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The Economization of Migration

- Games played in the arena of Migration

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Contents

Summary

Being acquainted with four of the most famous games in game theory, we will learn that players often are better paid off cooperating with each other, but that the structure of the game forces them to defect from cooperation. Only when confronted with the zero-sum game the players have no incentive to cooperate. In all the other games, cooperation is secured if the players commit themselves to adopting a cooperative strategy. However, if such a commitment should have any value it has to be credible, i.e. it has to make it impossible or too expensive for the player to take what normally would be her best action.

In the discourse of human rights, we are often confronted with provisions of a highly moral nature. Many provisions are based on the assumption that States are moral agents. An equally valid assumption is that States in fact are self-regarding entities, preoccupied mainly with maximizing their own interests. The theories of organized hypocrisy and cherry picking helps explaining why these self-regarding entities called States sometimes do strengthen the protection for refugees. The theory of cherry picking says that a player may be willing to loose in the present round to get an even greater benefit in a coming one and organized hypocrisy is a notion used to explain the difference between the words and action of an organization. Hypocrisy is a way of balancing competing interests or to create an illusion that the interests of a specific group have been considered.

Just as for the EU, one of the main puzzles of game theory is how to promote cooperation. The Open Method of Coordination and the European Refugee Fund are two initiatives made by the Union to promote a cooperative strategy among the Member States. While the ERF holds game theoretically valid properties to change the game, the properties of the OMC are less likely to foster cooperation.

Given the fact that the European States are dependant on immigration in order for their economies to function, they cannot pursue a zero-immigration policy but have adopted a strategy I choose to call a "need-based selection process". This is a strategy aimed at letting the wanted in while keeping the unwanted out. The wanted is on the one hand highly skilled labour and on the other unskilled illegal workers. This selection process can take place in the country of destination or in the country of origin. Measures taken in the country of destination are often ineffective because of the fact that the potential asylum seeker's choice of destination is based on factors that are beyond the control of policy makers. This has led the EU to cooperate with migrant sending and transit countries. This form of cooperation has taken two forms; a control oriented externalization of migration control and a prevention oriented root cause approach. Neither of these strategies has lived up to their original expectations. A factor contributing to the failure of these strategies is one often neglected by the

policy makers, namely that it is the perceived and not the actual payoffs that decide the strategy adopted by the player. Changes in the payoffs of the game thus have an impact on the game only if the other player is aware of these new payoffs.

 As a bystander with an intention to influence the game, it is easy to feel small and powerless. Game theory provides tools that help those wanting to have an impact on the game, even if they are not participating in it as players. The most important lesson to be learned from game theory is to use ones efforts on meaningful actions. This means e.g. that the common mistake of constantly attacking the players of the game for playing the game wrong should be replaced by a focus on the game itself and on how its payoffs can be shifted. One way of shifting the payoffs is to teach the players values, facts, knowledge and skills. Another way is to identify the different games played in the arena of migration. To reveal to a player how his counterpart simultaneously plays against another player in another game can change the game about. Thus, factors outside the game itself can be used to change the payoffs.

Having a game theoretical approach to a problem means to constantly look for the strategy that in the end leads to the desired outcome. We often find ourselves stuck in traditional ways of thinking and acting, a fact that often results in an obstinate pursuance of a strategy that does not lead to the intended outcome. An alternative strategy in the context of refugee law could be the promotion of a common system for immigrants and asylum-seekers.

Preface

Having a classical juridical approach to a problem traditionally means to first observe what judicial provisions are applicable on a specific problem, followed by a study on whether these provisions are complied with or not. Time after time, it has been established that the EU Member States do not comply with their undertakings in the field of refugee law. Instead of contributing to this ocean of literature declaring that certain provisions are not complied with, my intentions with this thesis is to answer the simple, yet complex and controversial question – why? Why do States sometimes not comply with the 1951 Refugee Convention and other relevant human rights provisions despite their expressed intentions to do so?

To the holders of the traditional view on the judicial approach, this question might not belong in the realm of law. A game theorist would argue that this traditional view is one of the factors helping to create the room to manoeuvre needed for those States not willing to comply with international law since it facilitates the performance of parallel games and organized hypocrisy.

I recall my very first day at law school when Professor Kjell-Åke Modéer was invited to welcome us all and to give a lecture on what he believed would be the role of the lawyer when we eventually would graduate. Professor Modeér predicted that we would graduate as a new species of lawyers in a context when the traditional view on the lawyer as a neutral, non-partial and non-analytic "machine" would have changed into one not stopping at establishing whether applicable provisions are complied with or not, but also taking part in the work of making them effective and adhered to. I hope that this thesis is a small contribution to proving that Professor Modéer was, once again, right.

Abbreviations

1951 Refugee Convention
C   Cooperation
COM   Communication
D   Defection
ECRE   European Council on Refugees and Exiles
ERF   European Refugee Fund
EU   European Union
HLWG   High Level Working Group
IDP   Internally displaced person
ICJ   International Court of Justice
JHA   Justice and Home Affairs
NGO   Non-governmental organization
N-player games   Games with more than two players
OMC   Open Method of Coordination
PD   Prisoner's dilemma
UN   United Nations
UNHCR   United Nations High Commissioner for Refugees

1 Introduction

In "the Republic", Plato has Socrates to worry about the following scenario. Consider that a soldier is at the front with his comrades to repulse an enemy attack. It may occur to him that if the defence is likely to be successful, then it is not very probable that his own contribution will be essential. However, if he stays, he runs the risk of being wounded or killed – apparently for no point. Then, if the enemy is likely to win the battle, the soldier is even more likely to be killed or wounded, and now clearly to no point since the fight will be lost anyway. Based on this reasoning the soldier is better off running away regardless of who will win the battle. Now, if all of the soldiers reason this way (as they all apparently should, since they are all in identical situations) then this will certainly bring about the outcome in which the battle is lost. The greater the soldiers' fear that the battle will be lost, the greater their incentive to get themselves out of harm's way. And the greater the soldiers' belief that the battle will be won, without the need of any particular individual's contributions, the less reason they have to stay and fight. Furthermore, if each soldier anticipates this sort of reasoning on the part of the others, all will quickly reason themselves into a panic and the battle will be lost before the enemy has even fired a shot.[1]

