenstein, para 90.
in the political community (i.e., voting) at a rate in which that State is able to provide the necessary language integration programs.

Two points here warrant further exploration. The first is the balancing or proportionality test the ECJ has employed in matters of cultural or linguistic identity. And the second is the extent to which a negative externality could ever occur through rapid multiculturalism.

On the first point is Las, a case involving a former employee who challenged the validity of his termination terms due to the fact that the termination notice was written in English, not Dutch, as per the Flemish Act of 1973. The Court in Las, concluded that the compulsory mandate to contract in Dutch “goes beyond what is strictly necessary”123 to protect the Dutch language. The implication is that the language-culture-rights nexus cannot be hypothetical; infringing on fundamental rights on the basis of a language claim must be grounded in the reality of the circumstance.

Balancing also involved the Court reading a traditionally unidirectional law as multidirectional.124 As Elke Coots (2014) notes, the ECJ sidestepped the principal-agent problem between an employer and its litigating employee “by turning the employer from a mere agent of another right-holder into the exerciser of his own, separate right.”125 Moreover, the court revealed how when an individual is the subject of a complaint involving the right to protect a culture through its language (in this case, pertaining to workers’ rights against his employer) that the employer may be empowered to hold her own context of the right in question. From an agent facilitating the worker’s right under Article 45 TFEU to be engaged without discrimination, the employer was recognized as “the owner of a freestanding right.”126 Abstracting this framework and extending it towards linguistic identity, refugees have a right to be protected, however, the nation state’s role is not only to serve the refugee, but to engage them within a broader cannon of domestic responsibilities, one of which is preservation of linguistic identity. Domestic courts have the right to challenge laws that deter the effective implementation of international agreements (in this case, the Refugee Convention) whether direct impediment, or the long-term ability to offer safe haven.127

Then there is the practical matter. Can a mass influx of refugees really have a negative, even detrimental impact on a language or the culture of which the language is derivative? In Las the Advocate General based his reasoning on the fact that drafting contracts in multiple languages could not harm the Dutch language.

123 Las, supra 117, para 33.
125 Coots, supra 123, at 633. The right in question is Article 45 TFEU.
126 Coots, supra 123, at 633.
127 Whether linguistic diversity clauses may be applied to Member States is extrapolated by Coote, supra 123 at 638, who notes that though the Charter’s fundamental rights are only binding on Member States when applying EU law, this does not preclude using those same fundamental values as a justification to restrict free movement, as Union Courts must interpret EU law in line with the Charter.
Realistically speaking, is there a harm that can be caused by an influx of immigrants beyond which can be reasonably integrated linguistically in a frame of time? Or is linguistic identity merely a thinly veiled guise for discrimination and economic protectionism? To answer conclusively, one would need to write a separate paper, as ghettoization and marginalization are not robustly correlated with language.

A second strand of argumentation looks towards dignity. The political philosophy literature frequently points to dignity and the perception of being treated with respect as the determinants supporting linguistic identity. Intention here is a crucial variable, as is the perception of intention crucial towards the subjective identification of language to dignity. This may mean that the State has an obligation to ensure that refugee hosting proceeds at a rate in which linguistic and social norms meet the perception threshold of its citizenry.

As Anna Stilz notes, hashing out a benchmark for reasonableness of dignity-based claims might involve a link with power structures. Specifically, that “there may not be a dispositive claim even where legitimate” since “Parity of esteem reasons need to be weighed against countervailing considerations, like coordination, administrative costs, other people’s legitimate expectations, and so on” and in those instances, where costs override benefits “we ought to offer a justification that shows why important public purposes cannot reasonably be achieved without this particular disadvantage.”

That an official multilingual policy might entail substantial costs may lead to a least cost model entailing limited absorption, in which the State makes a rational decision based on economic factors.

Despite the above evidence, one might say that while fascinating as a sociological exercise, limiting refugee intake on the basis of language and culture belongs more to the domain of populism than justiciable primary law. So let us explore a related strand of excess absorption.

Asylum seekers granted refugee status move onto a path towards citizenship and thus full membership in the political community. If integrated into the labor market and civic society— one aspect of which is language— there is a higher probability of community trust and refugees advancing with the population toward mutual goals. This may be true even when unique cultures are celebrated as valuable components of a multicultural society. But there is a flipside to this argument. Let us say that a Member State absorbs refugees in excess of what institutional structures allow for effective linguistic integration. The impact of social and labor market integration are often interdependent, which frequently leads to the ghettoization of...
subgroups, who in turn, identify less with the State than many of their compatriots.\textsuperscript{130} Lack of trust may lead to the inability to muster sufficient willpower and accept sacrifices to preserve equitable social welfare policies. Yet the inability to integrate into social and labor arenas may, as Kymlicka notes in a recent interview, lead to secession:

\begin{quote}
And if it turns out that within a particular group, for whatever reason, fewer and fewer individuals identify with the larger state, then I think we cannot exclude the possibility of legitimate secession. States exist to serve citizens, not the other way round. I don’t think states are sacred, and if the existing structure of the state is no longer serving the interests and identities of the citizens, then the citizens should be free to restructure the state. I don’t think we should be keeping national groups in a state against their will. And I do think that some of the old arguments for why it is in the interests of two or more national groups to stay together are not as compelling as they used to be, so I expect secession will remain a live issue in multination states. I don’t think that it is a crime against humanity if things develop in such a way that a national group does have a clear democratic consensus to secede.\textsuperscript{131}
\end{quote}

By the same token, if States exist to serve citizens, then citizens have the right to structure their context of choice in a way which absorbs refugees at a pace in which they can be effectively integrated into social and economic markets.

\textit{National identity as a political concept}

Aside from cultural-linguistic there is national identity as a political concept connecting European Law with domestic constitutional law. Most prominently, Article 4(2) of the TEU mandates the EU to respect Member States’ national identity, as it pertains to “fundamental structures, political and constitutional, inclusive of regional and local self-government.”\textsuperscript{132} In effect, this translates into a sphere in which the subjective self-conception of nation as codified in a constitution’s fundamental precepts is not immediately subject to EU jurisdictional primacy.

How this plays out is that content disputed under Article 4(2) falls under the jurisdiction of the ECJ and has been subject to a proportionality test between EU and domestic law, ostensibly, ensuing collaborative decision-making process. In \textit{Sayn-Wittgenstein}, for example, a case involving Austria’s refusal to incorporate a noble German surname,\textsuperscript{133} the ECJ concluded that “the Law on the abolition of the nobility,

\begin{flushleft}


\textsuperscript{133} Note: name law is typically the domain of private international law, not European law.
\end{flushleft}
as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law.”

While Article 4(2) was mentioned as an afterthought, it served to undergird the link between national identity and fundamental principles. As Bogdandy & Schill (2011) point out, Article 4(2) “prevents EU law from interfering in a disproportionate manner with the constitutional identity of Member States.”

The question that immediately follows is which domestic constitutional provisions constitute the ‘national identity’ that might be impacted by an over-absorption of refugees. Clearly all constitutional content was not intended as inclusive of Article 4(2). After all, one’s identity can be a feature of external perception. In a democratic State, however, identity is an agglomeration of values codified by a community who by consensus have agreed those values define them. This can be intimated through a reading of successive TEU versions in which “fundamental structures, political and constitutional, inclusive of regional and local self-government” were added to the Lisbon version from what was simply “shall respect the national identities of its Member States” in the Maastricht Treaty and later, Amsterdam Version. This addition was added in order to align EU precepts with rulings from domestic Constitutional Courts. These rulings asserted primacy of community-driven subjective interpretations of national identity within EU legal space. Per these judgements only core constitutional provisions are inclusive of fundamental content — those values which cannot be changed under any circumstance or are extremely difficulty to amend. These will be discussed below, but basically entail rights relating to democracy, human dignity, rule of law, State aims, fundamental rights, and more generally, democratic constitutionalism.

The German Constitutional Court, for its clarity and depth on the matter, is perhaps the most cited example. Rather than fealty, when a transfer of power between The Federal Republic of Germany and the European Union took place, it was, in the words of Karlsruhe, based on “respecting the Member States’ constitutional identity” and the insurance that Member States do not lose the ability to “socially shape the living

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134 Sayn-Wittgenstein, supra 128, at 135. [Italics mine].
136 Though several Constitutions were formed at historical periods when suffrage was limited, nevertheless, they presumably would [and have been] amended to reflect evolving notions of societal values.
137 TEU 2009, supra ?, at 4.2
139 Von Bogdandy & Schill, supra 134.
140 Von Bogdandy & Schill, supra 123 at 1433. Article 79(3) of the Grundgesetz, an eternity clause, ostensibly disallows amendment of the first twenty articles, the so-called ‘Bills of Rights.’ Article 79(3) reads: “ Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.” The only way to change the first 20 Articles of the Grundgesetz is via Article 146, the duration clause, which States that the Grundgesetz “shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”
conditions on their own responsibility.”¹⁴² The FCC made clear the relationship between identity in a supranational and national community, writing that “integration into a free community neither requires submission removed from constitutional limitation and control nor the forgoing one’s own identity.” Karlsruhe proceeded to highlight several inviolable facets of sovereignty that warrant citing at length for their pivotal relevance to this paper’s argument:

European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party, political, and parliamentary spheres of public politics. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and … These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.¹⁴³

For our purposes, what all this means is that the right to linguistic and cultural identity is an essential feature of the agreement between Member States and the EU. It is prominent in power transfers, and in the margin of appreciation afforded to Member States in the interpretation of the ECHR.¹⁴⁴ To be sure, our position is not against Habermas’ notion that, “A liberal political culture… heightens an awareness of both diversity and the integrity of the different forms of life coexisting in a multicultural society.”¹⁴⁵ Constitutional patriotism (Verfassungspatriotismus) is not necessarily formed by ethnolinguistic identity nor impeded by its absence.¹⁴⁶ My point is more fundamental: that each State has the right to its unique ethical consciousness shaped by socio-political developments and historical circumstances,¹⁴⁷ and that such a right necessitates that each Member State within the European Union has the sovereign right to dictate the pace and diffusion that integration takes place.¹⁴⁸

¹⁴² Lisbon Decision, supra 140, at para 226. [italics mine].
¹⁴³ Lisbon Decision, supra 140, at para 249.
¹⁴⁵ Habermas, Ibid.. From an economic perspective, diversity may also lead to an efficient allocation of services to align with group preferences, leading to optimal population levels within groups. Conley, J. P., & Wooders, M. H. (2001). Tiebout economies with differential genetic types and endogenously chosen crowding characteristics. Journal of Economic Theory, 98(2), 261-294.
¹⁴⁶ And as Putnam, supra 129, at 164 notes, the tradeoff between a sense of community and diversity can be mitigated over time by wise public and private policies. This of course implies that absorption rates must be tempered to reasonable allow wise policies to take effect.
¹⁴⁷ “Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.” Walzer, M. (1983). Spheres of justice: a defense of pluralism and justice. New York: Basic at 62.
Let us not forget that at the heart of a constitutional democracy is the notion of self-limitation. States place boundaries in accordance with the values of the public culture and political community. In fact, this is the very reason that refugees are able to be admitted in the first place—against the conventional norms of entry.

1.7 Reassignment of rights as an answer to negative externalities

In the scenario where excess absorption has a negative impact on the State, what are some potential solutions? From an economic perspective social welfare may be reconciled when the net utility from externalities is positive. Often this involves a reassignment of rights. And a market structure may reassign in a Pareto optimal or socially optimal level. In the case of carbon emissions, for example, polluters can buy a share of carbon emission quota from a less polluting entity. The excess polluter in effect pays a non-excess polluter to harbor his externality. The result is that neither company has in excess of what society deems socially acceptable levels of pollution. Of course, refugees are human beings not toxic chemicals. But the same theoretical framework applies.

Reassignment is certainly not a novel suggestion and has to some extent even implemented by the EU under the Common European Asylum System (CEAS). The European Union has occasionally and meekly promised to redistribute refugees from coastal States. Malta has been a part of recent resettlement agreements, and an agreement to return failed asylum seeker claimants from Greece to Turkey has commenced April 2016. Resettlement regularly occurs between designated refugees outside the EU into Schengen territory. Transfers under the ‘Turkish Agreement’ do not lessen, qualitatively speaking, the absorption of refugees, simply dissuade a perilous journey. Turkey aside, the discussion of transfer rights has been mostly intra-EU. Divergent preferences for hosting among EU Member States have, however, prevented a more equitable distribution.

1.8 Incentives

States will only enter into a market compliantly if there are net gains from transactions. On a fundamental level, this might be expressed by the simple formulation: net gains equal positive transaction gains from intergovernmental transactions minus losses plus transaction costs. These include ex post opportunity costs such as decision-making costs. Within a market net gains can be understood through traditional Coasian bargaining, which tells us that under zero or low transaction costs bargaining will result in an

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150 The ‘Turkish Agreement’ doesn’t directly address the quantitative aspect of number of individuals who must be absorbed.
efficient allocation. Zero here is of course a theoretical baseline. Coase recognizes there are often positive transaction costs and that in these situations courts must often allocate usage. In such cases, Coase advises courts to heed efficiency concerns, in particular, reducing uncertainty about their legal rights position. Notice, however, that definitional clarity serves to reduce inefficiency; there exists no prelegal intuition about the property itself. Defining property rights for Coase is solely for the purpose of efficient bargaining and contracting.

It then comes as no surprise that in the Coasian universe, usage, not the object itself is put in the spotlight. For instance, in his argument to privatize broadband spectrum, Coase addresses the usage rights to radio equipment, not ownership of the frequency (the thing itself). When ranchers disagree over grazing rights, it is only the rights of disputants to use the land that is in question, not the ownership of the land itself. Property rights serve usage rights. Nowhere does Coase suggest that efficiency may be enhanced through debating the nature of the property itself. Neither does he preempt allocation by addressing its implicit value structure.

Here is where Coase plays a key role in illuminating a refugee protection market. Within a market mechanism, refugee protection cannot be allocated solely as usage rights, since the ‘property’ itself, protection, has clear pre-legal antecedents. Because preferences play a key role in securing expectation – or, as Bentham reminds us, property’s attaining “certain benefits from a thing” is dependent on “the relation in which we stand towards it” outside the realm of pure theory, the nature of the asset is critical in determining the constraints of ownership.

