

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

Vluchtelingenstroom:
Een rechtseconomische benadering

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List of Abbreviations

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

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Refugee Flow: a Law and Economics Approach

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

Vluchtelingenstroom: een rechtseconomische benadering

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

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

נחשול פליטים: נקודת המבט של הגישה הכלכלית למשפט

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

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

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

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

Flüchtlingsströme aus rechtlicher und ökonomischer Sicht

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

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

Il Flusso dei Rifugiati: un approccio economico-giuridico

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

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