The European Commission acknowledges in its assessment of the Tampere programme that "the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient consensus"[2]. The original ambition referred to is that to tackle the challenges of forced migration collectively. The reasoning behind this lack of consensus to stick to the original ambition is similar to that of the game-theoretical reasoning of the soldier in the example of Plato. Instead of staying and collectively tackle the "burden" of asylum-seekers it occurs to States that they are better off running away, or hindering the protection seekers from arriving at "the front". As put by ECRE: "Deterring persons from seeking asylum in the EU seems to have become the only goal upon which all Member States agree while the will to collectively address the forced migration challenges is absent".[3]

As we will see below, the society acts in anticipation of the action of the soldier, making it economically impossible for him to run away by making desertion a heavily sanctioned crime. Thus, the payoffs are altered and staying and fighting becomes the dominant choice. Contrary to this, the sanctions imposed on a State for not respecting the right to seek asylum is not hard enough to make it economically impossible for the State to run away from its obligations. Yet, sanctions exist and the most pay-off generating action is to keep the potential asylum seeker from reaching the frontier of the EU. In other words, all Member States share the will to keep

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[1] Plato, *The Republic*, p. 71
[2] COM (2004) 401 final, p. 3
[3] ECRE, *Broken Promises – Forgotten Principles*, p.28

potential asylum seekers from reaching their borders and are thus willing to cooperate in keeping them from doing so. However, if this deterring strategy fails and the potential asylum seeker does touch the soil of a Member State, this Member States is better paid off running away from its obligations. Just as it would have been better for the individual soldier if the enemy never reached the front at all, when he eventually is there, the soldier is better paid off running away, provided that the sanctions for doing so is not grave enough.

1.1 Subject and Purpose

The subject of this thesis is international migration, i.e. migration that is forced as well as voluntary, illegal as well as legal and for labour purposes as well as non-labour purposes. The subjects studied are the EU, States, migrants and potential migrants.

The purpose of the thesis is twofold. First, it is my ambition to present some game theoretical explanations of why the attempts made at a European level to foster cooperation among the Member States have failed. Here, the lack of will shown by the EU Member States to collectively tackle the challenges of forced migration is set against the desire of the same States to attract foreign labour. Second, I present what a game theorist would advocate as the best ways for non-players to change the direction of the game towards more morally acceptable standards.

1.2 Method and Materials

Throughout the thesis a game theoretical method is used. I find it important to point out that even if the term "game" is used, it is not in the meaning of "fun and games". I do not want to reduce the very serious topic of migration, often dealing with the life and death of human beings, into something light and joyful. However, in peeling of the moral and often philosophical questions of what duties we have to persons in need, or the often as philosophical, interpretations of convention provisions and judicial decisions, and instead focus on what the parties involved (the players) value (what their payoffs are) and how they choose to achieve their goals (what strategies they choose), we might actually obtain the necessary tools to participate in changing the game about. I do not mean to suggest that game theory is the ultimate theory, but I am convinced that it possesses a great strength in that it focuses on the preferences of the players involved rather than on those of the observer.

1.3 Delimitations

I have chosen to limit the subjects of this thesis to the European Union, States and (potential) migrants. These subjects are throughout the thesis referred to as players since they have a direct impact on the game. In

addition, I address NGOs and other non-players in the final chapter. The term "non-players" is used because of the more indirect influence of these players on the game.

1.4 Outline

The thesis is divided into five parts. The first part aims to explain the basics of game theory and its applicability on migration in general and refugee law in particular. This short introduction to game theory is deliberately made in broad outline in order to make the theory easy to grasp. The advanced mathematical calculations that are often found in the literature on game theory have been left out to the benefit of theoretical reasoning. This may give the unwanted impression that conclusions are drawn unsupported by evidence. However, this is the result partly of the limitation of space and partly of the fact that the thesis' target group is lawyers rather than mathematicians. Those who want to deepen their knowledge in game theory and/or find mathematical proof for the solutions of the games presented are referred to the literature on game theory found in the bibliography. A reader already versed in game theory may object to the fact that I have only used the strategic (normal) form of the games presented. The explanation to this lies in the fact that there are no further points to make by expanding the thesis with the extensive form of the games since the strategic form is easier to grasp and will lead to the same results; at least when it comes to the games presented below.

The second part is devoted to cooperation. The meaning of the concept of "cooperation", why States tend to defect rather than cooperate and what mechanism that could be used to ensure cooperation are the main topics of this second part.

The third part shows what the EU has done to promote cooperation between the Member States. This is done through the study of the Open Method of Coordination and the European Refugee Fund.

The fourth part brings up the question of what strategies States and migrants use to get what they want.

Finally, the chapter on NGOs and other non-players in part four has more of a forward-looking approach to it. Rather than explaining what strategies these players use, this final chapter aims at posing suggestions on what strategies would be the most successful, from a game theoretical point of view.

2 Game Theory

Game theory studies the behaviour of decision-makers ("players") whose decisions affect each other. The term "game" stems from the formal resemblance of these interactive decision problems to parlour games such as Chess, Bridge, Poker, Monopoly, Diplomacy or Battleship. The analysis is made from a rational rather than a sociological or psychological viewpoint. To date, the largest single area of application has been economics, but the connections with political science is getting more and more important.[4]

Game theory may be viewed as a sort of umbrella theory for the rational side of social science, where "social" is interpreted broadly to include human individuals as well as other kinds of players (such as nations, NGOs, the EU and the UN). Unlike other disciplines, like economics or political science, game theory does not use different, ad-hoc constructs to deal with various specific issues. Rather, it develops methodologies that apply in principle to all interactive situations and then sees where these methodologies lead in each specific application. This is why game theory can study the optimal behaviour of prisoners pondering on whether to confess or not, and then apply the results on e.g. refugee law.