If we are to analyze refugee protection as an asset that can be traded, we must locate a core feature, a cornerstone in the architecture of protection that guides how externalities from protection interface with public values, how one might ‘use’ protection, and thus, how it

154 Coase, R. H. (1960). *The problem of social cost* (pp. 87-137). Palgrave Macmillan UK at 90. “Of course, if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well defined and the results of legal actions easy to forecast. But as we have seen, the situation is quite different when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law. In such cases, the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out.”
155 Coase acknowledges that a price mechanism could not work if unless there are clearly delineated rights or if there were large numbers of individuals involved thereby leading for regulatory or court intervention. Coase, R. H. (2013). The federal communications commission. *Journal of law and economics*, 56(4), at 908. *The Social Cost* deals primarily with limited actors and involves mainly trespass and nuisance cases.
156 Coase, supra 153, at 867? See also Barzel, Y. (1997). *Economic analysis of property rights*. Cambridge University Press. Barzel views property rights through the lens of contractual exchange of use rights. Property as a thing itself is brought to the fore only when contracting is not possible.
157 Discussing broadband spectrum rights, Coase writes that “the real cause of the trouble is that no property rights were created in these scarce frequencies. A private-enterprise system cannot function unless property rights are created in resources, and, when this is done, someone wishing to sue a resource has to pay the owner to obtain it.” Coase, R. H. (1959). The federal communications commission. *The Journal of Law & Economics*, 2, at 873.
159 What an owner may alter in a house deemed by the locality to have historic value is very different than a house without historical designation.
may be efficiently allocated. In essence, the bundle of sticks image with malleable usage rights must come to terms with the deontological component of refugee protection and how that component is addressed by fundamental constitutional values.\footnote{How the utility gained from offering protection functions in a similar way as the ability to exclude in conventional, spatially bound assets: proving stability, reducing uncertainty about key societal concerns, and acting as a direct manifestation of how fundamental constitutional values are addressed, commodified, and regulated.}

\textit{Even a Cathedral has working hours}

Much of the property rights scholarship over the past decade has debated the validity of the ‘bundle of sticks’ paradigm, where property is collective usage allocations or flexible entitlements governed by regulatory legal systems. Academics have investigated whether property rights are fundamentally \textit{in rem}, creating obligations of non-interference upon many unspecified dutyholders\footnote{Merrill, T. W., & Smith, H. E. (2006). \textit{Morality of Property, The. Wm. & Mary L. Rev.}, \textit{48}, 1851.} or whether property rights are essentially \textit{in personam} – flexible usage-based rights, typically ascertained through contracts or court judgments, and existing between one or few identified individuals.\footnote{Merrill, T. W., & Smith, H. E. (2001). \textit{The property/contract interface. Columbia Law Review}, \textit{773}-\textit{852}.} The example of cars is often used to illustrate the distinction. When one enters a parking lot they typically do not know the owners of the cars, the details behind who owns, who is borrowing, or if a particular car has been stolen.\footnote{Merrill & Smith, supra 161.} They simply know that the car is owned. Ownership indicates that that a possessor has the right to exclude the rest of the world from usage without bargaining over the specific usage allocation of each car. It would indeed be unusual if an interlocutor would begin bargaining for components – say the door handle or steering wheel – or claim they could lay on the hood and sunbathe. Rather, exclusion serves as a baseline for bargaining, lowering information costs by communicating to a large audience without the need for individual transactions. In the Henry Smith world of \textit{in rem} property rights, it is not the recognition of malleable usage rights that provides the foundation for future assignment of usage rights, but the recognition of the right to say no.\footnote{If the right of property secures dominion over the thing, it also benchmarks the condition for its use. As Adam Mossoff has advanced, “a ‘property right’ refers to the conceptual and normatively integrated rights of possession, use, enjoyment, and disposal, which implies a logical corollary that such rights are secured formally by making them exclusive against others.” Mossoff, A. (2011). \textit{The False Promise of the Right to Exclude. Econ Journal Watch}, 8(3), 255. The \textit{in rem} approach decidedly moves against breaking down the thingness of property into uses. Instead the thing itself is possessed, and ownership increases the residual rights to possession.}

The distinction is not insignificant for refugee protection. If protection is a malleable bundle of rights then efficiency may be predicted by pragmatism. Whichever party values the property more will obtain the property, either through bargaining or paying damages. Such is why contracts stand tantamount in the \textit{in personam} approach; if there is no inelastic ‘thing’ at the center of contractual transactions, then the contractual transaction is more important than the ‘thing’ itself. This approach is exemplified in Calabresi and Melamed’s seminal analysis of liability rules. In the \textit{Cathedral}, the optimal allocation of use rights between claimants is sought through either contract or forced exchange. Rights are elastic and defined in
context-laden usage terms. Property rules in themselves are given no prelegal form, instead paired alongside liability rules in a discussion of transaction costs.\textsuperscript{165} Allocating, in Calabresi and Melamed’s approach is more contract than property-driven.\textsuperscript{166}

If, however, property rights are about the entire bundle rather than contracting for individual sticks, then exclusion, as Henry Smith suggests, casts a net over “the interactions of persons in society.”\textsuperscript{167} It drives the understanding of who can obtain what, how they might obtain it, and how they might refuse it; essentially, exclusion increases cost effectiveness through minimizing information costs in a deeper manner than either the law or self-help. If one wants to enter, use, or buy property, she only has to ask the owner thereby minimizing the cost of social interaction.\textsuperscript{168} This recognition enhances security for the owner and incentivizes investment. Or as Blackstone put it, “who would be at the pains of tilling it [the land] if another might watch an opportunity to seise upon and enjoy the product of his industry, art, and labour?”\textsuperscript{169} Translated into the case of refugee protection, this means that the exclusionary rights are assurances that Member States can reduce the long-term cost of absorbing in excess of their capacity without engaging legal structures that cast opacity onto day-to-day operational sovereignty.\textsuperscript{170}

\textit{Possession-Exclusion Nexus}

Let us now dig a bit deeper.

Oftentimes, exclusion derives juridical force through its interdependence with possession. Several studies have engaged this nexus, notably from an efficiency,\textsuperscript{171} salience,\textsuperscript{172} and modular approach.\textsuperscript{173} My intention is not to re-litigate their analyses. Nevertheless, possession as a grounding principle of exclusion is crucial for the functioning of a refugee protection market. It is because of possession, in the spatial and phenomenological sense,\textsuperscript{174} that protection is molded as an asset without numerical ceiling.

In modern western culture, possession of an object or space, and property as self-possession are distinct. The spatial narrative is rather straightforward. A person possesses an object\textsuperscript{175} which enables them to exclude the rest of the world from that thing. Self-possession is less straightforward. An individual is born

\begin{footnotesize}
\begin{enumerate}
\item Smith, supra 165, at1704.
\item What remains, what Smith calls “governance strategies”—contracts, bargaining, seizures, nuisance and adverse possession cases—are the exception rather than a foundational component of the property rights architecture. Smith, supra 165, at1703.
\item Phenomenological in the Husserlian sense of the relation between mental phenomena and an intentional object. Husserl, E. (2012). \textit{Logical investigations} (Vol. 1); Routledge.
\item Here we are under the assumption that possession and ownership are one. In divergent cases, results differ.
\end{enumerate}
\end{footnotesize}
with an inherent, inalienable dignity.\textsuperscript{176} Self-possession, which here is taken to mean the ability for an autonomous individual to individuate, constitutes possession of that inherent dignity.\textsuperscript{177} Critically, it must be validated in a Hegelian manner, which is to say, the actualization of self-will through external recognition.\textsuperscript{178} Allowing possession to trade hands to the highest bidder, per se, or cost-minimizing social interaction may preclude an individual’s ability to self-develop.

The question that must follow is: who possesses what? Is refugee protection a right that is owned by the State, and extrapolated over the social contract between government and citizen? Or is protection owned by the protected in the sense they obtain positive rights from the State derived from the 1951 Convention? Possession in both accounts can be taken as the right to exclude based on ownership. Yet, the former implies that asset trumps its owner, as if a piece of land declared UNESCO protected instantaneously supersedes the rights of its owner. One way to clarify this distinction is to answer how the law reconciles competing claims of causation.

A key component of possession is its relationship to causation. Recollecting Coase’s hypothetical world, it is not merely the absence of transaction costs, but the agnostic view of causation that leads to an efficient outcome. If Mr. Plum’s cattle trampling Miss Marple’s flower bed is adjudicated solely on the basis of efficient allocation of usage rights, or if a factory pollutes a nearby land,\textsuperscript{179} there is no causation per se since both the polluter and the landowner need to exist for there to be a conflict; in effect, negative externalities from both sides cancel each other’s attribution. Existence and autonomous will override the notion of possession and ownership.

Reciprocal causation, on the other hand, does not fit in with a refugee protection analysis for the same reason it does not bode well in any human rights framework. Causation necessitates a point of orientation. Typically causation runs unidirectional in favor of the possessor. Determining causation in trespass or squatting is typically guided by the possessor having claim against a usurper. If cattle run over flower beds in the adjacent property, it is the cattle owner who has breached the possessor’s right to exclude. If a neighbor extends his fence onto your property, your immediate disapproval will trigger legal enforcement.

Spatial boundaries triggering the law of trespass rarely require in-depth case-by-case analysis where ex ante contracting has not been engaged.\textsuperscript{180} Refugee protection is contractual; it is a contract to protect. Owning

\begin{itemize}
\item \textsuperscript{176} See Infra part 2.1
\item \textsuperscript{177} Though non-possession does not entail loss of an inherent dignity, it does mean that the individual is not in full disposal to develop their sense of self, thereby not fully possessing. The Western philosophical roots of this view come from John Locke, “every Man has a Property in his own Person. This no Body has any Right to but himself.”
\item \textsuperscript{178} Hegel, G. W. F. (1962). Philosophy of Right. Translated with notes by TM Knox.
\item \textsuperscript{179} Coase, supra 152, at 88.
\item \textsuperscript{180} This, in contrast to the Lockian view that views labor and productivity of the land as the mediating factor to ownership. Spatial possession here is also clarified by its antithesis. Pufendorf, for instance, writes the first claimant to a piece of land is distinguished by the lack of necessity to remove an existing claimant. Possession is therefore validated by the lack of dispossession. Lack of dispossession is an affirmative statement for the sanctioning of diligence: if by hard work one expects rewards, this can only happen if they are not threatened with dispossession. In today’s
\end{itemize}
the asset of protection implies permission to exclude. Exclusion here is a stand in for actualizing State preferences *within the permissible bounds of ownership*. This means excluding excess hosting, while still protecting. This is because causation involving norm-commitments to those fleeing persecution is unidirectional. Whether other stakeholders value elements that contravene the protection asset is inconsequential. Consider a woman who is raped. She possesses the property, her body, and retains exclusion rights over use. As H. Sterling Burnett has pointed out, the victim bears no responsibility for her violator valuing the use of her body, which an agnostic view of causation would view as competing.\(^\text{181}\) In another example, librarians in Leuven cannot be seen as residing in the same legal corridor as the German arsonists during the First World War. Similarly, human rights, including refugee protection, cannot logically comport to a regime without causality. Pragmatism in property rights, even when it perseveres, cannot erase the moral foundations that protect against the unwanted. On the other hand, the political community is also supported by a moral foundation.

**A moral basis to property rights?**

The aim here is not to systematically delineate a causation theory of property rights and the prevailing social order. Nevertheless, the reasoning behind exclusion as the baseline from property rights—particularly its limitations—is crucial towards understanding how a market for refugee protection might function.

The question of a moral core to property rights has been tackled by Merrill & Smith (M&S) and their insights guide this segment of analysis. The authors’ departure point is *in rem* rights. M&S argue that because property right must communicate to a “wide and disparate group of potential violators”\(^\text{182}\) it can only address the faceless mob if the majority acknowledge that the right to own the asset is a moral right.\(^\text{183}\) In fact, property-rights is frequently couched in deontological terms suggesting that the ability to exclude, or protect against invasion, is itself a moral good. Merrill & Smith provide numerous cases in support of the moral core of property rights. Without replicating their extensive scholarship a few points bear rehashing: (1) trespass rulings that consider neither the comparative utility\(^\text{184}\) of the owner-invader, nor a cost justification\(^\text{185}\) (2) a lack of consideration of the utility gained from acts considered to contravene conventional morality, such as the wrongful dispossession of assets taken from victims of the Third Reich.

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\(^\text{182}\) *Morality of Property*, supra 159 at 1850.

\(^\text{183}\) *Morality of Property*, supra 159 at 1850.

\(^\text{184}\) Taking Coase’s polluter, there exists a common moral intuition that polluting is wrong, despite the fact that the factory might be creating jobs, or manufacturing products deemed useful by society.

\(^\text{185}\) *Morality of Property*, supra 159 at 1871-72. The authors cite *Jacque v. Steenberg Holmes*, in which a mobile home sales company trespassed despite Jacque explicitly refusing permission. The Wisconsin Supreme Court did not consider whether the Steenberg’s trespass was efficient (cost justified) as a delivery route. As M&S note, “the question of comparative utilities simply was irrelevant to the analysis.” [ibid. at 1873]. Efficient breach gave way an *in rem* exclusion-based approach that led to a fine 100 times the maximum criminal fine.
or property from Native Americans\textsuperscript{186} (3) the prominence of good will in cases of adverse possession, accession, and building encroachments.\textsuperscript{187} In each of these points, it is not the language of cost internalization and efficient breach that guide the court, but the right to exclude couched in deontological reasoning.

For a stylized example, take a coatrack at the entrance of a museum, not guarded by security, as is frequently the case in the Netherlands. Informational costs to communicate the usage and ownership rights of each coat would be extremely high. There must therefore be a core mechanism to mediate each anonymous owner’s claim to a coat or an umbrella. And these claims must be recognized by random individuals. The same can be said of umbrella cans in restaurants and shoes outside the entrance of a large mosque. From a bundle of rights perspective, one could simply take a coat, an umbrella, a pair of shoes and bargain over its use. But this is clearly not the norm.

Does this mean that there is a moral structure behind the relative lack of theft in Dutch museums? Thieves might simply be deterred by post facto policing in a similar manner that corporate polluters are occasionally dissuaded by threats of civil action, and cattle owners uncomfortable with their neighbor’s double barrel shotgun. Intuitively, it is most likely true that far more coats would be taken, and land trespassed upon, if there was no enforcement mechanism in place. However, on occasions when the law has been out of step with societal moral norms, property law has often been disregarded on a large-scale. This is particularly true in the early years of music downloading and continues with video streaming.\textsuperscript{188} When downloaders feel they’re ‘trading’ not ‘stealing’ the law is frequently disregarded on a large-scale. Yet stealing a coat is never misunderstood as borrowing. Taking somebody’s shoes in front of a mosque while they’re praying is certainly not morally sanctioned. While the law clearly plays a role both directly and through more indirect preference-shaping modalities,\textsuperscript{189} legal enforcement is not sufficient to account for instances where little to no enforcement results in upholding an owner’s right to exclude.

And yet, despite M&S acknowledging a moral core to property rights, they couch morality within the pillars of efficiency. Information costs, they argue, are minimized through streamlined social interactions. In turn, social interactions are conducted within boundaries. They presuppose moral structures without analyzing how efficiency and cost-minimization are preempted by values. Taking a broader view, Joseph William Singer argues that property law is more than a coordination mechanism that reduces information costs and

\textsuperscript{186} Morality of Property, supra 159 at 1876. See also Pollock, B. E. (2006). Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims. 

\textsuperscript{187} Good faith is critical in the judgments relating to encroachment.


regulates human interaction on a cost-benefit basis, but rather, a quasi-constitutional framework guided by values. The problem, writes Singer, is not “how to grease the wheels of social interaction” but to “determine the character of that interaction.” That is: not to coordinate interactions at the minimum cost, but to regulate interactions in line with understandings of foundational values of the social order.

Minimizing the cost of social interactions is in Singer’s position a mere component of property rights, not the framework itself. Instead, property rights are derived from the social order and costs are minimized within that social interaction. Smith, in this view, can be seen as more of a manager, one who addresses a structural problem, rather than interpreting the right to an asset based on societal values. It is not merely the recognition of the ability to exclude: “We can only determine whether an action causes an externality by reference to a normative framework that distinguishes self-regarding from other-regarding.”

Such is why, at least partially, the exclusion argument advanced by Smith and Merrill does not often reflect the reality of courts. Heterogeneity presupposes that assets will have been acquired, endowed, and that ex ante arrangements will have often been contracted. This fact is captured in the frequently cited State v. Shack, where the New Jersey Supreme Court reversed a trespass conviction of NGO worker entering a farm property to administer medical and legal aid to a farm worker acknowledging that “man’s right in his real property is not absolute.” Provocatively, the court equated the relativity of rights to serving human values, a notion at odds with a purely economic interpretation of thingness. An asset, in the court’s view could not trump societal values for lowering information cost through more efficient social interaction.

If the core of the property rights regime is about the values laden in and around an asset, then both contractual exchange and exclusion as a first order principle play second fiddle to the dominant societal narrative bounded within legal constraints. In international law, these constraints—or the gap between the individual and the law— is manifest in derogation and clawback clauses. More eloquently, Italian thinker

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190 This perhaps accounts for Smith’s position that rights, while bundles, are not infinitely malleable and that “lumpy packages of legal relations” coalesce “around useful attributes that tend to be strong compliments.” Smith, Properties as the law of things, supra 165, at 1693.
192 See infra at 301 (“the norms associated with a free and democratic society imply structural constraints of their own. They are not things we can add on later; they inform the very basis of property rights.) And again at 302, speaking with regard to American property law. (“Costs of human interaction become relevant only within a normative framework that defines what kinds of property arrangements are compatible with the ideals of freedom, equality, and democracy.”)
193 Singer, supra 189, at 1299.
194 Singer, supra 189, at 1303: “Smith’s insights depend on a normative framework that is implicit in his analysis; the normative framework merits separate attention because we cannot engage in meaningful analysis of information costs (or any other costs) without first discussing the social, and legal framework within which those costs are computed.”
195 Singer, supra 189, at 1297.
197 State v. Shack, supra 194 at 372.
198 Though morality is often witnessed in the rules and jurisprudence of property, its normative basis is unclear. Therefore, antecedents governing the point at which exclusion and access are set is unclear. Clarity here serves an edifying function. Moral obligations give way to a prerogative for government to provide or regulate rights. Since rights to exclude are derived from a lack of an obligation, it stands that a limitation on the right to exclude is derived from an opposing value. See, Gerhart, P. M. (2014). Reflections on Property as a Social Good. Tex. A&M J. Prop. L., 2, 323.
Giorgio Agamben calls these instances “that [which] binds and at the same time abandons the living being to the law” 199 and can be seen through two shocks: martial law and eminent domain. In these two instances, assets can be conditionally expropriated. However, these conditions, or shocks within shocks, are predicated on, and clearly define the distinction between a property rights methodology that can allocate the distribution of human assets, and the boundaries within which cost-minimization may take place.

**Eminent Domain**

Eminent domain, or government taking private property for public use is a near universal exception to the private property regime. The State, under varying limitations, can take private property regardless of the owner’s valuation. The rationale for government takings, in Grotius’ words, are not only ‘extreme necessity’ but public utility. 200 It is this point, public utility that is described by Grotius as “ends [that] those who founded civil society must be supposed to have intended that private ends should give way.” 201 Implicit in this relationship is a value structure where usage and ownership are beholden towards society (i.e., the private must give way to public interests).

Grotius’ position is very much in line with several domestic legal systems. The German Basic Law (hereafter, Grundgesetz) obliges that takings serve the public good. Accordingly, property must be expropriated only for that public good and compensation is determined by “an equitable balance between the public interest and the interests of those affected.” 202 Even compensation therefore accounts for communitarian interests outside the ambit of welfare enhancing utilitarian concerns. In Italy, private property may be expropriated “for the purposes of the common good.” 203 In the United States, government takings is called eminent domain. The Fifth Amendment guarantees the State’s right to take land if that expropriated property is for public use and justly compensated. 204

What is interesting for our analysis is recent case law that addresses the capacity for private enterprises to directly benefit from government takings. The deeper question presented here is whether the private domain must relinquish rights to an economic asset when the end involves not societal, but private interests. If so, then government takings undermines the exclusionary mechanism and opportunity costs at the heart of property rights. *Kelo v. City of New London* tackles this very question. In *Kelo* the plaintiff challenged the city’s takings of property to allow a private developer initiate a comprehensive development project, arguing that economic development did not constitute public use as delineated under the Fifth Amendment,

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202 Grundgesetz Art. 14(3).
203 The common good criterion is conditioned on the property “operates in the field of essential public services, energy sources or monopolies and are of general public interest.” See Article 43
204 United States Constitution, Article V. Note that the takings clause is applicable to State governments as well through the XIV Amendment.
particularly development benefiting private actors. The US Supreme Court, in a 5-4 ruling for New London argued that “promoting economic development is a traditional and long accepted function of government”\(^\text{205}\) which, in addition to removing blight, might fall under the purview of public use despite having a private component. As per the decision in \textit{Kelo}, it would seem that the sanctity of private property is subject to expropriation when society through democratically elected local government deems a cost-benefit application salient, regardless of whether it occupies a purely public or hybrid public-private domain.\(^\text{206}\) In response to the uproar over \textit{Kelo}, then president, George W. Bush, signed an executive order prohibiting takings from advancing the interests of private entities.\(^\text{207}\) Takings may still involve private entities serving a public end, albeit with a strong burden of proof. Private interests, then, cannot spearhead government takings in the US system. The Lockian and Blackstonian opportunity cost tied to ownership is secondary to community, but not individual or group wealth. As such the allocation of any asset in a market structure presupposes that public utility may play the role of usurper, if and only if the welfare of society is legitimately affected. But here we only look at property. Let us take a more humanely applicable example: states of emergency.

\textit{Property rights during states of emergency}

During states of emergency fundamental property rights may be suspended. Like eminent domain, declared emergencies clarify what rights can (and by extension, cannot) be suspended, and the general criteria by which an asset may be subject to matters of efficiency or public interest. The significance for this paper is clear: a tension exists between the fundamental rights of the community and the fundamental rights modernity has codified as inherent in all mankind. This tug of war impacts the extent to which citizens internalize negative externalities when they arise out refugee absorption.

The language of full inclusion arising from supreme and constitutional courts (e.g. the universal tenor of constitutional amendments and international human rights instruments) is often at tension with domestic concessions during a declared emergency. The roots of this dichotomy appear to be Aristotelian, as the community in \textit{Nichoimean Ethics} is judged by its ability to engender a good or noble life for its citizens and the law must serve this purpose.\(^\text{208}\) It thus stands that derogation from lofty precepts must serve an equally noble end. Locke discussed this very issue in the context of executive prerogative: acting without or against the law for the public good.\(^\text{209}\) In the American tradition, exception is grounded in a Jeffersonian

\(^{206}\) Interestingly, an interpretation of the \textit{Monaghela Navigation} case suggests that possession is limited to a strictly legal interpretation. Takings triggering just compensation are in the Court’s words “for the property, and not to the owner.”
\(^{208}\) “For although it is worthy to attain it [human good] for only an individual, it is nobler and more divine to do so for a nation or city-state.”
understanding of sustaining life, liberty and property. The reasoning is circular. Self-preservation through stepping outside the law ensures that the law will not be lost, and life, liberty and property with it. Even so, stepping outside the law, including abridging property rights, must be for necessity and not undermine fundamental societal values.

The question of what limits constitute necessity is a vexing one. American president Abraham Lincoln, for example, suspended habeas corpus in 1861, at the beginning of the Civil War. Lincoln was less concerned with whether his actions were “strictly legal or not” but focused on what he termed “public necessity.” History has vindicated Lincoln through his achievement of a just end. As it has cartelization of industries and abandoning the gold standard during times of emergency. It has not been so kind to the confiscation of property of Japanese-Americans during the Second World War. An important lesson is henceforth derived: the content of public safety, public utility, and public interest, emanate from an amalgam of constitutional principles and their modern day interpretation. All are thus subject to shifting social currents.

Exceptional states have become forged into positive law through emergency laws, claw-back clauses and derogations, providing a legal basis for acting outside everyday legality. In effect, this creates a “double-layered constitutional system” by institutionalizing the exception. It enables standing, simultaneously, inside and outside the law. The rationale for doing so is to enable sustaining the law in the long term. As a component of that self-defense (e.g., derogating in the short-term for long-term benefits) the exclusionary nature of property is shifted onto the State. An asset temporarily abdicates the full continuum of its autonomy. The excludability of the private becomes the excludability of the State under the condition that an asset itself cannot constitute a non-derogable component of society’s moral core values.

How have courts treated derogations from property rights? Echoing Nebbia v. New York, property rights are not absolute. Property is litigated based on a balance between community and individual interests and emergencies hold a trump card over the individual so long as abridgement of individual property rights do

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211 The modern incarnation of states of emergency begin with the French Revolution and involve the government placing restrictions of certain rights and conduct in order to resolve a crisis. A clear link is typically made between restrictions and a goal, with the former validated by public necessity. This point is essential. States of emergency have also been linked to more permanent situations.
214 Found in Hirabayashi v. United States to be “not wholly beyond the limits of the constitution.” Hirabayashi v. United States, 320 U.S. 81 [1943] @ 101. “The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.
217 Neither property rights nor contract rights are absolute.” Nebbia v. New York 291 us 502. (1934) at 523
not undermine the goal for which the emergency was declared. This is because the measuring stick during an emergency is harm. Shifting excludability from private to government presupposes a decrease in harm to the community. Interestingly, this thought process is very in much line with Coase, who writes that “All property rights interfere with the ability of people to use resources. What has to be insured is that the gain from interference more than offsets the harm it produces.”

Harm, in the Coasian context may be more about reducing spillovers and transaction costs than moral interpretation or emergencies. Nevertheless, an exclusion-access binary is configured upon society’s interpretation of ‘gain’. In Coase’s view, gain is personal. It is utility maximizing. Calbresi includes distributional concerns to property rights. Emergencies take into account the individual as well as distributional, adding to them a deontological component predicated on interpretations of constitutional precepts. Posterity has decided that a decrease in harm to the community that does not include dismantling core societal precepts is acceptable.

A closer look at how international Treaties and regional case law has elaborated on this nexus reveals that core rights may not be abridged. Article 4 of the ICCPR provides for derogations “In time[s] of public emergency which threatens the life of the nation” only “to the extent strictly required by the exigencies of the situation” and contingent that the derogations “are not inconsistent with their other obligations under international law.” Derogations during a state of emergency may thus be undertaken for a nation to save itself. But the Convention is clear that a nation cannot save itself by becoming something else then itself (negative). This implies that the life of the nation is not extending the lifeline of a particular government nor undergoing a metamorphosis to a repressive State, but balancing rights with necessities. Similarly, all three regional regimes have derogation or claw-back clauses. For the purposes of this analysis the European system is most relevant. Under Article 15 of the European Convention derogations are permissible when there exists a threat to “the life of the nation… provided that such measures are not inconsistent with its other obligations under international law.” Subsequent case law has elaborated on what may not be derogated. In Lawless, Strasbourg positioned ‘exceptional situation of crisis’ as impacting

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218 Coase, The federal communications commission, supra 153, at 27.
220 European Commission for Democracy Through Law, Opinion on the Protection of Human Rights in Emergency Situations, 66th Plenary Session, Opinion No. 359/2005 (April 4 2006) at para 36. “A balance has to be found between national security, public safety and public order, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other hand. Then assessment of the fairness and proportionality of the balancing of public and private interests has to be determined by the concrete situation and circumstances. The bottom line, however, is that the right or freedom concerned may not be curtailed in its essence.”
221 “…and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” ICCPR at 4(1)
222 Recalling Nietzsche’s warning, “He who fights with monsters should look to it that he himself does not become a monster. And if you gaze long into an abyss, the abyss also gazes into you.” Nietzsche, F. (1966). Beyond good and evil, trans. Walter Kaufmann (New York: Vintage, 1966).
223 Svensson-McCarthy, supra ??,at 215.
224 ECHR at article 15(1).
“the whole population and constitutes a threat to the organized life of the community of which the State is composed.” The scope postulated in Lawless, is supported by the Court in the Greek Case, which indicated that a public emergency must “involve the whole nation” and threaten the “continuance of the organized life of the community.” These derogations, are permitted, as A & Others v. United Kingdom reveal, because a State is “the guardian of their own people’s safety.” Essential for our discussion, is the implication that the measures provided by a Treaty or Constitution may be insufficient to protect the most fundamental constitutional principles.

Derogations are therefore not permissible for acts that undermine the fundamentals of a democratic society.

In Öcalan v. Turkey, Strasbourg observed that:

Article 3 of the Convention [prohibiting torture, cruel, inhuman or degrading treatment or punishment] enshrines one of the fundamental values of democratic societies....Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.

Similar rulings from the ECtHR have linked the inability to derogate during times of emergency to cases concerning no punishment without law, slavery, and servitude. From how the ECHR has been interpreted in Strasbourg, it is clear that the balance of fundamental rights and emergency sway in favor of the former. This is perhaps because derogating from the protection of fundamental rights would not only undermine fundamental values, but, it would create a new power not provided for by primary law.

Derogations do not create a new power. Deviations to protect the constitution in moments when it is unable to protect itself, may not overlap the bounds of the very entity whose values are in peril. Economic crises might necessitate remedies outside the usual ambit, but they cannot enlarge constitutional power. An example of this unusual twist can be read from the Schachter Poultry decision, where U.S. Supreme Court Justice Hughes wrote:

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the

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225 Lawless para 28.
229 Öcalan v. Turkey, 46221/99, Council of Europe, European Court of Human Rights, at para 97.
231 Rantsev v. Cyprus and Russia, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, §283; Stummer v. Austria, judgment (Grand Chamber) of 7 July 2011, § 116; C.N. v. the United Kingdom (no. 4239/08), judgment of 13 November 2012, § 65.
national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.232

The modern democratic conception of an emergency disallows the creation of prelegal power. As Chief Justice Hughes affirmed in the Blaisdell case, fundamental rights nor essential liberties may be abrogated, even in the case of an emergency.233 Notice, however, that in the above discussion restrictions on the law presuppose returning to a state of lawfulness. The rationale for public utility presupposes a non-authoritarian government that suspends rights as a tool to defend a democratic way of life and return to normal rule of law, in contrast to authoritarian regimes that use emergencies to expand restrictive laws even after de facto emergency has stopped.234

Applications to Refugee Protection

Fundamental societal values, as we have explored, underwrite economic efficiency in the Coasian, Calabresian, and Henry Smith dominated in rem property rights approach. To the extent that non-fundamental values can be compromised for the sake of cost-minimiztion, particularly lowering informational costs235 they may not, even in times of public necessity derogate from structures at the heart of the constitutional order. This reasoning is straightforward: to sacrifice the core would be to deconstruct what derogating aims to protect. Kantian in its logic, infinitely elastic means are inconsistent with a morally consistent future. Or as Ben Franklin would have it: “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”

Property law plays an interpreting function by which common societal values regulate ownership of an asset and make clear the latitude by which complex interactions can be undertaken.237 It provides the synthesis of what become justified expectations of control.238 And with refugee protection, control must be available on both sides of the equation: to the host and the hosted. This means that while a sovereign nation has the right to exclude refugees from being hosted on its own territory, it may not refuse to protect them without dislodging the moral obligations undergirding its norm commitments.

235 That further impact other transaction costs such as policing and litigation.
237 Property rights analysis of refugee protection helps interpret/is interpreted by European societal values.
238 Singer, supra 189, at 1289.
In general terms, just as property rights must heed fundamental societal moral structures, a refugee protection market must coexist with fundamental human rights values. The reasoning is perhaps circular: without the fundamental human rights values there would be no market. If protection is to be viewed as an economic good with utility, both positive and negative, a good that moreover is able to be transferred, then protection must satisfy both the political community of a host State and the refugees they protect. Informational mediation and more generally, coordination, occurs on this fundamental level where allowing those under persecution to suffer offends the moral calculus of most people. Secondary coordination, what Smith calls “governance strategies” can only come after fundamental market precepts have been satisfied. Fundamental here means offering protection when a refugee enters EU territory as per the 1951 Convention. Second-tier relates to the how. The how here is akin to what Smith and Merrill refer to as “pragmatic situational morality” in which “decision makers can afford to let other moral considerations in, including the case-by-case pragmatism characteristic of modern utilitarianism.” Within the realm of refugee protection this refers, for instance, to supranational laws, quotas, and reception directives. More poignantly, it refers to a Member State’s preference whether to fulfill its quota on its own territory.

Heterogeneity among EU and select OIC Member States presumes there will often be conflicting second-tier values. Some Member States will want to host. Some will not. Most will have annual optimal levels of absorption. A market cannot be disconnected from the society. While the “conventional and moral architecture” of the law precludes perverse counterfactuals preferences cannot be misrepresented as competing core values. Rather, they are strategies to optimize protection through a gauntlet of cost minimizing scarce resources, balancing labor market concerns and maintaining domestic political capital. Coordination between actors must acknowledge the role that this trifecta plays in a market mechanism.

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239 Protection in refugee terms, a market must satisfy the basic components of dignity and liberty before it can decide the where and the how. These baselines have been codified in treaties. They have been crystallized in domestic and supranational laws. And though the shifting bounds of society means that in general terms, the underlying framework governing social interactions will not remain static, for affording dignity and liberty to morph into a distinctly different forms, what constitutes modern day Europe would need to be upheaved. The thought progression that led to abolition of slavery and allowed women to vote, promoted equal rights for homosexuals is unlikely to devolve into a framework that quantifies and ranks dignity on an ordinal basis. The sticks that are malleable are not the core of the larger bundle. They are not the contours that defines European society.

240 If property as assets coordinates interactions over an object or space, in a property-based analysis, refugee protection communicates and litigates the boundaries of a moral right to safety from persecution and actualization of human dignity.

241 Morality of Property, supra 159

242 Pakistan provides a case in point. From ---- to 2015 Pakistan was the largest refugee hosting State. Interestingly, Pakistan is not signatory to the 1951 Convention or 1967 Optional Protocol. From a domestic reading of Pakistani law, the prelegal intuitions that undergird refugee protection are moral in nature. They consider efficiency as a subset of the larger moral-based norm. Allocating protection in a market must accept that pragmatism or a purely State centric utilitarian approach will be infused with the moral tectonics shifting beneath the market mechanism. Case sensitive adjustments such as privately held optimal levels of refugee absorption, or North-to-South transfers do not offend the core morality of protection, just as balancing in nuisance laws, or liability laws that do not provide supererogatory damages.