2.1 Basic Elements and Assumptions in Game Theory

2.1.1 Utility/Payoff

An agent is an entity with preferences, which are described by game theorists, philosophers and economists with the abstract concept called utility or payoff. This concept denotes a measure of subjective psychological fulfilment that each agent strives to maximize. Since game theory involves formal reasoning, it has constructed a device for thinking of utility maximization in mathematical terms. Such a device is called a "utility function". This utility map transforms ordered preferences into numbers. Suppose that an agent prefers outcome a to outcome b and outcome b to outcome c. We then map these preferences onto a list of numbers, where the function maps the highest ranked outcome onto the largest number in the list, the second highest ranked outcome onto the next largest number in the list, and so on, thus:
Outcome a – 3
Outcome b – 2
Outcome c – 1
The only property explained by this function is order. The magnitudes of the numbers are irrelevant, i.e. the agent does not necessarily get three times as much utility from outcome a as she gets from outcome c. The only thing

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[4] Baird, *Game Theory and the Law*, p.6

shown is the order of preference and the numbers are thus irrelevant, we may just as well write the order of preference without numbers:
a>b>c

2.1.2 Players, Games and Information

All situations in which at least one agent can only act to maximize her utility through anticipating the responses to her actions by one or more other agent is called a game. Agents involved in games are referred to as players. Players are assumed to be economically rational, i.e. the player can assess outcomes, calculate paths to outcomes and choose actions that yield her most preferred outcome.

The basic elements of a normal game include: (1) the players – the actors who make the decisions (either individuals or collective decision-making units like firms or States); (2) the strategy space – the range of moves available to a player in a given situation (i.e. to cooperate or to defect); and (3) the payoffs – the outcome generated for the players from a chosen move or strategy.[5]

Each player in a game faces a choice among two or more possible strategies. A strategy is a predetermined programme of play that tells the player what actions to take in response to every possible strategy other players might choose.

A crucial aspect of the specification of a game involves the information that players have when they choose strategies. Conceptually, the simplest games are those of perfect information: games like chess, in which all moves are open and above board, in which there is no question of guessing what the other players have done or are doing. A rational player in such a game chooses her first action by considering each series of responses and counter-responses that will result from each action open to her. She then asks herself which of the available final outcomes that brings her the highest utility and chooses the action that starts the chain leading to this outcome. This process of first looking at the final outcome is called backward induction.

Each zero-sum game of perfect information has optimal pure strategies and an optimal solution (Nash equilibrium[6] and Pareto optimality[7]). The Nash equilibrium is often referred to as the right solution of the game and does not always coincide with the Pareto optimal solution. The Nash equilibrium

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[5] Baird, *Game Theory and the Law*, p. 8
[6] An equilibrium, (or Nash equilibrium, named after John Nash) is a set of strategies, one for each player, such that no player has incentive to unilaterally change her action.
[7] Pareto optimality is a measure of efficiency. An outcome of a game is Pareto optimal if there is no other outcome that makes every player at least as well off and at least one player strictly better off. That is, a Pareto Optimal outcome cannot be improved without hurting at least one player. Often, a Nash Equilibrium is not Pareto Optimal, i.e. the players' payoffs can all be increased.

is found through the use of solution concepts – ideas about how rational players are likely to choose strategies and about the characteristics of these strategies given the players' goals. Solving a game is the process of identifying which strategies the players are likely to adopt.[8] A right solution is foreseeable and can be anticipated by other players and spectators.

The distinction of acting parametrically (on a passive world) and acting non-parametrically (on a world that tries to act in anticipation of these actions) is fundamental.[9] In anticipation of the reasoning of the soldier in Plato's example, the army makes the choice of retreat economically impossible for the soldier: deserters are shot. The response by e.g. a criminal organization to the fact that defection is the right solution (acting parametrically) to the PD (see chapter 2.2), is that squealers loose their status and are seen more or less as being fair game in criminal circles. A question to be dealt with later on in this thesis is whether there are any mechanisms at work when it comes to acting in anticipation of States not taking their responsibility under international refugee law, thus forcing them to make decisions in compliance with it.

To attain optimal results in an interactive situation often requires collective action. This occurs when the efforts of two or more individuals are needed to achieve a certain outcome, one that typically furthers the interests or well-being of the group. In terms of Pareto optimality, the course of action that leads to the best outcome for the group is cooperative behaviour. The main problem with collective action occurs when a rational individual's behaviour leads to pareto inferior outcomes. This phenomenon often happens in large groups and in situations where all individuals agree about the common good and the desirable means of achieving it. The EU may be seen as such a group.

The basic assumptions of game theory as used in this thesis are compatible with those of modern international relations theory. These assumptions are: (1) States are the central actors in the international system; (2) States are not subordinated to a central international authority to enforce cooperation; (3) States are self-regarding entities that constantly try to maximize their payoffs; (4) States are rational – they have consistent, ordered preferences, which derive from calculating the costs and benefits of alternative courses of action.[10] Note that the costs and benefits are not necessarily economical.

2.2 The Prisoners' Dilemma

The distinctions made in game theory are difficult to grasp if all one has to go on are abstract descriptions. The distinctions are best illustrated by

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[8] Baird, *Game Theory and the Law*, p.11
[9] Aumann and Hart, *Handbook of Game Theory with Economic Applications*, p.xii
[10] Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, p. 346

means of an example. For this purpose, I will start by using the most famous of all game-theoretical examples called the Prisoner's Dilemma. The name of this game is derived from the situation typically used to exemplify it but can be applied in numerous situations.

Suppose that the police has arrested two persons whom they know have committed an armed robbery together. However, the police lacks enough evidence to convict the robbers. What does exist, however, is enough evidence to send each prisoner away for two years for theft of the getaway car. The chief inspector now makes the following offer to each prisoner: if you will confess to the robbery, implicating your partner, you will go free and your partner will get ten years of imprisonment, provided that she does not also confess. If you both confess, you will get five years each. If neither of you confess you will both get two years of imprisonment for the auto theft.