A property rights framework reveals how a market-based mechanism trading in refugee protection may result in Member States not hosting in excess of their privately optimal absorption quota. When absorption reaches congestion, Member States may sell their quota to EU or select OIC States. Though Bertrand-like competition in the matching mechanism and the market being strategy-proof and stable account for its efficiency (Section 3.5) a market for protection is possible because cost-minimizing and allocating an asset based on efficiency—who values it more—cannot remove itself from the core value of protecting and providing dignity to those facing persecution.

**Part II: Market-Based Solutions**

2.1 Burden Sharing

As mentioned in Part I, burden sharing outside the EU has suffered from an incentive incompatibility. Namely, the interest of many EU States to remain in the refugee regime but shoulder the least amount of burden has precluded meaningful sharing arrangements with the Global South, and hence, the OIC, who count a number of African States as members. This status quo has functioned from an EU perspective so long as the number of asylum seekers to mainland Europe was below a privately optimal number held by EU Member States. Advances in technology, smuggling networks, bridges in informational asymmetries, and crystalizing positive rights have, however, upheaved the status quo.

In the literature, two broad categories of burden-sharing arise: human and monetary. Within the EU human transfer such have been suggested since 1994 when Germany failed to pass a proposal allocating temporary protection seekers based on Member States’ GDP, population, and size. In 2000, the Kosovo Evacuation Programme (KEP) proposed non-binding unilateral quotas on accepting Kosovar refugees temporarily residing in The Former Yugoslav Republic of Macedonia. And more recently, 40,000 refugees were allocated to be transferred from Italy and Greece under emergency measures derived from Article 79(3) of TEU. In non-EU regions, such transfers have become common practice. Australia has paid Nauru, Papua New Guinea, Indonesia, and Cambodia to resettle or temporarily detain asylum seekers. The “Pacific Solution” in which Australia processed refugees offshore, as well as the more recent Regional Resettlement

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245 To prevent holdup problems, quotas must retain a fixed annual price. Transaction costs from monitoring are borne by the UNHCR. Other transaction costs relating to payment to third parties and transport are offset by domestic political capitol.
Arrangement between Papua New Guinea and Australia may not constitute the most ethnical example, but show a willingness to provide some structure to claimant transfers.

Money-sharing schemes have also been suggested in the literature, notably by Bettis (2003), and have ostensibly been employed for years. The European Refugee Fund (ERF)\textsuperscript{247} whose redistributive effort have been likened to “a drop in the ocean”\textsuperscript{248} provided assistance until 2015, proportionally, to Member States hosting refugees. Currently, on top of the already deep-pockets of the Asylum Migration and Integration Fund (3.1 billion Euro from 2014-2020),\textsuperscript{249} there exists allocations for regional development and protection programmes (30 million Euro allocated for 2016), healthcare (60 million for 2016), and an emergency fund recently proposed by the commission with a startup of 1.8 billion Euro. These do not include deterrent efforts such as sea-borne rescue, Operation Triton and Poseidon Rapid Intervention (120 million Euro), providing Turkey refugee management-related assistance (79 Million Euro in 2015),\textsuperscript{250} the 3 billion Euro extracted from both the Union and individual Member States, for Turkey approved February 2016, as well as many other costly non-entrée schemes.

The drawback of money-based burden-sharing endeavors are the transaction costs associated with implementation and the difficulty monitoring how money is spent. Corrupt bureaucracies might siphon funds and provide poor quality of protection. In theory, this externality might be mitigated by UNHCR administration, which already represents a piecemeal burden-sharing financial approach, and has presences in EU and OIC States. This would substantially reduce the transaction costs associated with monitoring and implementation, as well as allay concerns about quality of protection, excessive agency participation, and flow of information. Critics have argued, however, that a centralized system would still entail high transaction costs.\textsuperscript{251}

The theoretical literature has likewise tackled burden-sharing. Hatton (2015) provides a model where asylum is viewed as a locally provided public good, which, in the absence of cooperation is underprovided.\textsuperscript{252} Hatton foresees this optimal burden sharing being realized through either refugee transfers or asymmetric compensation from a common pool. However, Hatton’s model, like Moraga and Rapport’s (2014, 2015) suffers from an assumption of what States see as socially optimal.\textsuperscript{253} Insufficient

\begin{itemize}
\item \textsuperscript{247} Created from TEU, Article 63(2)(b).
\item \textsuperscript{250} COM (205) 240 final at 8.
\item \textsuperscript{252} Consequently, EU-centric policymaking has the opportunity to produce socially optimal results. This contrasts with harmonizing policies at a national level. Hatton, T. J. (2015). Asylum Policy in the EU: the case for deeper integration. \textit{CESifo Economic Studies, 61}(3-4), 696.
\item \textsuperscript{253} This point, particularly in light of a 2010 EU Commission Report finding that nearly 40% of asylum applicants would be transferred, with approximately 15% of those transferees to new EU States, many of whom have expressed strong reservations about hosting refugees. European Commission (2010), Study on the Feasibility of Establishing a Mechanism for the Relocation of Beneficiaries of International Protection, JLX/2009/ERFX/PR/1005, Directorate General of Home Affairs, Copenhagen.
\end{itemize}
quarter is provided to States that see hosting in excess of their privately optimal number an externality no matter the compensation. Neither do either proposals address the possibility that a boundless definition of protection might exceed the total annual number of incoming claimants.

2.2 Market-based options: inside and outside the literature

Market-based solutions are one approach to burden-sharing. Outside academia, the only refugee markets that have been implemented involve resettlement and dispersal schemes. Resettlement refers to “the transfer of refugees from an asylum country to another State that has agreed to admit them and ultimately grant them permanent settlement.” Since 2013, the EU has allocated nearly 40,000 resettlement spaces. In addition, 50 million euro has been allocated by the EU for 2016: 20,000 individuals living outside of the EU and identified by UNHCR as unable to remain in safety in the respective country of origin will be resettled. This prototype may be subject to future binding legislation.

Dispersal refers to moving refugees from an area deemed over-concentrated and is typically conducted within State territory. An example is the no choice dispersal of asylum seekers from London to southeast England in 2000. Dispersal has also been common in the last decade the Pacific, where Australia has excised land and declared it international territory, dispersing refugees from the Australian mainland.

Within the walls of academia a much wider array of options circulate; their framework is often derived from Coase’s discussion of crop and cattle markets and include recent proposals in environmental policy papers on ‘cap and trade’ emission solutions. The literature dealing specifically with markets and immigration is indebted to two papers, one by Hathaway and Neve (1997), and the other, Peter Schuck (1997), who contemporaneously proposed tradable quotas in refugee protection. More recently, studies have explored markets for auctioning visas, a low-skilled labor tax subsidy mechanism, and an EU-specific refugee market. The latter, proposed by Moraga and Rapport (2014) involves a refugee matching mechanism that reveals both refugee and destination countries preferences. Compensation is paid for States absorbing in excess of their refugee quota. It is unclear, however, how the authors presume to reach an

255 European Commission. COM (205) 240 final, at page 5.
257 Coase, Social Cost, supra 152.
efficient arrangement for refugees in excess of an EU directed absolute number.\textsuperscript{262} Other notable proposals have involved “interest-convergence groups”\textsuperscript{263} that fulfill quotas through “common but differentiated responsibility,” centralized funds that compensate refugees and host nations,\textsuperscript{264} and debt-based deductions from regimes responsible for persecution.\textsuperscript{265} The drawbacks of many of these systems are the negative externalities not captured in dyadic market transaction such as social unrest, security, and difficulties integrating new members into civil society. Feasibility and legal soundness also plague such proposals.

\textit{Trading}

Markets typically involve transactions that compensate one State for absorbing the quota of another. They are often modeled in two steps. Perhaps most famously elaborated upon by Schuck (1997, 2014) the first step consists of a quota set by an international or supranational agency.\textsuperscript{266} A burden-sharing system that deals with an absolute number disproportionality benefits wealthier and larger countries and so equity presumes multiple criteria. To discharge their quota, States can offer protection to refugees within their borders or sell a portion of their quota, bilaterally. This allows States with a preference for not hosting to pay what amounts to an exclusion toll. Refugee protection quotas may have a fixed price based on a single commodity, or may be satisfied holistically. Compensation in Schuck’s system, for example, is not fixed and has the flexibility of trading in goods, which “encourage[s] states to exploit their heterogeneity through exchanges that serve both their self-interest and the public interest in refugee protection.”\textsuperscript{267}

While trading refugees may lead to an efficient outcome within a geographically limited domain, as Bubb et al., (2011) point out, where North to South transfers are a component of the market, asylum seekers might forgo the perilous northbound journey, travelling directly to neighboring countries, thereby distorting levels of compensation from transfers. Such a distortion may lead to a prisoner’s dilemma whereby a Southern State’s best option is to forgo a joint EU-OIC system unless they could be receive commensurate compensation.\textsuperscript{268} In a general equilibrium model, it is therefore necessary to for the mechanism design to account for non-dyadic costs, particularly unilateral South-to-South migration

\textsuperscript{262} One of the conditions for their model is “the market would not apply to all refugees or asylum seekers at the doors of the EU but only to a predetermined number that Member States would need to agree upon.” Moraga, J. F. H., & Rapoport, H. (2015). Tradable refugee-admission quotas and EU asylum policy. \textit{CESifo Economic Studies}, 61(3-4), at 651.


\textsuperscript{265} Blocher, J., & Gulati, G. M. (2015). Competing for Refugees: A Debt-Based Solution to a Humanitarian Crisis. \textit{Available at SSRN 2674831}.

\textsuperscript{266} A snapshot of what a quota system might look like comes from a recent measure under the Juncker Administration, where redistribution of 40,000 refugees from Greece and Italy to other EU Member States be based on population size (40%), total GDP (40%), asylum applications received and resettlement offered within the last five years (10%), and unemployment rate (10%). European Commission. Press release: First Measures under the European Agenda on Migration: Questions and Answers.’ Last accessed January 12, 2016 from \texttt{http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm}.

\textsuperscript{267} Schuck 1997, supra 249, at 283. Heterogeneity in refugees themselves (i.e., education, job skills, and language abilities) may skew a market if not properly designed to avoid selection bias.

\textsuperscript{268} Bubb et al., supra note 67, at 399.
Comprehensive Trading

Markets may also be configured to optimize comparative advantages of diverse agents. Thielemann & Devan (2006) coin the ‘comprehensive trading.’ Such a model views protection as a global collective good whose quota includes non-tradable goods and services, such as peacekeeping and post-conflict justice. Burden-sharing might include the contributions of peacekeeping, reconstruction, and efforts subsumed under the general category of ‘deterrence.’ While an inter-agency needs assessment and quota configuration entails higher transaction costs than a tit-for-tat or single agency model, they will more than offset the increase coverage in protection and the ability to absorb in excess of the quota allocation for wealthier Northern States.

Such a market-based mechanism may approach equilibrium, since, in contrast to the public goods literature which predicts smaller countries exploiting larger ones, peacekeeping burdens are carried by larger countries. In our context, a flexible quota system would account for the preferences, strengths, and comparative advantages of both EU ad OIC States. OIC States unable to physically host refugees, but able to contribute to peacekeeping, peacebuilding, or deterrent operations may, for instance, offset peacekeeping expenditures of hosting States.

Criticisms

Several criticism have been launched at market-based approaches. The commodification of human beings, a multi-faceted argument involving both ethical and economic arguments regarding norm-erosion is dealt with at length in my forthcoming paper, Kaleidoscopes: on the legality of refugee transfers. Other criticisms have addressed feasibility, political will, regulation, and security. Milner and his co-authors, for example, in several texts, express concern that trading protection may lead to negative externalities in the security sector not captured in market transactions and therefore lead to over-incentivized trade.

Quality of protection has been a notable concern by human rights lawyers. Prioritizing quantity may result in a rush to obtain refugees in exchange for a desirable commodity, then providing less than stellar protection. This in turn may force Strasbourg to disallow transfers, even though the country may not fall under a non-refoulement category. This has already been seen in judgments from the European Court of Human Rights, which has effectively precluded Greece’s responsibility for incoming transfers, and

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270 Thielemann 2006, supra 267 at 24.
transfers to Italy now require special arrangements. Shirking standards and free-riding off more developed protection initiatives would be effectively precluded under a comprehensive market.

There has also been criticism launched over a potential EU-wide tradable refugee quota market, pointing to the fact that the current EU refugee system is not strictly command and control. The semblance of an ad hoc market arose when Hungary and Greece stated their preferences for not hosting refugees and German Chancellor Angela Merkel welcomed migrants northbound, en masse, without numerical qualification. Protection could in theory achieve Pareto efficiency through Member States engaging in intra-EU bargaining without the high transaction costs of a centralized agency responsible for establishing quotas and monitoring protection.

Unfortunately such optimism is illusory. Merkel’s Market has already proven unsustainable. Germany and Sweden have stopped welcoming unlimited numbers of refugees, and anti-refugee States have calcified their opposition. There is no consensus on a mandatory quota system, in large part because observable factors such as GDP, population, or land size, the suggested criteria, do not sufficiently account for State preferences. Inversely, forming a ‘hosting ability’ distributional key, would likely be undermined by State incentives to distort their true capacity.

**Why not an exclusively EU market?**

This paper proposes a joint OIC-EU market. But why not simply an EU market, which would have far lower transaction costs and deal with unified international obligations of protection? One such example might come from Moraga and Rapoport (2015). After implementing a bare bones initial EU-wide quota based on observable factors, the M&R model incorporates matching devices to mitigate the principle-agent problem arising out of misaligned preferences. Similar to the top-trading cycle mechanism proposed in the literature for housing assignment, refugees rank their country preferences, Member States bid on a quota of protection, and are compensated for the amount they host by destination countries with an unfulfilled quota. The EU could be responsible for enforcement through collecting unfulfilled quota penalties based on an initial distributional quota to be agreed upon at an EU level. Other models include similar mechanisms that differ in how quotas are traded and refugees selected.

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274 Despite these difficulties lack of ex ante information about true capacity to host may be revealed over time through a system of tradable quotas.

275 Not all OIC Member States are party to the refugee Convention. Pakistan, for instance, hosts over 2 million refugees and is a non-signatory.

276 Moraga & Rapoport, supra 12.

From the point of view of this paper, the problem with these exclusively EU markets is that they place an ex ante ceiling on the legal definition of protection. When the number of claimants exceeds the privately optimal number of all 28 Member States, the marginal benefit from protection will outweigh the cost of protection for the entire EU. States with less positive rights and active NGOs will free-ride, leading to an under-provision of protection. Taken a step further, an exclusively EU model that deals with a non-finite quota number and adheres to international law operates under three assumptions (a) that deterrent measures can stem the tide of claimants below the point of congestion; (b) that ineffective screening procedures do not trigger a race to achieve more stringent standards to assess asylum seekers; (c) and that those not adjudged as claimants and those that have their refugee status lifted will repatriate.

This paper believes that all three assumptions are unrealistic. Firstly, deterrence can be accomplished either through preventing war, persecution, and poverty (utopian), preventing access to mainland Europe (nearly impossible), more stringent immigration laws (empirically inconsistent) or disincentivizing economic migrants to pass as refugees (unrealistic without incorporating the threat of extraterritorial transfers). Secondly, informational asymmetries make screening unreliable, this despite that 55% of refugee claimants were denied in 2014. Thirdly, as to be discussed in Section 1.4, returning unsuccessful claimants has been highly ineffective and repatriating former refugees compounded by legal barriers. An OIC-EU partnership potentially alleviates all three concerns.

2.3 Why an OIC-EU Market?

What are the advantages of an OIC-EU refugee protection market? As discussed above, an exclusively EU market might exploit common funds, centralized bureaucracy, pan-European values, and have less administrative hurdles. Common market structures would also more efficiently streamline non-monetary goods. Overall transaction costs would be lower. Furthermore, the breadth of the OIC’s political, economic, and geographical diversity has several notable drawbacks. Transfer of money or other goods might be restricted by trade treaties, security provisions, and less than half of OIC countries are considered non-refoulement by EU Member States. Most strikingly, OIC countries host 52% of the world’s refugees. A market-based burden-sharing system cannot start tabula rasa, and EU States would be strongly disincentivized to begin their quota in the red. That having been said, there are also several benefits to an EU-OIC market that outweigh its externalities. These fall under three categories: (a) logistics (b) diversity of market (c) congestion.
**Logistics:** Since 2010, 92% of migrants assessed as refugees have fled from OIC countries.\(^{278}\) Although refugee burdens are most commonly suffered by neighboring countries, smuggling networks have dramatically changed the informational and logistical asymmetries in favor of migration to continental Europe. A joint market would be able to take advantage of geographical considerations and more efficiently process and allocate claimants *ex ante*. This may improve screening capabilities, as well as reduce the enormous transaction costs of *non-entrée* schemes conducted by FRONTEX. Importantly, it would have the ability to more efficiently process claimants before they undertake a perilous journey to Europe.