The first step in modelling this situation as a game is to present it in terms of utility functions. Both partners (hereinafter Player I and Player II) have identical utility functions:
Go free – 4
Two years in prison – 3
Five years in prison – 2
Ten years in prison – 0

The numbers in the function above are used to express the players' payoffs in the various outcomes possible in this game. Having these utility functions, the entire situation can be represented on a matrix, the strategic form of the game.

Player II

Player I		C	D
	C	3,3	0,4
	D	4,0	2,2

Each cell of the matrix gives the payoffs to both players for each combination of actions. Player I's payoff appears as the first number of each pair, Player II's as the second. The numbers have significance only in relation to each other; a higher number is more desirable than a low one.

Evaluating the two possible actions by comparing the payoffs in each column, the players observe which action is preferable for each possible action by the other player. Doing this they will notice that they are better off confessing, regardless of what the other player does. If Player I confesses, Player II will get a payoff of two by confessing and a payoff of zero by refusing. If Player I refuses, Player II will get a payoff of four by confessing and a payoff of three by refusing. Thus, the preference ordering of the players in the PD game is:
DC>CC>DD>CD

The applicability of the PD game will be dealt with in chapter 3.

2.3 The Zero-sum Game

The zero-sum game is one of game theory's most famous models. The key feature of a zero-sum game is that the sum generated for the players for each possible combination of moves is zero. In zero-sum games, whatever one player wins the other loses. Since the payoffs to Player 2 are equal to the negative payoffs to Player 1, it is possible to simplify the strategic form and only write the payoffs of Player 1:

Player II

	C	D
C	0	-4
D	4	0

Player I

The preference ordering of the players in this particular zero-sum game is thus:

DC>DD=CC>CD

Two-player zero-sum games represent strictly competitive situations where the players maintain opposing preferences and are rivals. Thus, the players are in conflict and not inclined to cooperate and as such, the two-player zero-sum game represents one of the worst models for international cooperation.

Refugee law can be seen as a zero-sum game if one sees asylum seekers as a constant mass that no State want to deal with, but that some State has to accept. The State ending up with the asylum-seeker is the looser and the one succeeding in avoiding him is the winner. The major arguments against applying the zero-sum game on refugee law are two: the amount of refugees is not a constant mass and the players are more than two. Only when the game has just two players who are exclusively interested in relative gain, the game can be modelled as a zero-sum game with no room for cooperation. The potential for conflict diminishes significantly when there are more than two players, since this opens the possibility of coalition building.

What strengthens the idea of applying the zero-sum game on refugee law, however, is the significant tendency in most receiving countries to focus on flows rather than individuals, at least when addressing the issue to the public.

A very explicit example of a zero-sum game in a refugee law setting is the conflict between Norway and Australia in 2001 concerning the asylum seekers onboard the Norwegian freighter MS Tampa. The MS Tampa was guided to a sinking vessel by an Australian Customs aircraft and agreed to

take on board 438 persons. MS Tampa began to head for Indonesia, the country of embarkation of the rescued passengers but several of them objected and threatened to commit suicide if the captain did not change course for the Australian Territory of Christmas Island. When the Tampa came close to Christmas Island, permission to enter Australian territorial waters was refused. Australian authorities directed the freighter to keep out of Australian territorial waters and to change course for Indonesia.[11]

From a game theoretical point of view, the most interesting in this case is the deadlock between Norway and Australia that was created. Neither of the countries wanted the rescuees on their territory and the situation truly constituted a zero sum game where no player was inclined to cooperate with the other. Australia considered Norway (flag State) and Indonesia (State of embarkation) to be responsible for the asylum seekers. When the Norwegian Ambassador visited the ship and received a letter requesting asylum from Australia, the Australian government inquired whether Norway would be willing to accept some of the asylum seekers for processing, this inquiry received a negative response. Later UNHCR issued a compromise recommendation calling upon the States to burden-share. This time the Norwegian government's reaction was positive while Australia rejected the proposition. The fact that both countries rejected a cooperative strategy when they knew that the other player had accepted such a compromise is a consequence of the properties of the zero-sum game where there is no incentive to accept an offer of cooperation.

Another interesting aspect of the MS Tampa case is the fact that it took place during the national elections in both Norway and Australia and that the parties in power in both countries at the time were suffering in the polls. The Tampa case was used by the governments in demonstrating their strength. The Prime Minister of Australia used the image of repelling an "invasion" to raise his popularity. In Norway the government used the opportunity to take on a moral high stand accusing the Australian government of failing to cooperate in a humanitarian mission.[12] The fact that the rescuees were used in more than one game made it even harder for any of the players to give in to the demands of the other.

States often regard asylum burdens as a zero-sum phenomenon, in which a reduction of one country's burden will result in increasing burdens for other countries. The assumption is, again, that there are a certain number of migrants each year who intend to claim asylum and that the role of national asylum policy is to restrict the inflow into a particular country to an acceptable proportion. States will try to use policy instruments to make sure that their country will not be regarded as more attractive than others. Confronted with this, the EU Member States agreed upon shared procedures

[11] Baillet, The Tampa Case and its Impact on Burden Sharing at Sea
[12] Ibid, p. 744

for the processing of asylum claims and the reception, care and removal of forced migrants.[13]

2.4 The Assurance Game

The assurance game presents less conflict-driven features than the PD and the zero-sum game, but successful collective action remains uncertain. As shown in the matrix below, attaining the optimal outcome in the assurance game requires cooperation by all players.

Player II

		C	D
	C	4,4	1,3
Player I	D	3,1	2,2

The preference ordering of the players in the assurance game is CC>DC>DD>CD.

An examination of the matrix shows that the game has two Nash equilibria (CC and DD) and neither dominates the other. Although CC is Pareto superior to the other possibilities, a rational player may reach the equilibrium of DD, since a player may play D if she is not certain whether the other player will play C or D, and if she is determined to avoid the worst outcome (CD). In such cases, defection is the dominant choice.[14] Unlike the PD, pre-play communication between the players may alleviate the problem in assurance situations. A rational player will pledge to play C, thus improving the chances that the other player also will adopt a cooperative strategy. Such communication does not eliminate the likelihood of defection, since, regardless of her own play, Player 2 gains more if Player 1 plays C. Thus, no matter what action intended by Player 2, she will tell Player 1 that she intends to play C. Player 1 should of course not be assumed to believe Player 2.[15]

In two-player sequential assurance situations, a player may drive the other to cooperate in the next move by playing C in the first stage. A player may also accomplish this by committing to a cooperative strategy in an early stage. The same is true for N-player settings regarding all the players but the last one. If all players except the last one have already played C, or

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[13] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.
[14] Rousseau's story of the stag hunt, in which two hunters must cooperate in order to catch a stag, is commonly used to illustrate the structure of the assurance game. If the hunters catch a stag, it will be shared between them, thus generating the best outcome. If both hunt for hare, each one of them will catch a hare and attain inferior payoffs. The worst result arises if one player attempts to catch the stag while the other hunts for hare, the one hunting alone for stag will then catch nothing. *See* Binmore, K, *Game Theory and the Social Contract II, Just Playing*, p. 189
[15] Aumann and Hart, *Handbook of Game Theory with Economic Applications,* p.48

committed themselves to cooperate, a rational player playing last will cooperate to gain the optimal result (CC).

Attaining optimal results in N-player games is less likely than in two-player sequential situations. Increasing the number of players will increase the likelihood that one player will defect and, subsequently decreases a rational player's incentive to cooperate and thus take the risk of suffering the worst outcome (CD).

In an iterated assurance game, the prospects for cooperation are fostered because of the fact that the gap between the optimal outcome (CC) and those generated by cautious strategies (DD) grows, increasing the losses from long-term mutual defection. As the gap increases, the likelihood that a player will take the risk of a cooperative strategy and thereby encouraging the other player to cooperate is increased.

As noted above, a player in an assurance game will cooperate if assured that the other players will do the same. Therefore, gaining reliable information regarding the players' intentions is crucial to cooperation. Some scholars argue that the assurance game does not constitute a genuine collective action problem, but rather presents an "information problem".[16] Lack of information occurs frequently in the international arena. Players are expected to gather information regarding the expected behaviour and expectations of the other players. This task may be realized, wherever possible, through pre-play communication and examination of the other players' records in similar situations. In iterated situations, the players learn about the intentions of the others through the moves of the game itself. The negotiations of norms on asylum and migration that take place amongst the Member States are one way of satisfying the need for information. However, as we will learn from the theory of organized hypocrisy, words should be separated from action and the most valuable information is obtained through observing the other players' action.

Without reliable information, the variables used to determine the probability of a player adopting a cooperative or non-cooperative strategy are: (1) the extent of the gap between CC and DD, (2) the number of remaining stages of the game, (3) the discount rate[17] (in iterated games), (4) the number of players, (5) the magnitude of the risk generated by CD. Increasing the value of the first three variables increases the prospects for cooperative moves, while increasing the number of players and the magnitude associated with CD, decreases the prospects for cooperative moves.

In the arena of refugee law, the assurance game can be used to explain e.g. why States tend to stick to the minimum norms in the directives. In many situations, players are prepared to cooperate provided that enough others cooperate, but prefer defection if that is the way others are going to behave.

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[16] Elster, *Rationality, Morality and Collective Action*, p.136
[17] The discount rate is used to establish the importance of future payoffs. A high discount rate signifies a high importance of future payoffs and vice versa.

The players look at the other players' game moves to find out about their preferences and play accordingly.[18] Thus, if one State chooses to apply the minimum norm in a directive, the other States are likely to follow. Another example is the rapid spread of safe third country provisions across Europe in the 1990's.[19] States tend to copy deterrence measures introduced by other States in order to avoid the worst outcome (CD), which would be to have the most generous asylum provisions in the Union and thus have to cope with a disproportionately high number of asylum applications. This is different from the situation in the single shot PD, where each player would choose defection irrespective of the choice of the other player. What PD and Assurance have in common, though, is that the players prefer the outcome in which cooperation occurs to the outcome in which they both defect. Thus, if a State in fact prefers to apply more generous norms than the minimum ones, but only if the other States do the same, what we face might be an assurance game. The problem for those wanting to apply norms that are more generous is the advantage held by the first player to move. If the first player chooses defection then the others will have to copy that strategy in order to avoid the worst outcome. If the first player to move chooses cooperation, the other players have not as strong an incentive to choose cooperation as they do to choose defection when the first player defects, since CD is the next best option. Thus, a defective strategy is much more likely to propagate (and in an iterative situation initiate a "race to the bottom") than a cooperative one.

Thus, if a State truly finds it important for the Union to apply provisions that are more generous towards asylum-seekers, initial cooperation is the best strategy in which to "test the waters".[20] Even if this strategy is risky, it may be worth taking the risk of possible short-term losses in order to deploy this kind of information gathering strategy, and in future rounds getting those who also in fact want to cooperate, but are forced to defect because the others do so, to follow the cooperative strategy.

Similarly, when the Member States agree on criteria for determining what State is responsible for examining an asylum application through the adoption of the Dublin Regulation[21] they look to the other Member States in order to get information on whether they defect or not, since defection from the others would result in the worst possible outcome of CD. Thus, a defective strategy from one player would spread among the others in their effort to avoid CD. Therefore, when Italy allegedly neglects their duty to

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[18] Ward, *Testing the Waters: Taking Risks to Gain Reassurance in Public Goods Games*, pp. 280
[19] Thielemann, *The "Soft" Europeanisation of Migration Policy: European integration and Domestic Policy Change,* p.20
[20] Ward, *Testing the Waters: Taking Risks to Gain Reassurance in Public Goods Games*, p. 302.
[21] Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

examine applications for asylum of persons reaching their borders[22] and lets them continue to another Member State without registering them, this procedure runs a great risk of spreading to the other Member States.