Why is large-scale extraterritorial processing not possible within an exclusively EU mechanism? While the UNHCR can and does currently process resettlement claimants bound for Europe in their home countries, it has proven ineffective in large-numbers. In 2015, for example, offshore processing amounted to less than 50,000 claimants. Moreover, UNHCR strategies and agency constraints do not at all time align with EU or OIC objectives. There are also grey areas. Significantly expanding an EU operation would run into the legal hurdles of an effective control definition that has expanded its legal space from a territorial oriented framework, to one including authority over individuals and the exercise of public powers. How and where migrants may be processed and interdicted now presents dilemmas not in existence a decade ago.\(^{279}\) OIC Member States exercising public powers on their own territory, aids the EU in avoiding the constraints of recent developments in the law.

Logistics are also aided by pre-existing structures. In contrast to an international approach which lacks feasibility and would be coordinated through an already inefficient UN bureaucracy, the OIC has several centralized organs crucial to resolving externalities and promoting commodities. Issues of trade have a centralized forum through the Islamic Chamber of Commerce, Industry and Agriculture (ICCIA) and the Islamic Centre for the Development of Trade (ICDT); banking through the Islamic Development Bank (IDB); post-conflict humanitarian concerns through the Humanitarian Organisations Council (HOC) and Islamic Solidarity Fund (ISF). Though without a single sub-organ, conflict resolution doctrine subordinates itself to UN precepts, is built into the OIC Charter, and is guided by its executive organ, the Council of Foreign Ministers. Already there is collaboration between the EU and OIC in matters of peacekeeping, terrorism, and refugees.\(^{280}\) This is not to say that implementation and monitoring between two supranational

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bodies will be fluid or have low transaction costs, only that the bureaucratic structures are firmly in place and have a distinct advantage over a fully international or newly created *ad hoc* network.

*Diversity of Market:* While regulating an OIC-EU market is far more complicated than an intra-EU market, OIC States bring to the table a number of comparative advantages. They are: (a) cost; (b) incentives to repatriate, and (c) diversity of commodities. Cost is straightforward. Providing protection in Cameroon or Malaysia is far less expensive than in the Netherlands, or even Estonia. For example, the estimated cost of a first year refugee in the United Kingdom is 24,000 GBP\(^{281}\) and Germany spends between 10,000 Euro per a refugee, per a year, on food and housing alone.\(^{282}\) Turkey, one of the OIC Member States with the highest GDP per a capita, estimates its 2015 refugee cost per a capita a 3,450 USD.\(^{283}\) Cameroon is less than an eighth of that figure.

OIC States also change the duration of stay incentive-structure after cessation of status has been declared. In Europe, a generous social welfare system and educational opportunities disincentive refugees granted temporary status to return to their home of nationality. As discussed in section 2.5, Europe also possesses a network of positive rights that impede the removal of former refugees after social and economic links have been formed. OIC Member States, on the other hand, are not hampered by such barriers. Moreover, the social and educational benefits are nowhere as generous in refugee hosting OIC Member States as those provided within the EU.

Related to this discussion is the differences in removal mechanisms for claimants denied refugee status. Europe has struggled to implement its Return Directive.\(^{284}\) In 2013, less than 40\% of irregular migrants refused asylum status were returned to their country of origin, despite such instruments as the Cotonou Agreement which provides for reciprocal readmission upon request.\(^{285}\) The expulsion rate for 2015 is calculated at 32\%.\(^{286}\) Neither have trilateral treaties such as the Pilot Project on Return with Pakistan and Bangladesh achieved higher success rates.\(^{287}\) Removal mechanisms in OIC countries have proven far more effective.

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\(^{285}\) Joint declaration on migration and development, Article 13(3), provides for readmission.

\(^{286}\) For example, out of 135,000 non-EU cases in Q4 2015, 65.00 have been conferred positive status, a rejection rate of 52\%. 2014 saw a 55\% rejection rate. Calculating off the 2014 baseline of 39.2\% returnees of those not given asylum are actually removed for EU borders, the real rejection-expulsion rate comes to approximately, 32\%.

\(^{287}\) Council Conclusions on EU Return Policy adopted at the Justice and Home Affairs Council meeting of 5 and 6 June 2014, as qtd in COM (205) 240 final, at 10.
The third category, diversity of tradable commodities, is more efficiently realized in an OIC-EU model than in the current EU asylum system. State-interests dictate that some countries will be xenophobic, while others will gain utility from hosting; there are wealthy refoulement States that can pay without hosting, and poorer safe countries welcoming an infusion in capital, particularly above the figure needed to host (Part III). Countries unable to host may fulfill their quota through peacekeeping or related development efforts, thereby freeing up expenses from hosting countries. Typically, the risk of such diversity is that insular States will defect as their incentives to cooperate in excess of their privately optimum absorption rate are limited. Schuck compares this risk differential to an insurance scheme where low risk participants will not engage in an average-risk premium pool.\(^{288}\) A quota system with diverse commodities, however, decreases the rate of defection as a State may fulfill its obligation more closely in line with its preferences.

Congestion

One unavoidable externality to offering intra-EU protection is the lack of an upper boundary. The ability to transfer refugees to select OIC countries somewhat tempers this congestion. In effect, the ability to pay others to fulfill one’s protection quota equates to a short-term exclusion toll in order to allay a long-term externality.\(^{289}\)

There thus remains the elephant in the room: 15 million refugees outside Europe that the EU is not obliged to share in the cost of protecting.\(^{290}\) It is unclear how a market-based solution can account for this enormous figure. In essence: why should Europe enter into a venture that might hoist additional responsibility upon them in excess of Pareto optimality? This question will be dealt with at length in Part III where the specific market mechanism is detailed.

2.4 Transaction Costs: temporal and territorial parameters

Determining the incentive-structure for a market-based solution must account for the costs of refugee protection. Is there an objective standard for how long a State is obliged to offer protection? Moreover, is a State legally bound to offer protection on its own territory?

In accordance with refugee law, refugee status may end when an individual re-avails himself to the protection of his country of nationality,\(^{291}\) acquires a new nationality, or when the “well-founded”

\(^{288}\) Schuck 2014, supra 271, at 87.
\(^{289}\) It also must consider that even a well-functioning EU specific quota systems may run into the problem of relative versus absolute funding: migrants in excess of the total annual EU quota need to be absorbed elsewhere. This is under the assumption that Member States will not voluntarily absorb migrants in excess of their proscribed quota.
\(^{290}\) Unfortunately, States already hosting refugees have an incentive to forcibly remove their registered refugees towards EU borders, then extract compensation for taking them back. Perversely, there may also be incentives for refugee-hosting countries to prolong the instability of persecuting regimes.
\(^{291}\) Despite no durable or fundamental change in his country of nationality, an individual retains the right to enter the country of his nationality. ICCPR, supra 20, at Article 12(4): “No one shall be arbitrarily deprived of the right to enter his own country.” It is important to note that returning and re-availing oneself to their home country is insufficient under Article 1(c)(4). The individual must be re-established taken to mean a
conditions by which he was declared a refugee no longer exist. Without refugee status repatriation may occur.

**Repatriation**

Repatriation can be separated into two categories: voluntary and mandatory. The distinction is critical towards a State assessing the long-term risk of accepting refugees.

Voluntary repatriation, what the UNHCR repeatedly refers to as “the preferred solution” may transpire when conditions are unsafe, but typically occurs when there have been durable changes in the country of nationality and a cessation clause is enacted. For this to happen, a fundamental change must have transpired such that the individual will not be threatened with persecution. Changes must be “(1) fundamental (2) durable (3) and effective protection must be available in the country of origin.” There is thus a positive dimension to ending refugee protection.

Changes which are cosmetic or not causally linked to the reason a refugee fled are not applicable. Germany, for example, refused to recognize genuine change in 1992 Romania primarily because of the continued presence of the Ceausescu era secret police. Similarly, the Federal Court of Canada, in Oskoy v. Canada, reversed a denial of refugee status to an Iranian applicant due to the Iran’s law of executions.

Time is another issue. Though the UNHCR recommends a minimum of 12 months to observe the permanence of changes, the UNHCR also places a more ambiguous threshold of “sufficient time to take

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292 Refugee Convention, supra note 17, at Article 1(C) 1-4.
293 UNHCR, Executive Committee Conclusion No. 89, Conclusion on International Protection, U.N. GAOR, 55th Sess., at Preamble (2000)
294 An individual may therefore repatriate in midst of violence due to his dignity trumping what a legal regime may be considered to subject him to persecution. UNHCR, Guidelines on International Protection: Cessation of Refugee Status Under Article 1C(5) and (6) Of The 1951 Convention Relating to the Status of Refugees, at 10-12. U.N. Doc. HCRIGIP/03/03 (Feb. 10, 2003)
295 UNHCR Statute, supra ??, at 6(e)(ii); Joan Fitzpatrick summarizes the gamut of both binding and soft cessation provisions as “(i) cessation of UNHCR protection under the Statute; (ii) cessation of State protection of refugees previously recognized on a group basis; (iii) individualized cessation for recognized refugees; (iv) withdrawal of temporary protection; and (v) denial of initial claims to asylum based upon changed conditions between flight and status determination.” Fitzpatrick, J., & Bonoan, R. (2003). Cessation of Refugee Protection. Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection. Cambridge/New York/Geneva: Cambridge University Press and UNHCR, at 492.
296 While Article 32(1) of the Refugee Convention, supra 17, declares that “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”
297 Public Statement, at 2.2. Protection, in the words of the UNCHR, “encompasses more than the absence of a risk of persecution; it requires the availability of effective protection.” Public Statement, at 4.1. Also, significant change is taken to mean “far-reaching political change, including democratic elections, reforms of the basic structure of the State, and (re)establishment of protection against the actions which caused the refugees to leave.”
298 In a COE Report, voluntary repatriation has been found to be significantly more cost effective than forced. COE. Report | Doc. 12277 | 04 June 2010. Last accessed 19 May 2016 from <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fideid=12461&lang=en
300 Hathaway 2005, supra 19, at 792.
hold.”\textsuperscript{302} Crucially, voluntarily repatriation according to the \textit{Voluntary Repatriation Handbook} must be just that: absent of any type of coercion or incentivizing.\textsuperscript{303}

\textbf{Mandatory Repatriation}

Must all repatriation be consensual? Reading UNHCR documents one would be led to believe this is the case. In fact, the voluntary nature of repatriation is not relevant to binding treaty-based obligations.\textsuperscript{304} This has been echoed rather succinctly by the English High Court’s position that, “Aspirations are to be distinguished from legal obligations.”\textsuperscript{305} It is thus critical to note that the recommendations of UNHCR as to when mandatory repatriation is possible, or even preferable, are non-binding.\textsuperscript{306} What is relevant is protection up until cessation of status. It is therefore important in this case to avoid conflating optimal from a refugee’s point of view with legally binding State obligations. Though mandatory repatriation is never promoted and rarely used by the UNHCR, as Michael Bartuciski reminds us:

\begin{quote}
We should not lose sight of the fact that international law concerns the imposition of obligations on States. It may be in the individual's best interest actually to remain in the host country and continue his or her life in exile, but is the State obliged to provide refuge if conditions in the country of origin have become safe within a reasonable time period? Clearly, States never agreed to such legal obligations.\textsuperscript{307}
\end{quote}

Though deferring to UNHCR is common practice, ultimately each host State may decide which countries constitute non-refoulers and the circumstances surrounding positive rights. Nevertheless, the UNHCR recommends that invoking the cessation clause should consider duration of stay, familial, economic and social links, and allow refugees to “maintain their established situation including the grant of permanent residence status”\textsuperscript{308} have frequently been incorporated into domestic laws. Challenging a State with strong domestic rights networks entails high transaction costs from general bureaucratic investigations and legal

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\textsuperscript{303} The “absence of any physical, psychological, or material pressure.” UNHCR Voluntary Repatriation Handbook, June 1996 at 2.3.

\textsuperscript{304} Hathaway 2005, supra 291, at 182.

\textsuperscript{305} R. (Hoxha) v. Secretary of State for the Home Department, [2002] EWCA Civ 1403 (Eng. C.A.), at paras. 46-48 as qtd in Hathaway, J. C. (2005). Right of States to Repatriate Former Refugees, supra 291, at 232. Also, at para 47-48: “Moreover, it must be seen as significant that the international community did not take the opportunity at the time of the 1967 Protocol to amend the proviso to Article IC(5) when it was considering the temporal scope of the 1951 Convention ... One might think it desirable that states should... recognise [sic] the humanitarian purpose which would be served by ignoring the restriction on the proviso to Article IC(5). But that is not enough to establish a legal obligation binding upon all parties to the Convention.”

\textsuperscript{306} See Hathaway, J. C. (2005) . Right of States to Repatriate Former Refugees, The Immigr. & Nat'lity L. Rev., 26, at 231. “While all states have the sovereign authority to allow any person they wish to remain on their territory and while it will often be humane and right to extend such generosity, this is not a matter fairly understood to be required by either the text or purposes of the refugee law” at 231.


\textsuperscript{308} UN High Commissioner for Refugees (UNHCR), Note on Cessation Clauses, 30 May 1997, EC/47/SC/CRP.30, at para 9.
\end{flushright}
States providing incremental benefits including access to the political community must thus consider the long-term implications of the difficulty to repatriate.

Transfers

If there is no cessation of refugee status, there may be transfers to a non-refoulement country, provided the transfer is conducted in safety and dignity. This enables the potential for market-based transfers.

The normative basis for this argument has been cogently laid down by David Miller. Because the claim of a refugee is not against a specific State, but all States participating in the 1951 Convention, the refugee is not entitled claim to a specific State, but only to have her case decided by a legitimate selection criteria and be hosted in any State that can meet the legal obligation to host. Legal, of course, includes relevant human rights treaties. How then does the State derive the right to exclude refugees vis-à-vis transfers?

The foundation for this claim is a territorial-based jurisdictional right. In democratic societies, it typically involve protecting a minimum core of basic rights to those residing in the respective territory. In order to develop “a fair system of cooperation over time, from one generation to the next” in countries whose institutions have been forged through a historical relationship between a country and its peoples, whose citizenry’s collective decisions have helped shape those institutions, preferential assignment of exclusionary rights is demanded. This is the distinction between claims originating in human rights and those in social cooperation. If externalities are predicted due to absorption of refugees in excess of an efficient (privately optimal annual number), then the State has a right to exclude, if and only if the State can provide a reasonable alternative.