2.5 The Coordination Game

As in the assurance game, all players in the coordination game have to cooperate in order to attain the optimal outcome. The central difference between these two game models is that while the assurance game presents only one pareto-equilibrium position, the coordination game presents multiple pareto-equilibria over which the players have divergent preferences. The normal form of this problem is presented in the matrix below.

<div align="center">Player II</div>

	C	D
C	2,1	0,0
D	0,0	1,2

Player I

The preference ordering for Player 1 is CC>DD>CD=DC
The preference ordering for Player 2 is DD>CC>CD=DC

Thus, the coordination game has two Nash equilibria (CC) and (DD). Each one generates different payoffs to the players, however. The players are interested in coordinating on one of the equilibria positions. The collective action problem arises since they have conflicting preferences regarding the chosen equilibrium.[23] If pre-play communication is allowed, each player may announce that she will follow her preferred equilibrium point (e.g. C for Player 1), while the other player, seeking to avoid the worst result (CD), is driven to the first suggested strategy. As we always assume that the players are rational, the above proposition does not help in solving the game. On the other hand, in sequential games the first player to move may have a significant advantage since she is able to commit herself in an earlier stage to her preferred equilibrium. The second player has then no choice but to join the first player. As in the PD, the prospects for cooperation are not necessarily decreased in N-player games, in some cases the prospects are even enhanced. Increasing the number of players impedes communication and complicates bargaining, but does not increase the players' incentives to defect from the equilibrium point. While each player in games with a small number of players may have an incentive to depart (or threaten to do so) from the coordination point in an attempt to compel the others to accept her preferred point, the strategy's impact decreases as the number of players increases.[24] In contrast to PD situations, the iteration of the coordination

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[22] Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, art. 3.1 and 10.1

[23] Shelling., *The Strategy of Conflict*, p. 69

[24] Snidal, *Coordination versus Prisoner's Dilemma: Implications for International Cooperation and Regimes,* p. 928

game does not lead to better cooperative results. On the contrary, playing through time may become one of the destabilizing factors in coordination games. The magnitude of the distributional problem corresponds to the extent of the gap between the payoffs generated to the players in the different equilibria positions. This gap is relatively small in a one-shot game, but it increases together with the iteration of the game. Thus, a player willing to give up the relatively small additional benefit of her preferred equilibrium, in order to avoid the worst results would find it more difficult as the gap grows with each iteration of the game. The discount factor's impact upon the prospects for cooperation is very different from that in the PD. Decreasing the discount rate to zero brings the players closer to the one-shot games. The decrease in the discount rate reduces future losses arising from compromise on the unfavourable equilibrium point. Therefore, decreasing the discount rate encourages players to cooperate.

Players playing the coordination game are expected to misrepresent their private information. They are likely to attempt to convince the others that adopting their preferred equilibrium position will also further their own interests. The players may gain on dissemble information and conceal or underrate unfavourable information, and exaggerate favourable data. Increasing the gap between the different equilibria positions enhances the distributional problem and intensifies the information problem. When the players do not trust messages conveyed by the other players, the likelihood of successful coordination is reduced.

The coordination game captures the essence of numerous collective action situations, in which several ways of attaining optimal results exist. The coordination game is applied to various international contests where the actors are interested in meeting each other in some coordinated position but have conflicting preferences over the particular meeting point. Below I will use the economic immigration policy as an example of the coordination game.

3 How to Ensure Cooperation

Many people find the fact that if both suspects in the PD refused to confess, they would have arrived at the lower-right outcome in the matrix (DD), in which they each go to prison for only 2 years, thereby both earning higher utility than they receive when they confess. The question is how the lower right box can be reached. Communication, some might say; if the partners in crime could communicate, they would surely see that they are both better off refusing, and could make an agreement to do so? In fact, however, this intuition is misleading and its conclusion is false since, in this case an agreement to refuse to confess can not help. If the partners are convinced that the other will stick to the bargain then they can seize the opportunity to go scot-free by confessing. Being rational players, they realize that the same temptation will occur to the other player and that she, consequently, also will confess, as this is her only means of avoiding her worst outcome. The agreement comes to naught because there is no way of enforcing it; it constitutes what game theorists call 'cheap talk'. However, players can make commitments that make it impossible for them to take what seem to be the best actions in the game. For this to work the commitment has to be credible, otherwise it can be dismissed as being cheap talk. In order for a commitment to be credible it has to make it impossible or too expensive for the player to take what normally would be her best action.

The importance of credible commitment is also true for the assurance and the coordination games. As we have seen, in the assurance game the first player to move is forced to defect in order to avoid the worst outcome (CD) and in the coordination game the second player to move is forced to follow the strategy adopted by the first player to move in order to avoid the worst outcome (CD or DC). Again, this is true for the normal form of the game, where no credible commitments are made. Only when the game is perceived as a zero-sum game, credible commitments are ineffective. Here we face positions that are locked no matter what is done.

3.1 Enforcing Commitment

In international law commitments are made through treaties, but without an effective enforcement mechanism the commitments run the risk of being cheap talk ("the rule of nobody"). It is easy to see the parallels to the PD game – the players get the opportunity to negotiate and agree on cooperating, they realize however that they are better off refusing to cooperate since the commitment lacks credibility. As being rational players the other States come to the same conclusion and consequently also defect. Human rights language can thus even be used to distract from and legitimize the opposite result, if the ones agreeing know that they will in fact defect. We will get back to this when discussing organized hypocrisy.

Looking at the Refugee Convention, we find that the UNHCR has a special responsibility to supervise the implementation of the Convention. [25] However, UNHCR is not really in a position to apply meaningful forms of pressure on States. UNHCR has, after all, a small core budget and is dependent on voluntary contributions of a very small number of powerful States.[26] Furthermore, the existence of UNHCR has made States to rely on the High Commissioner's supervision, thus neglecting their own responsibility to supervise their fellow States. In addition, States have either avoided or, on occasion, evaded UNHCR's insistence on the importance of protection principles.[27]

In addition to UNHCR supervising the Convention, the signatory States have the fundamental right and duty to ensure that other States actually live up to their obligations under the Refugee Convention. This right and duty is formalized by providing that disputes between States parties about the interpretation and application of the Convention are to be referred to the ICJ.[28] This possibility has never been used[29] but nevertheless, States are both the objects and the trustees of the Convention.

To be game-theoretically valid, however, an enforcement mechanism is effective only if it possesses the possibility to issue sanctions that make it economically unfavorable for the players to adopt a strategy that would be the best without such sanctions. Neither the UNHCR nor the signatory States have displayed such ability and alternatives have to be looked for.

3.2 Alternatives to an Enforcement Mechanism

3.2.1 Reputation as Commitment

Alternatives to an enforcement mechanism to secure commitment do exist however, and reputation is such an alternative. The value to a player of her own reputation can sometimes secure commitment, since reputation is an important factor for the outcome of future rounds. However, certain conditions must hold if reputation effects are to underwrite commitment. First, the game must be repeated, with uncertainty as to which round is the last one. If the players in a PD game know in advance which round will be their last, the equilibrium unravels; since reputation has no value in the last round both players will defect. The logic of backward induction gives us

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[25] 1951 Refugee Convention, article 35

[26] Hathaway, *Who should watch over refugee law?*, p. 397

[27] Ibid.

[28] 1951 Refugee Convention, article 38

[29] Kälin, *Supervising th e1951 Convention on the Status of Refugees: Article 35 and Beyond,* p.11

that the players in the second last round know that they will defect in the last round, which makes defection the dominant choice in all rounds.[30]

3.2.1.1 Reputation in Refugee Law

Thus, if Member States have a true intention and will to ensure e.g. the absolute respect of the right to seek asylum (in other words; if securing this right is the dominant choice) as expressed as late as 1999 in Tampere[31], but choose to undermine this right because of the fear that other States will defect, they have made the right choice only if the game has a final round. If the game is seen as endless, reputation could be used to secure commitment. Without a specific date for the last stage, there is no starting point for backward induction logic, thus inducing cooperation in the present stage remains a viable option. The key factor is that choices made in the present round not only determine the outcome of the present round, but can affect payoffs generated in future stages. Future payoffs are, however, probably less important than present payoffs. This phenomenon is referred to as the discount factor.

Note that the above mentioned is only true if securing the right to seek asylum is the dominant choice. If this will does not exist among the Member States the reason for defection is another, namely that the lack of effective sanctions make defection the most pay-off generating choice no matter how many rounds the game has.

More than one strategy can elicit cooperation in infinite iterated PD games. The most famous is "Tit-for-Tat", which has achieved the highest score in experiments.[32] Tit-for-Tat is a strategy of cooperating in the first move and then copying the other player's previous move. In order to motivate cooperation by Tit-for-Tat in infinite PD games, the players must not significantly underestimate future gains. In other words, the discount rate should be as high as possible. To lawyers, the tit-for-tat strategy is recognized in the principle of reciprocity.

3.2.2 Cardinal Values and Morals

Some games cannot (should not) be solved simply based on the players' ordinal utility functions, since the intensities of their respective preferences are relevant to their strategies. The soldier bound to run away might stay and fight since the intensity of his preference to live in a free country, or his sense of solidarity with his friends overrun his fear of being hurt or killed. The prisoner in the PD game might be madly in love with the other prisoner and cannot stand the thought of spending a single day without her. What does the player value? What society does she want to live in? This "personalization" of the game helps to explain action that seems to be irrational given the ordinal (objective) payoffs. The payoffs presented in the

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[30] Aumann and Hart, *Handbook of Game Theory with Economic Applications*, p. 12
[31] European Council, *Presidency conclusions*, Tampere, para. 13
[32] Axelrod, *The Evolution of Cooperation,* p. 42

games above entails only the ordinal utility functions, but the games may look differently when played by a player with e.g. very high morals.

When the players are human beings, cardinal values and morals are indeed factors to be taken into account when calculating the outcome of a game. In international law, however, States are the players, and the obvious question is whether these types of values are applicable also when the players are States. In other words: can a collectivity such as a State be a moral agent?

3.2.2.1 Morals in Refugee Law

The "Realists" answer to the above posed question of whether States can possess moral agency is in the negative. Even though States are seen as actors in international relations, realists do not see States as capable of moral action since national interests replace moral action.[33] However, in international law the idea of collective responsibility has been addressed when exploring the degree to which individual citizens must bear guilt for the past deeds of their governments. A degree of solidarity within a collectivity that allows those not party to an action to be held responsible has been assumed. Some theorists take this one step further and do not hold non-actors (within a collectivity) responsible for the agents' actions. Instead, the collectivity is the agent. These "institutional moral agents" are said to be vulnerable to ascriptions of duty and assignments of blame. A current example of this view is the filing of the claim to the ICJ by Bosnia, accusing Serbia-Montenegro, as a State, of Genocide.[34] This is the first ever genocide court case against a State in the 60 year history of ICJ. The Bosnian lawyer, Sakib Softic, says that "the essence of our claim is of a moral, not material nature"[35], thus implying that a State is a moral agent that can be held responsible as an entity, without having to search for responsible individuals within the collectivity.

I will neither suggest that States are moral agents nor that they are not, since I find it impossible to prove either of the views. History gives us several examples of States acting morally, but whether these moral actions have been taken because of the fact that States posses the ability to understand moral reasoning or because they are driven by other goals, is impossible to answer. In the forthcoming though, it is relevant to be sensitive to the idea that States may not be sensitive to moral arguments.

The assumption that collectivities such as a State are sensitive to moral arguments is made by e.g. human rights NGOs. If not it would be pointless to condemn an action by a State based upon moral arguments, at least if you expect the States to change their action based solely on that argument. The assumption that States are moral agents, or at least to be insensitive for the possibility that they are not, may be, as we will discuss later, quite decisive.