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309 “A number of countries do not invoke the cessation clauses at least in part because of the administrative costs involved, including the costs of implementing review procedures; the recognized likelihood that even where cessation results, it may not lead to return because those whose refugee status has ceased will have the possibility to remain under another status; and/or a State preference for naturalization under Article 34 of the Convention.” Expert Roundtable, Lisbon, Port., May 3-4, 2001, Summary Conclusions: Cessation of Refugee Status, at para 2 (June 2003).
310 Miller, D. (2015). Justice in immigration. European Journal of Political Theory, 14(4), 391-408 at 394. This argument is also laid down by Miller by ay of an analogy of exit rights and marriage options. Freedom of movement and its collorary right of exit are valid only in so far as there is a country willing to allow one entry; similarly, marriage can be consummated so long as there is someone willing to marry you. See Miller, D. (2014). Immigration: the case for limits. Contemporary Debates in Applied Ethics, 363-375.
311 According to Miller (2015) a State “may decide to admit the refugee on a temporary or permanent basis. But it may also provide asylum outside of its borders by agreement with another state on condition that human rights requirements are fulfilled there” at 395. And at 396: “In the absence of an international procedure, states may legitimately try to limit their responsibility to what they reasonably judge to be a fair share of the total burden.”
315 Kates, M., & Pevnick, R. (2014). Immigration, jurisdiction, and history. Philosophy & Public Affairs, 42(2) at 194, surmise “only once we recognize the importance of the state as an institutional embodiment of the decisions of a particular self-determining political community that it might make sense to say that the current citizens of a state are entitled to restrict the entrance of potential immigrants.”
However, once a refugee develops familial\footnote{“Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.” Temporary Protection Directive, supra ??, at 23(2)} and economic ties, or health complications,\footnote{The Temporary Protection Directive states that those who “cannot, in view of their state of health, reasonably be expected to travel; where for example they would suffer serious negative effects if their treatment was interrupted. They shall not be expelled so long as that situation continues.” Temporary Protection Directive, supra ??, at 23(1)} the legality of transfer becomes murky.\footnote{Non-removal under the abovementioned ties has been supported by the Human Rights Committee which has stated that, “[Non-citizens] may not be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence.” Human Rights Committee, General Comment No. 15, The Position of Aliens Under the Covenant, at para. 7 (1986).} A number of rights are afforded to the former claimants that impose high transaction costs upon the State including rights corresponding to Articles 6, 7(1), 9(1), 10, 13,\footnote{“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” ICCPR, supra ??.} and 17 of the ICCPR,\footnote{Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 22, 1984, 24 I.L.M. 435, E.T.S. No. 117, at 2 (entered into force Nov. 1, 1988). Note: while I am familiar with the three Conventions and these Articles in particular, I am grateful for Zieck, at 252-253 for framing them within the context of the general legal burden placed on States before removing refugees.} Articles 10(1), 11, 12, 12(2)(a) of CESCRT, Articles 2,8,9,10 of the Convention for the Rights of the Child.\footnote{When "an alien has developed such a close relationship to his or her State of residence that it has become his (her) 'home country,' he is entitled, in addition to Article 13, to the nearly unrestricted protection against expulsion under Art. 12(4)." Manfred Nowak, U.N. Covenant on Civil and Political Rights, commentary 228 (1993) as referenced in Joseph, S., & Castan, M. (2013). The international covenant on civil and political rights: cases, materials, and commentary. Oxford University Press. Also see Walter Kalin as qtd in Zieck, at 257: What must be decisive in the context of Article 12(4) ICCPR is ... that the link between the immigrant and the country of immigration has become so intensive that the country of origin is now the point of reference in his or her life.”} Moreover, Article 1(1) of the European Convention for Human Rights limits expulsion of a legal alien.\footnote{See, for example, 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment1465 UNTS 85 / [1989] ATS 21; ICCPR, supra ??, at Article 7; European Convention, on Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S., 222, E.T.S. at Article 7.} Individual hearings must be provided during which the refugee will be able to provide reasons for extending his refugee status including past trauma, social, familial, and economic ties formed during his time in the host country,\footnote{Article 4, 4th Protocol, European Convention for the Protection of Human Rights and Fundamental Freedoms.} as well as any considerations relating to the possibility of being subjected to cruel, inhuman or degrading punishment.\footnote{African Charter on Human Rights and Peoples’ Rights, at Article 12(5); American Convention, at Article 22(9).} Scale takes on another face as well. Large-scale expulsion based on race or ethnicity is strictly prohibited under various regional instruments.\footnote{“Once people have been settled for an extended period, they are morally entitled to the same civil, economic, and social rights as citizens.” Carens, J. H. (2014). An overview of the ethics of immigration. Critical Review of International Social and Political Philosophy, 17(5), at 546.} 

Ethical mandates are likewise pressing with claims increasing over time.\footnote{Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). The articles from the three above-mentioned Conventions are conveniently delineated in both Hathaway 2005, supra 19, as well as in footnote 32 of Zieck, at 251.} Whereas temporary protection (i.e., temporary work and residence permits) may satisfactorily fulfill legal and ethical norms in the first instance, over time, justice concerns demand full integration into the political community. This may mean that asylum should be allocated based on the potential for the refugee to live long-term. Here we reach a
grey area. The law requires protection in the immediacy and for as long as necessary. Yet the law does not require fortune-telling. Absorption of refugees with the intent to lead to citizenship (very high probability that citizenship will be obtained) is, as Miller suggests, “a discretionary benefit over and above what justice itself demands.”327 As such, from a normative point of view, transfers must take into account projected length of stay, as well as incremental access to the political community of third party States.

**Potential Objections**

Anticipating *ex ante* UNHCR objections over refugee transfers to OIC countries may be gleamed from concerns over the ‘Turkey Plan’ by which Syrians transiting from Turkey to Greece are returned to Turkey. To be clear, the legal basis for refugee transfers differs from the Turkey Plan. The former rests on the safe first country principle derived from the Asylum Procedures Directive, and applies to refugees who could have applied for refugee status but did not or whose status was not yet determined.328 The first country must be willing to receive the refugee, but also to provide a durable solution that includes ‘sufficient protection’.329 Even though a market for refugee protection does not make use of the safe third country concept of first asylum, the UNHCR’s concerns over the ‘Turkey Plan’ sheds light on potential objections for a refugee market and therefore warrant further scrutiny.

Aside from *non-refoulement*, the UNHCR recommends that the first country provide “effective and available in law and practice”330 taken to mean accession and compliance with the 1951 Convention and 1967 Optional Protocol.331 In addition, there should exist no risk of further persecution,332 onward refoulement, and compliance should exist with international human rights and refugee conventions to include, but not limited to: health care, education, rights to work and ‘adequate standards of living’.333 Though the UNHCR’s expansive definition of ‘sufficient’ is not in itself binding, several points

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327 Miller (2015), supra 29o, at 397. The sentence continues: “so provided the distribution of this benefit is governed by defensible principles, no injustice is done to those who are not chosen.”

328 Return of the refugee to the first safe country is optional, and the refugee may rebut and also appeal the transferring State’s decision. In addition to an interview to determine admissibility Art. 34(1) APD, the refugee may have the right to legal counsel Art. 22(1) APD, and an effective remedy before a judicial body Art. 46(1)(a)(ii) APD. Under Article 35(d) of the APD Turkey may be considered as safe (Article 38) country of first asylum.


330 UNHCR, ‘Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept’ (23 March 2016) at 3.


333 UNHCR, ‘Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept’ (23 March 2016) at 3.
are derived from Treaties and Covenants that all EU Member States are bound by, not to mention case law guided by readings of the ECHR under Article 3 and 13. Whether transfers in general require interpretation by the CJEU under 276(b) of the TFEU is debatable; it is nevertheless common sense that a blatant disregard for the consensus EU minimal standards that fulfill ‘sufficient,’ ‘effective,’ and ‘adequate’ risk illegitimating transfers. There likewise is a concern when dealing with authoritarian or semi-authoritarian third party States whose unpredictable activities may invalidate their status as safe hosts.

**Positive externalities**

Transfers, despite their hurdles, may also have a deterrent effect on economic migrants thereby increasing the efficiency of the CEAS. If North-to-South transfers are well-established and information sufficiently diffused, a protection market may reduce the incentive for economic migrants (as opposed to genuine refugees) to apply for refugee status in wealthier countries as they are subject to transfer even if a fraudulent claim was accepted. Individuals fleeing persecution, however, would presumably be glad to be hosted in any safe State. North-to-South transfers are on paper, an incentive-compatible way of the EU ascertaining allocation of refugees and aid in screening problems.

This scenario has been modeled in the literature by Bubb et al. (2011) where refugee protection forms a Pareto improving contract in which the 1951 Refugee Convention propels States to provide an efficient level of protection. However, levels of public benefits create a free-riding problem, whereby those not under persecution seek to deceive authorities, reducing the utility for genuine refugees. The result of these screening problems over whether a claimant is a refugee, migrant, or potentially harmful agent, disincentives Pareto efficiency, prompting more stringent standards for claimants, thereby reducing the number of refugees and occasionally leading to *refoulement*, and strategic complementarity, whereby other States, particularly contiguous in proximity, will increase their standards of proof. Transfers compel purely economic migrants to reassess the incentives to undertake a costly and perilous journey.

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334 Whether false cases (those deemed to be economic migrants) would have the opportunity for transfers is another issue. On the one hand, including migrants would reduce the number of false negatives among genuine refugees unable to provide proof of their perilous situation, thereby preventing potential *refoulement* cases. On the other hand, including those deemed economic migrants

335 Bubb et al, supra 68, at. 368.

336 Ibid.
Part III: The Mechanism

The proposed market involves eight steps. They are:

1. Preliminary (a) determining which OIC States fall under non-foulers; (b) setting an EU minimum absorption number per Member State;\(^ {337}\) (c) ensuring UNHCR monitoring apparatus in place; (d) creating a market specific database of refugees.
2. Setting a protection quota price systematic across all nationalities; harmonizing determination of status and eligibility procedures.
3. Allowing Member States to set their annual refugee absorption number.
4. Allowing select OIC States to set an annual absorption number.
5. Asylum seekers determined as refugees would be allocated using a matching mechanism.
6. Refugees arriving in excess of protection quotas will be allocated to participating OIC States.
7. Refugees in excess of both EU quotas and OIC absorption will be granted temporary status.
8. Integration Programme tailored to matching mechanism

3.1 Preliminary Measures

(a) After forging a bilateral OIC-EU agreement, a list will be populated of OIC States deemed to be safe from torture, cruel, inhuman and degrading punishment under Article 3, ECHR. Ideally this list will be unanimous among EU Member States. However, where there is strong opposition among only one or two Member States that OIC State might be accepted and refugees allocated proportionally without the consideration of the opposing parties. (b) The EU must then set up a minimum annual absorption rate. This number can be conceived using the current 40-40-10-10 divided by a total number agreed upon in Brussels. (c) UNHCR already has a presence in all potential OIC destinations. However, additional staff and streamlined monitoring mechanisms must be emplaced before transfers transpire. UNHCR trainers can upskill their domestic counterparts providing jobs for the local economy. Such a system will maintain low transaction costs. (d) Refugees must be included in a database to keep track of preferences and to prevent overlap. This includes biometric information. The current EURODAC system is sufficient.

\(^ {337}\) In addition to the aforementioned 40-40-10-10 formula, Thielemann and his co-authors have suggested a combined capacity index. Thielemann, E., R. Williams, C. Boswell, and Matrix Insight Ltd. (2010), What system of burden-sharing between Member States for the reception of asylum seekers? Study. Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, European Parliament, Brussels as mentioned in Moraga & Rapoport, supra 12, at 646.
3.2 Setting a price for Tradable Protection Quotas

Setting the mechanism in motion requires both harmonizing status determinations and setting a market price. On the first point, EU Member States have an incentive to establish a centralized positive status determination instrument, as failure to do so would leave them out of the market mechanism and thus threaten receiving ‘less desirable’ refugees as per their respective preferences. What’s more, uniform status determination is not a novel idea and has been agreed upon the EU’s 2011 Qualification Drive (but not yet implemented).

A protection quota price must also be agreed upon. This may work in two ways. Either the market can set its own price and allow Bertrand-like competition to allocate quotas efficiently. Or, a single price for a protection quota may be established annually. The first measure may raise serious ethical concerns as it parallels bidding on human beings in slave markets. Qualitatively it may not much differ from setting a single annual price across all quotas, yet political capital is essential in such a venture.

Returning to our discussion on property rights, although the State does not own the refugee, it owns the right to protect the refugee. The fact that there is a cost to society beyond a certain measurable point, further suggests that protection is rivalrous and therefore cannot be treated as a pure public good when designing a market mechanism. Without property rights (and by extension, the ability to exclude and transfer) it is not at all obvious that a socially optimal amount of refugees will continue to be protected. In fact, property rights theory suggests that without the right to exclude, transfer, or free-ride, amending the 1951 Refugee Convention and its Optional Protocol may the dominant strategy.

Protection is non-rivalrous up until a point where the marginal cost for hosting (to include successful integration) is less than the marginal benefit from hosting. To see why, we might turn to Hardin’s seminal work on the commons. Let there be a country C for whom refugees [r₁,…,rₘ] ∈ R are interested in living. If a fraction x of R refugees moves to country C, then the benefit to members of country C equals f(x) for a function f(.) However, the more refugees that enter country C, the less resources are available to integrate them into the labour market and political community. Meaning that f(.) is increasing. So if f(x) =z-x for all z<1, refugees are beneficial (a positive externality) until x reaches z. Increasing refugees beyond the point x=z signals a negative benefit (externality) per an additional until of refugee protected.

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So if the total positive benefit of refugees to country $C = f(x) \times R$ which in our application of Hardin’s Commons, equals $(zx-x^2)R$. If we place $y=(zx-x^2)R$ on a graph, we can see that the socially optimal level – defined as the point before the marginal utility for hosting at $z/2$. Therefore, the optimal price for a protection quota would be $z/2$ for country $C$. Anything greater than the decreasing marginal utility would in theory be too high for country $C$ to trade. Such is why protection quotas cannot easily be equalized across the EU28. If $z/2$ for the EU28 is standardized, then the cost for Estonia to transfer one until of protection might be significantly more costly than, say, for Germany, thus distorting any EU wide Pareto efficiency.

Any protection quota price would be subject to annual cost of living adjustments based on inflation, and could be set as the median of participating OIC countries with cost of living adjustments for receiving States whose hosting cost is above the quota price. Or, a quota price can be standardized above the highest hosting cost of an OIC receiving cost.

### 3.3 Setting EU Member States absorption levels

Each EU Member State may set its annual absorption rate. This rate must be must not be less than $(.33) Q_{ms}$. In the event that extraordinary circumstances, the respective Member State may apply for an exemption for that year and move below the lower boundary. This rate must be conceived in light of a nominal EU mandated basement. Protection costs below the quota must be borne by the respective Member State.

Any State who decides to opt out of the matching system would be at high risk of receiving less desirable (according to that State’s preferences) refugees than if they would participate. The mechanism is therefore incentive-compatible, provided a general willingness to absorb refugees.

### 3.4 Setting OIC Member States absorption levels

Depending on whether the European Union decides on a fixed price per RPQ or allows them to be reconciled in the market, OIC States set their calculus. There are several options. (a) OIC States (hosting and non-hosting) can set an annual quota. In this manner, EU States will know exactly how many RPQ are on the market at a given time. It also allows for oversight by the UNHCR and relevant civil society organizations to ensure that facilities are available in advance. The downside to OIC Member States providing annual quotas is how it impacts the market structure. A matching mechanism similar to that employed for EU Member States will be used to optimize compatibility between refugees and transfer host countries and will include data derived from individual transfer status determination hearings. (b) The

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340 The socially optimal point occurs for $x^*$ when it maximizes the function $f(x) \times R$. Easley, D., & Kleinberg, J. (2010). *Networks, crowds, and markets: Reasoning about a highly connected world*. Cambridge University Press at 780-782.
second issue concerns how quotas for hosting OIC States impact quotas for non-hosting States (NHOS). The architecture of an OIC-EU market benefits the political order of EU Member States, true. But to be sure, it is grounded in a two-way notion of burden-sharing: protecting refugees must be borne by communities of receivers and senders, not merely actors within those communities. As such, though all OIC States cannot host under International Law, their contributions should reflect those of their hosting co-members. Contributions in this case might be directed towards their hosting brethren to raise the maximum amount of refugees that can be absorbed. Here, however, we compound the dilemma of paying States for consummating their obligations under international law. (c) Contributions from non-hosting States can be directed towards refugees already hosted by OIC Member States. This path may alleviate some of the burden for Turkey, Lebanon, and Jordan. (d) Several OIC States operate below the poverty line. The per capita income of Somalia, Niger, and Central African Republic is under 1,000 (USD) with Uganda, Burkina Fasso, Mali, and Mozambique not far behind.\textsuperscript{341} NHS might therefore contribute in a number of ways, from manpower, to goods and services. Contributions for States below a calculated lower GDP boundary might have their contributions prorated.

### 3.5 Matching

Following matching theory, the mechanism is a two-sided matching, top trading cycle mechanism inspired by Moraga & Rappaport (2014, 2015); Jones & Teytelboym (2016),\textsuperscript{342} and explicated in previous scholarship regarding universities and apartments.\textsuperscript{343} As Gale & Shapley (1962) first showed, an algorithm for a two-sided matching mechanism can be made stable, meaning that there is neither preference for re-matching nor aloneness.\textsuperscript{344} Later, Roth (1992) showed that many-to-one two sided matching may be Pareto efficient, while Fragiadakis et al., (2016) revealed this to be the case for minimum quotas.\textsuperscript{345} If a mechanism is ill constructed, a refugee will obtain a slot near the bottom of her list, while a State at that top of her list wants to host her; if well-constructed, Pareto dominant outcomes will prevail (i.e., match between preferences of States and refugees).

In effect, the matching mechanism acts as a centralized clearinghouse. It matches refugee preference with state preferences. It is worthwhile to note that a matching mechanism does not decide how many refugees


are protected; it simply distributes an absolute number $Q_{eu}$ provided refugee and EU Member State preferences. As such, matching is about finding the optimal allocation, not negotiating boundaries.

Currently agency belongs almost entirely to the State. Either the Dublin system gluts a few States with asylum seekers (i.e., Italy, Greece), or EU Member State decide who is eligible for residency. A matching system that takes into account refugee preferences transforms into a more equitable dynamic. Refugees list countries, 1-28, they want to go. Member States list their preferred criteria for hosting. An ordering is chosen randomly from the distribution and an algorithm is employed whereby the first protection quota is filled by the first refugee’s first choice, the second refugee her first choice, etc. When a particular member state has been exhausted of visas, it is crossed off the list of 28. For example, if an asylum seeker lists her top three preferences as Sweden, Germany, France, she may be allocated Sweden until there are no more visas for Sweden. In that case, her first choice will become Germany, and so forth. As Moraga & Rappaport (2015) show in their mathematical model, the mechanism is individually rationale, there are no incentives to misrepresent preferences, and Bertrand like competition accounts for efficiency.\footnote{Moraga & Rapoport, supra 12, at Appendix.}

Moreover, taking into account stated preferences, no refugee can be made better off without making another refugee worse off.

If refugee preferences are simply a matter of ordering, the State’s preferences are more complicated. Preference matching must take into account not only categories (i.e., language, skills, family ties), but distributional quotas, transparency requirements, and ethical constraints. Distributional quotas, similar to affirmative action in the United States (Echenique & Yenmez, 2015),\footnote{Echenique, F., & Yenmez, M. B. (2015). How to control controlled school choice. The American Economic Review, 105(8), 2679-2694.} would presumably be directed at vulnerable populations or underrepresented sectors of the labor market. An example is Germany’s Humanitarian Admission Pilot program and the UK’s Vulnerable Persons Relocation Scheme. On the supranational level, the EU might mandate that the 20% resettlement category be aimed at protracted situations (at least five years).

Any matching mechanism would have to come to accept a degree of harmonization. This is not only so with status determination decisions, but also with regards to family units and legal constraints. Having family as a priority category, for instance, would require harmonizing understandings of what constitutes a family unit.\footnote{Jones & Teytelboym, supra 341, at footnote 9.} Moreover, categories incompatible with the ECHR (i.e., discrimination based on race, religion, nationality) would have to be excluded from formal preference criteria. Any margin appreciation of discrimination is exorcised by a temporal dimension to selection. As Miller’s (2015) analysis of justice in immigration implies if a long-term stay is assumed, one in which the refugee would eventually obtain
full citizenship rights, then a selection criteria may be warranted based on the needs of the political community. In turn, this requires that any selection criteria not be discriminatory. To illustrate this point, Miller uses Blake’s example of a car: as a matter of justice a State is not required to give every citizen a car, but if it chooses to do so, it cannot discriminate based upon race, gender, etc.

Nonetheless, constraints are counterbalanced by potentialities: bespoke options may be tailored into this matching mechanism. If at the behest of a Member State distributional constraints (i.e., minimum quotas) are deemed necessary within a priority category, it is possible to do so. In this manner, States can fill gaps where there are labor shortages and more expeditiously absorb refugees projected to integrate faster. All these macroeconomic beneficial points are of course conditional on the mechanism being well-designed. Because there is no matching mechanism that is all at once—efficient, stable, and incentivizes truthful reporting—some conditions must be relaxed. Stability is not an issue so long as the EU prohibits re-matching. A non-transparent system would seemingly avoid incentives to misrepresent preferences, as the categories and quotas linking a particular EU Member State is unknown. Nonetheless, a stable matching mechanism should not contain incentives to misrepresent preferences. Full disclose of priority categories, however, may lead to misrepresentation. I therefore advocate for a completely non-transparent system decided on the level of individual States. Categories of priority and quotas within that category should not be publicly disclosed.

### 3.6 Transfers

Transfers occur on two planes. The first is between sovereign nations. The second, between supranational bodies. Refugees in excess of the EU mandatory total plus any number over that will be transferred to OIC States, per previous agreed upon intake numbers. Transfers between sovereign nations work as follows. EU MS country \( C_i \) is given a quota \( Q_{ms} \) of 10,000 refugees for the fiscal year. \( C_i \) decides that its optimal absorption rate for that year is 6,000. Now, 4,000 RPQ remain to be traded on the market. Both EU and OIC States may purchase protection quotas. Refugees would be allocated based on the matching mechanism, meaning that if participating OIC States were ranked higher than an EU State the refugee to be protected would be allocated to the respective OIC State before an EU one. In most cases this will not

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349 Miller (2015), supra 290, at 397.
transpire. Typically, EU States would buy quotas from other EU States until all EU States maximized their absorption, then select OIC States would absorb remaining RPQ.

From a refugees point of view such a system of transfers may not be optimal. If refugees want only EU Member States as hosts, but are allocated OIC States, is there a legal basis for their transfer? Recollect the 1951 Convention and its Optional Protocol were designed to provide safe haven and a dignified existence to those fleeing persecution. They were not designed for asylum shopping and in fact, there is no legal basis for refugees choosing where they are protected. What is essential is that host States not endanger a dignified existence, a point I explore at length in my forthcoming paper, *Kaleidoscopes: on the legality of refugee transfers*. From an administrative point of view, this includes an *ex ante* assessment of potential transfer countries during positive first decisions.

As to the question of whether transfers can work in reverse— that is, from OIC to EU Member States, in theory this too is possible. Part of the agreement between the OIC and EU stipulates that 20% of the total EU annual quota $Q_{eu}$ will come from resettling refugees. Above this total would typically be part of an intra-EU resettlement scheme and not require compensation from participating OIC States. More salient to our study is the responsibility of refugees who exceed the annual EU total $Q_{eu}$, and those refugees who cannot find other participating States to protect them.

### 3.7 Above $Q_{eu}$

Refugees above the total EU quota will be granted temporary (subsidiary)\(^{353}\) protection status. This may occur on EU territory (preferable) or at a camp outside EU territory. Those designated as recipients of temporary protection will have their RPQ listed on the market, with the costs borne by the European Union, not the individual Member States. It is noteworthy that while temporary status would grant full rights, making them *de facto* refugees they would be placed first on the list of transfers for the upcoming year, with that year’s total mandatory absorption number adjusted as such. The rationale behind this decision is to maintain an incentive-compatible

### 3.8 Integration Measures

Without employing the lexicon of Law and Economics, European Commission literature from 2016 suggest that ineffective integration may spur difficulties. Instead of ‘externalities’ the Commission

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speaks of “the cost of failed integration.”\textsuperscript{354}Euphuisms aside, policy-oriented scholarship acknowledges that effective integration is the key to preventing potential externalities. Indeed, it is because of this relationship that this paper suggests Member States be provided with the capacity to determine how many refugees become a part of their political community. Intake must be regulated with those most intimately acquainted with the respective integration infrastructure. Brazenly, we might even suggest this connection to fall under subsidiarity.

In \textit{The Law & Economics of Effective Refugee Integration} (forthcoming) I outline a comprehensive plan of monitoring the integration of refugees. Here, instead, I focus on how EU funds should be dispersed \textit{vis-a-vis} the matching mechanism. In effect, though the preferences of EU Member States are not heterogeneous (i.e., linguistic, labor shortages) States with more potent social welfare systems (i.e., Germany, Sweden, The Netherlands) will find themselves more easily able to attain refugees that match their preferences. Though at first glance counter-intuitive, this would seem to particularly be the case with highly skilled, highly educated candidates in need of protection. Social welfare systems frequently correspond with more robust economies and thus more opportunities. EU Member States falling under the lower quartile of receiving the refugee type they prefer would receive a greater share of integration funds under various schemes, for instance funds already allocated by the European Investment Bank for integration, European Structural and Investment Fund programs for 2014-2020; the forthcoming European Integration Network. Releasing integration funds in a marginally increase relationship to decreasing preference matching is an incentive-compatible way for ‘less desirable’ EU States (by refugee standards) to remain in the market and host close to their annual quota.

\subsection*{3.9 Modelling the Mechanism:}

For the sake of comparability with the most prominent recent economic analysis of refugee protection, we use similar notation, and where possible, definitions, as Bubb et al. (2011):

Let each region (EU and the Global South) have $L+1$ States. Let EU States, who have higher wages, be $w_{eu}$, and Southern States $w_{s}$. Clearly there are wealthy States in the Global South. This designation is meant to capture those southern states who move northwards both for economic migration and asylum. Let the wage differential between $w_{eu}$ and $w_{s}$ be designated $\Delta w$ in which $w_{eu} > w_{s}$. Individuals $\lambda$ inside States $N_0$ and $S_0$ are persecuted, costing them $P$ utility to remain. Non-persecuting States are designated $\{N_1, ..., N_L; S_1, ..., S_L\}$. By moving to the EU, both economic migrants and asylum seekers derive linear utility. This utility, however, may vary significantly. For economic migrants wages are naturally captured in such utility, but also quality of living standards. For asylum seekers, the same utility is captured as that

\textsuperscript{354} European Commission ‘An economic take on the refugee crisis’ at 4.
of economic migrants, but in addition, utility from not being persecuted. There may be (but not necessarily) a dislocation cost from moving away from one’s homeland. This cost is captured in $d \in [0, d']$ and distributed through a cumulative distribution function $G(.)$

As discussed at length earlier, host States have a cost function. This is a convex function. It increases as the number of refugees increase and is denoted as $B(.)$. Note that because many EU States are in need of refugees for reasons also discussed at length above, the function $B(.)$ though a cost, does not necessarily equate to a negative cost (externality) until it exceeds the marginal benefit, defined in terms of the annual optimum number of absorption. On the benefit side of the equation, States have a preference for altruism $\beta$ between $0 < \beta < 1$ which for each refugee protected, the State gets an ‘additive altruistic utility benefit’ of $\beta P$. States typically have a choice as whether to establish a high $s$ or low $w$ burden of proof to be determined a refugee. As mentioned in Part I, this is part of what makes refugee protection an incomplete contract. However, States may inflict a shading cost $K$ on themselves for choosing a high burden. This cost stems from their norm commitment.

(1) What does an EU absolute number annual quota change?

Because there is no homogeneity in the cost of hosting even in the absence of economic migration, the 1951 Refugee Convention will not be the first best option for EU States. There will always be a rational choice incentive to make the standard of proof ($p_j$) as high as possible so long as it does not exceed the cost of shading humanitarian norm commitments (e.g., $p_j \neq K$). Because $K$ and $\beta$ are nonstatic, as the marginal cost of hosting becomes larger than the marginal benefit, $1-K+\beta$ may decrease. With or without strategic complementarity (i.e., other EU States raising their burden of proof) country $j$ may still be incentivized to marginally increase $p_j$ as the cost function, $B(.)$, increases. Moreover, because hosting is not currently spread out evenly among EU States, without an absolute quota the informational asymmetries associated with screening of economic migrants, results in multiple equilibria, where all host, and where all shirk.\footnote{Bubb et al., supra 68, at 383.}

An absolute quota enables EU Member States to maintain a standard $P_j$ that allows for a larger provision of protection than the current system, since those States must only host an absolute number annually. Because the proposed market mechanism requires harmonizing of determination status, there is even less of an incentive to deviate from standard community-wide directives. In fact, the only actor with an incentive to increase $P_j$ is the EU itself, since the more economic migrants admitted as refugees, the more
the Union must pay to third party States. There is an assumption supported by empirical evidence that the norm commitment of government and civil society actors within the EU is sufficient to ensure checks.

(2) How does an EU-OIC market for protection impact the screening problem Member States face? Asymmetries in information present States with difficulties in determining refugees for economic migrants. This may lead to raising levels of proof for asylum seekers, resulting in refoulement, a ‘race to the bottom’ in high burdens of proof, and generally speaking, an under-provision of protection.

An absolute annual EU quota eliminates the need for of higher burdens of proof thereby affording more protection. With an annual absolute number and harmonized status determinations (e.g., \( P_j \) is uniform across the EU), there is little incentive to increase burden of proof for refugees, thereby increasing the overall provision of protection to a socially optimal level. While it is true that States with a low \( K \) may simply try and make it difficult for asylum seekers, since the EU (though not the individual EU State) must pay for all those deemed genuine refugees above \( Q_{eu} \), States with high \( K \) values can counterbalance them.\(^{356}\) Achieving an equilibrium in which all EU States choose a low standard of proof \( w \) if \( K \geq K^{NEM} \) the cost of non-economic migration is thus moot.

As to the claims that the difference in wages play a role in screening: \( \Delta w \) the wage differential between north and south, will not play a significant part in shifting burdens, as \( P_j \) (uniform across the EU) will not alter the difference between \( \Delta w \) and \( d_i \), the dislocation costs, in this application, for economic migrants. An absolute EU total quota \( Q_{eu} \) and the ability for States to transfer a portion of their individual quota \( Q_{ms} \) thereby prevents a breakdown of the protection provision generated from Convention and increase ease of reaching the EU.

(3) The role of evidence in a market mechanism.

Each migrant produces either strong or weak evidence \( e_i \{w,s\} \). Because the market mechanism requires harmonizing positive first instance criteria, homogeneity in standards can be assumed. \( \pi^R \) of persecuted individuals from \( S_0 \) and \( N_0 \) can provide strong evidence. \( \pi^M \) of non- persecuted individuals from \( S_0 \) and \( N_0 \) can provide strong evidence. It is unclear whether \( \pi^R > \pi^M \) thereby exacerbating screening problems.\(^{357}\) \( \gamma \) of individuals from the persecuting States \( S_0 \) and \( N_0 \) know how strong their evidence is; \( 1 - \gamma \) do not. Bear in mind, that while \( \gamma = 1 \) represents all migrants, economic or otherwise know the strength of their evidence, applicants who have abilities in demand by host States (even in a non-transparent

\(^{356}\) Bearing in mind our earlier discussion on the differences between hosting and protecting, the shading cost of hosting \( K \) may decrease as the cost of hosting \( B(.) \) increases. However, taking into account the ability to transfer protection on a market, there is no obvious relationship between \( K \) and \( B(.) \) regarding protection without hosting.\(^{355}\)

\(^{357}\) This differs from Bubb et al, supra, 68, at 374, where \( \pi^M < \pi^R \).
matching mechanism, there is clearly a preference for vulnerable groups, common language, family ties) will have a distinct advantage. Bubb et al. (2011) refer to those who know the strength of their evidence as ‘informed’ and those who do not ‘uninformed’. In the set $\theta_i \in \{w, s, \Omega\}$ there are informed citizens with evidence $e_i = \{w, s\}$ and uninformed, $e_i = \Omega$. EU States must have thresholds of proof by which a refugee will be admitted. $p_j \in \{w, s\}$ where $e_i \geq p_j$ ensures a migrant will be determined a refugee (but not necessarily admitted to an EU country).

Travel from South to North costs $J$ utility. In contrast to Bubb et al. (2011) this cost is not the same for everybody. It varies significantly and is not necessarily a positive number. Typically, $d_i + J < p_j$ the probability of being determined a refugee, whether or not $e_i = w \lor s$. What might be a potential solution?

Bubb et al. (2011) show that a hypothetical tax on migrants reaches the same end as when there is no economic incentive to migrate $\Delta w < J$, that is, the north-south wage differential is less than the cost of migration. Notwithstanding that the authors’ proposition is flawed ($\Delta w$ does not capture the additional utility of benefits from northern State captured in the term ‘economic migrant’), nevertheless, the question posed is relevant. Let us reconfigure it as follows: might immediate removal have the same effect as (an illegal) tax on refugee claimants?\(^{358}\)

It must be noted here that neither a tax, nor stringent return policies will completely eradicate the screening problems EU States face. Economic migrants who have strong evidence $\pi^M$ will continue to try to fool asylum granting authorities. Economic migrants without strong evidence $1-\pi^M$ may be dissuaded from migrating if $e_i < J + d_i$, that is, if their evidence is weaker than the cost of the journey plus any dislocation cost. In effect, the screening problem EU States face can be partially (but never absolutely) mitigated by stringent return policies. If illegal economic migrants face harsher penalties (i.e., $J + d_i >$ the benefits of migration, then economic migration should plummet and with it the screening problem of asylum seekers. In effect, screaming in the proposed OIC-EU market mechanism is not about raising standards of proof, but enforcing failed claimants and illegal economic migrants in general.

Will such a scheme increase South-to-South migration by shifting deterred northbound migrants to seek opportunities in neighboring countries? Meaning that North to South transfers will generate negative externalities on both hosting and non-hosting Southern States, by directing migrants laterally who would have otherwise moved northward? On pen and paper this may be the case. The argument is not convincing, however, and anecdotal evidence points to the contrary.\(^{359}\) Realistically speaking, the wage

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\(^{358}\) 1951 Refugee Convention, supra 17, at Article 31.

\(^{359}\) United Nations. The role of South-to-South migration. (June 2012).
differentials of neighboring States plus any additional utility from EU countries are not enough to push EU-bound migrants, laterally. Moreover, the enforcement of illegal economic migrants in the Global South is typically well above that of EU States. A more incisive EU return directive would thus not logically increase the burden from economic migrants on Southern countries.  

(4) The Role of Islamic Norms in a market mechanism.

One of the common assumptions in the market-based literature is that there are norm commitments that bestow utility on States that host refugees. In the theoretical literature, some authors indicate norm-derived utility as static and standard across a range of States, while others recognize its nonstatic nature and its role as a covariate with other key variables. None of the economics literature, to my knowledge, has discussed and empirically shown an Islamic norms variable.

In a forthcoming paper, *The Tents of Mina*, I discuss and show empirically an Islamic norm to refugee hosting above that of the West. This norm is calculated through a standard OLS regression with refugees protected operationalized as the dependent variables against a host of independent variable (e.g., mean refugee cost per country; exogenous funding; GDP; integration into the labor market).

The significance for our paper is the following. As mentioned above (point 1), because $K$ and $\beta$ are nonstatic, as the marginal cost of hosting becomes larger than the marginal benefit, $1-K+\beta$ may decrease. With or without strategic complementarity (i.e., other EU States raising their burden of proof) country $j$ may still be incentivized to marginally increase $p_j$ as the cost function, $B(.)$, increases. Now let us introduce a new variable $K_{ISV}$ to indicate the cost of shading Islamic norms. To be sure, there are benefits for some States to join the OIC, whose raison d'être is Islamic values, other than adhering to these values. However, the same argument can be made for States who join international Treaties. Just as we assume some degree of norm commitment generalizable across all signatories to international mechanisms, so too do we provide the same assumption for States who have acceded to the OIC Charter.

Returning to our equation, when the marginal cost of hosting becomes larger than the marginal benefit, $1-K+\beta$ may decrease to a value less than $B(.)$. However when $K_{ISV}$ is added to $1-K+\beta$ then the additional value may be larger than $B(.)$. This explains the empirical results, whereby Islamic values play a role in hosting refugee populations. Now let us take these conclusions a step further. OIC States either set an annual quota that cannot be re-contracted, or allow the market to determine allocations. If $K_{ISV}$ delays the point at which the marginal cost surpasses the marginal benefit of hosting, then OIC Hosting States’

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$^{360}$Not all Southern States may sign on to be transfer States due to refoulement concerns.
strategy may result in driving down the price for a RPQ. It also may result in accepting more refugees than social and labor market forces can reasonably bear. Then, though the cost of shading Islamic protection values (but not exclusively hosting) is beneficial in participation in the larger market, externalities borne from $K^{RIV}$ must be accounted for in the market price, as well as quality of protection manners.

A potential solution would be to have pre-certified transfer slots. Again using notion from Bubb et al. (2011), let $Q^Sj$ be the number of transfer slots from EU countries, $N_k$, to OIC States, $S_j$. Payment for each RPQ is designated as $T^Sj$. In effect, each OIC hosting country (OH) provides a number of slots they may be able to contract for each year. This is a maximum number and is subject to EU or UNHCR certification, and how the OH responds to the market. Above that annual maximum, no refugees may be hosted. Now, each OH has a strategy $R_sj$ to accept or reject the RPQ. So that the vector of $R_sj$ $(Q^Sj, T^Sj)$ equals 1 if $S_j$ accepts, and 0 if $S_j$ rejects.\(^{361}\)

Now, the contract between the OH and EU States is $\tilde{Q}^S_{N_k}$ and all sets of transfers $(\hat{Q}, \hat{T}$ ) equaling$\{(\tilde{Q}^S_{N_k}, \tilde{T}^S_{N_k})\}_j$, $k=1$ to $L$. Still following the aforementioned model, the total sets of transfers between the OIC and EU on the market is denoted as $nNj (\hat{Q}) \sum_{k=1}^{L} \tilde{Q}^S_{N_k}$. These sets do not include the number of refugees in excess of $Q_{EU}$ the total EU annual quota.

Now, what happens when EU States offer RPQs $\hat{Q}$? As previously mentioned, both economic migrants and genuine asylum seekers have an incentive to migrate to the EU if their evidence is stronger than the evidence $e_i > J+d_i$. That is, their evidence is stronger than the cost of reaching Europe, plus any dislocation cost. To this equation we now add the probability of more stringent return regulations sending back failed claimants, denoted as $p(\xi)$. Thus, we have incentives for economic refugees to migrate northward if $e_i > J+d_i + p(\xi)$. Because there is no evidence that northbound migrants will make lateral movements (e.g., South-to-South), increasing $p(\xi)$ should have no bearing on South-to-South migration. However, individuals persecuted from $S_0$ gain utility from any migration. Therefore, even poorly informed, weak evidence asylum seekers will attempt to move north if the perceived benefit of EU States over neighboring States is $> J+d_i + p(\xi) + (1-P)$, the latter, the cost of staying in persecuting country, $S_0$.

Moreover, though South-to-South migration for economic migrants has not been empirically nor anecdotally shown to be increased by rejection from working in the European Union, for refugees, moving to neighboring countries, the status quo, may alleviate tension on Southern States due to the 20% resettlement quota in the market mechanism.

\(^{361}\) Following Bubb et al., supra 67, at Appendix, Proof 8.
Focusing on a symmetric equilibrium, in the absence of the externality of South-to-South migration, with participation clearly defined by OIC States prior to engaging the market, and a sufficiently high probability of fail claimants being returned, the Nash equilibrium is for OIC States to absorb the maximum amount of refugees until $K^{ISV} K^+ B(.) – \beta P = 0$.

Potential Objections

There may be several objections to the proposed mechanism not discussed in Part II. I discuss five of them here.

(a) Advocates for full refugee choice, might criticize the preponderance of State agency in my proposal. There is no getting around the fact that this paper conditions maximizing protection upon the flexibility of sovereign nation. States must be able to optimize their nonstatic preferences within the bounds of the law. Those who advocate for more refugee-centered agency may consider the feasibility of their position.

(b) Can Southern States be compensated for costs not captured in dyadic transactions? Put another way: will asylum seekers make lateral South-to-South migrations if information about an absolute EU total is sufficiently diffused? Firstly, this may depend on private information about eligibility. If an asylum seeker is confident their skills and reason for persecution match eligibility criteria there is little incentive to make lateral transfers. For even if they are transferred to an OIC State, they may still be better off either pushing northward or remaining where they are. Such is because pushing northbound provides those who are certain to meet the burden of proof a better probability of success in the matching mechanism, while being registered as a refugee elsewhere allows them to be entered into the database for resettlement. Because this proposal requires a twenty percent of the total annual EU quota to come from resettlement, there is little incentive for lateral South-to-South migration above what would have already occurred.

(c) If OIC States are compensated for hosting EU determined refugees, they would seemingly have an incentive to surreptitiously push refugees northbound to continental Europe, then receive compensation for taking them back. Non-observable factors such as social unrest, national identity, and impact to the job market all suggest that this is the dominant strategy for OIC Member States.

A few points here require exploration, though they must be conducted with an understanding of the status quo. Currently, OIC States may push refugees northbound without penalty. Noting prevents Jordan or Turkey, for instance, from engaging a State-sponsored effort to drive refugees northbound. The fact that they currently host refugees without proportionate compensation speaks to their norm commitments, and by extension, the relationship of norm commitment to cost function. To presume that EU funding (already intact, albeit not for hosting specific refugees) would undermine the utility of their norm commitment is
presumptuous at best. As a corollary, it must be noted that Islamic values adds incentives to retain the norm commitment, as well as keep to a potential agreement between the OIC and EU. If adequately promoted and systematized, Islamic values, the raison d'être of the OIC, mandates a level of care for refugees beyond the proscriptions of the 1951 Convention.\textsuperscript{362} OIC States shirking refugee quotas would fall prey to being named and shamed, and might very well face opposition from domestic forces. So long as the joint market permits a flexible exchange of quotas (i.e., not only hard currency) it may form through the legitimacy of Islamic norms.

Secondly, there is no guarantee that those countries would receive the refugees they propelled northbound. On the contrary. Refugees may place the States that pushed them northbound at the lower spectrum of their preferences, and therefore those countries are less likely to be selected in the matching mechanism. For those who relish doomsday scenarios, then, yes: it is possible. State sponsored collusion with refugees could occur, as could an upheaval of a State’s normative commitments in the face of EU payments. Both, however, are highly unlikely. Moreover, several of the OIC States currently hosting refugees may be considered safe first countries under the \textit{Asylum Procedures Directive}. States that push refugees northbound in exchange for compensation could end up taking them back without payment.

(d) Why would OIC States enter into an EU-centric market? Again taking into account the status quo, OIC States are better off entering into an EU-centric market than maintaining their current trajectory. First off, payments for some future refugees would be regular, in contrast to the unpredictability of UNHCR support. OIC States now host the majority of the world’s refugees without adequate or stable levels of compensation. Pakistan, for example, hosts 2.5 million Afghan refugees and receives an annual budget from the UNHCR below 140 million USD; however only 40 million of that was disbursed in 2015 due to the Syrian crisis.\textsuperscript{363} Joining an EU-OIC market is akin to an insurance policy for potential future migrant crises that drain funding.

Second, and more significantly, the EU resettlement quota requires a number of refugees be transferred and hosted on EU territory annually. While an EU-centric market is not the optimal solution for OIC States, and certainly not Pareto efficient, it does put them in a better position than they are currently. Though Turkey has recently been earmarked 3 billion Euro for migrant-related matters, other OIC States have received little to nothing. If the cost of providing protection is significantly below the quota set by a market, poorer OIC States would have incentives to accept refugees from wealthier European neighbors. Though quality of


\textsuperscript{363} Reuters. ‘Refugees in Pakistan hit by aid cuts as Europe crisis drains funds’ Last accessed February 11, 2016 from http://www.reuters.com/article/us-pakistan-refugees-europe-idUSKCN0S71T320151013
protection concerns require stringent monitoring, an incentive structure should be created for safe OIC States to absorb the excess of EU and OIC States without preferences for hosting.

(e) In order to employ an extraterritorial approach the UNHCR recommends repatriation or transfers be conducted in safety and dignity. Though this agency standard is non-binding, it is rooted in binding mechanisms. Avoiding “harassment, arbitrary detention or physical threats”\(^364\) is derived from Article 7 of the ICCPR,\(^365\) and agency recommendations such as mandating mine-free routes\(^366\) is rooted in the ICCPR, at Article 9(1).\(^367\) Relevant for our situation, the European Union has also issued its own standards as to that constitutes safety.\(^368\)

Dignity, on the other hand is less clear. In UNHCR’s words, dignity is composed of a host of generalities including:

- that refugees are not manhandled;
- that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace;
- that they are not arbitrarily separated from family members;
- and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.”\(^369\)

Strasbourg, however, has clearly indicated a more narrow application of dignity, signaling that only the protection of a private right is sufficient for the right of non-return.\(^370\) The picture that is forming is one in which offering protection, transfers, and removal of refugees after cessation boil down to the fundamental right of an autonomous individual’s right to dignity. Yet what exactly does this word mean? If ‘dignity’ has becomes the shibboleth by which market-based solutions may be subject to court stoppage, any viable solution must address dignity. It is to this complex domain that a forthcoming paper, *Kaleidoscopes: on the legality of refugee transfers* is devoted.

\(^{364}\) Executive Committee Conclusion No. 65, supra 292, at para j.

\(^{365}\) ICCPR, supra 20, at Article 7. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

\(^{366}\) Voluntary Repatriation Handbook, supra 302, at 11. However other UNHCR safety standards such as “material security (access to land or means of livelihood)” has no clear binding sponsor.

\(^{367}\) “Everyone has the right to liberty and security of person.” ICCPR, supra 20, at 9(1).

\(^{368}\) COUNCIL DIRECTIVE 2005/85/EC at 17. “Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.”

\(^{369}\) Voluntary Repatriation Handbook, supra 302, at 11.

\(^{370}\) Boutilif v. Switzerland, 54273/00, Council of Europe: European Court of Human Rights, 2 August 2001 also see Huang v. Secretary of State for the Home Department [2005] EWCA Civ 105
Part IV: Conclusion

If the refugee regime cannot provide an alternative to a boundless hosting regime, social and economic forces may very well supersede the law. At the time of writing, Austria has passed a bill allowing the government to declare a state of emergency if refugee numbers rise, leading to restrictive entry policies. Other EU Member States have already enacted or threatened to enact similar measures. While this paper has at its core the maximization of protection to refugees, it readily acknowledges that comprises must be made and ideal situations compromised.

Despite its valiant undertaking, what refugee scholarship has often disregarded is the backlash from State actors when the incentives for upholding international norms are no longer in alignment with State interests. As such, yes, I readily acknowledge that this proposal is driven by the needs of receiving countries. It advances equilibria based on Pareto optimal allocations within EU countries, while excluding their OIC counterparts. To be exact this is not fair. And yet, a ‘global well-being’ paradigm or such efforts at achieving global utilitarian maximum are simply unrealistic. And this proposal seeks to be feasible.

After all, "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country." The refugee is an exception. She is an exception to the paradigm of access. Of the liminal space of the juridical order. And because her exceptionality is asked to be non-exceptional –legitimized through binding treaties– the economic forces that have developed in stride with the juridical order vacillate. Now they are out of step. For the sake of the law and the moral force behind it, economic forces are asked to play catch up.

And yet, as this paper has shown, economic forces also have a moral skeleton. They are derived from public order and etched within constitutional boundaries, so that, for example, property rights are only as strong as the constitutive document that undergird their enforcement, and the constitutive document only as strong as the principles through which parchment has been scripted. And just as property rights may be abridged for public order (i.e., eminent domain) or curtailed for public necessity (i.e., martial law), the refugee protection regime must be balanced during times of excess absorption. Confronting probable negative externalities ex ante will lower the risk of States declaring emergencies, derogating from fundamental rights and treaties, and backsliding international law.


An economic analysis of refugee protection will indeed seem out of place for most human rights scholars. Yet this unorthodox approach permits a sterile view of state interests and state incentives that a purely legal analysis is unable to perform. Human beings are not commodities. They are not to be sold and traded. And yet, protection is a service, it is a good that may be sold and traded, so long as it does not deteriorate qualitatively. A property rights analysis is a useful analytic tool towards unearthing the mechanics of an OIC-EU market. It reveals how negative rights of the State (non-interference and exclusion) and a positive rights (protection) can reach equilibrium through transferability of protection on a market.\textsuperscript{373} All this, of course, is conditional on maintaining dignity throughout the process.

Dignity in the inherent sense may be absolute, but all else is subject to a balancing acts between individual and the legitimate aims and dignity of society, public interest. This fundamental value structure can be seen in a subset who are excluded from being protected as a refugee: persecutors.\textsuperscript{374} The right to refuge from persecution is not absolute and dignity is not unconditional. As Christopher McCrudden concludes, “Dignity allows each jurisdiction to develop its own practice of human rights.”\textsuperscript{375} Institutional structures such as a market-based mechanism for refugee protection that provide a dignified existence in a third party country would fall in line with international and domestic mechanisms, as well as return sovereignty back to the States, allowing them to decide who remains on their territory in the long-term.

\textsuperscript{373} If through the lens of \textit{in rem} grounded property theory we look at sovereignty as a closed juridical order –only the State regulates entry– then we can see how a refugee protection regime without a ceiling acts as kink in the juridical circuit disallowing latitude in deciding both positive and negative rights.

\textsuperscript{374} 1951 Convention, supra 17, at 1(f); The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations”; Article 14 UNHR “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”; The Refugee Act of 1980, Public Law 96-212, approved March 17, 1980; Article 1 (2) of the \textit{Convention Governing the Specific Aspects of Refugee Problems in Africa}.

\textsuperscript{375} McCrudden, supra ??, at 720.