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[33] Erskine, *Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States*, p. 243
[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)
[35] http://www.rferl.org/newsline/fulltext.asp

In the words of O'Neill: "If ethical reasoning is accessible only to individuals, its meagre help with global problems should not surprise us".[36]

3.2.2.2 The International Community as a Moral Agent

Politicians, NGO's, the public and many others often talk about the "international community". There is no generally agreed understanding as to what the term means, but it is clear that the international community is presumed to possess agency, the ability to act in the world. Moreover, this agency is frequently assumed to be explicitly moral, insofar as the notion of the international community is used in connection with moral duty. The term is often used in the context of moral failure, e.g. when the international community has failed to prevent some human rights abuse in some part of the world. Thus, the international community is perceived as some kind of collective agency-possessing body.[37]

Scholars in the mainstream of contemporary international relations are critical to this notion of the international community. A structural realist's approach is that the international system is generated by the self-regarding actions of its component States, and that this system may constrain the behaviour of the actors, but it does not possess agency.[38] In game theoretical terms, this approach means that the international community can never be a player, but it can limit the scope of possible actions (strategies) available to the players. This assumption makes the notion of the existence of an international community as an agent an unhelpful and even dangerous fiction, because it draws attention away from the fact that the States are the key actors in international relations. Another unfortunate consequence of the notion of an international community possessing moral agency is the false assumption that action can or should be taken on behalf of the common good, while in reality the cause of international action is the egoistic interests of States. The use of the term international community implies the possibility of altruism and self-sacrifice on the part of States, but such action is not to be looked for, according to the structural realist. As an example, the UN was not just created by States; its central agencies actually consist of States. These States do not simply pursue the common good of the society. Rather, they pursue their own interests even if they clash with the common good, or define the common good in such a way that it corresponds with their own interests.

What makes the international community to act, or give the impression to do so, can be explained by using the assurance game. As we have seen above, this game is distinguished by the need for cooperation by all players, and the difficulty to obtain cooperation in N-player games. The chances for cooperation increases if the gap between the payoffs for mutual cooperation and the payoffs for mutual defection increases. Thus, in the context of international law, a human rights violation has to be great enough to produce a sufficiently big gap between CC and DD, in order for the States to

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[36] O'Neill, *Who Can Endeavour Peace?*, p. 62
[37] Brown, C., *Moral Agency and International Society,* p.87
[38] Ibid, p.32

take collective action in the name of the international community. The less dramatic violations of human rights that take place as a result of the refugee policy are not likely to create such a consensus.

3.3 Cooperating in what?

Several of the game theoretical examples show that cooperation is better paid off than mutual defection, but that the properties of the game forces defection. To use this conclusion in the context of refugee law is indeed tempting since it would lead to the conclusion that States would be better of cooperating in collectively tackling the challenges of forced migration as stated in the Tampere Summit Conclusions, but that the properties of the game itself forces them to choose the less favourable action of defection. This may be true, but the kind of cooperation in question depends on what the preferences of the States are.

Unlike the players in the games presented in chapter 2, States do not have only one goal, but many. Some of these will be met by cooperating and some by defecting. Among the goals, we find migration control, compliance with international law, solidarity between Member States, ensuring protection to those within the jurisdiction of the State and cost reduction.[39] These goals are sometimes opposed to one another, and can not be met without circumscribing another. By looking at the goals preferred by the State, the interests of that State are revealed. These interests are not static but changes over time, as was clearly seen after the events of 11 September when the intensity of the preferences shifted from humanitarian sensitivity to security, i.e. the payoffs for meeting humanitarian needs was lowered in favour for security issues. As put by the Economic and Social Committee: "An increasing zeal for the need of security tends to undermine a climate of tolerance, acceptance and humanitarian sensitivity, prevailing in the behaviour of European refugee-immigration services, as well as in European legislation".[40]

Thus, a cooperation taking place when the payoff for applying a restrictive policy is greater than that for implementing a policy built on humanitarian values would mean a cooperation in keeping potential asylum-seekers away rather than cooperation guided by the full inclusion of the 1951 Refugee Convention and other relevant human rights instruments.

A common argument among the supporters of the view that States have to realize that they are better paid off implementing more generous asylum policies is that the Member States are dependant on immigration. This is a valid argument, but some immigrants are more valuable to the receiving

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[39] Noll, *Negotiating Asylum: The EU Aquis, Extraterritorial Protection and the Common Market of Deflection*, p.341.

[40] COM(2001) 510 final, p. 6, 5.3.

State than others are. Refugees are not the most valuable immigrants for a country, since their qualities as contributors to the society is not a relevant factor in the qualification process. The State wants to control the game, be able to chose "productive" persons, and avoid large amounts of refugees. This is done through several strategies of which border control is the dominant one. Through schemes of border control, the State can control who gets in on their territory instead of letting the schemes of refugee protection be the determinant. Another common strategy used once the asylum seeker is on the territory of the State is that of unfair and complex proceedings of asylum claims. It is a game of cherry picking, of constructing a net through which the wanted enters and the others are kept out.

Considering the above mentioned, how come that EU Member States sometimes do strengthen the protection for refugees in their common instruments, as they did inter alia by accepting non-state actors as agents of persecution in the Qualifications Directive?[41] This question leads us back to the theory of repeated games, discussed briefly in chapter 2.2, and to the theory of cherry picking.

3.4 Cherry-picking

A reasonable procedure when dividing a cake with a cherry on top between two persons is that one of them gets to divide the cake into two parts and the other gets to choose one of the parts. If this game is iterated, the player dividing the cake should cut it into different sizes in the different rounds to check how much of the cake the other player is willing to sacrifice in order to get the cherry. If the player that gets to choose always picks up the part that he really prefers, he will reveal in a few rounds his trading price and the other player will henceforth be able to take full advantage of the knowledge thus acquired.[42]

The conclusion of the famous game theoretical problem of cherry picking is that the player that gets to choose should sometimes choose the bigger part of the cake and thus lose the cherry in order to, in forthcoming rounds of the game, get the biggest possible part of the cake, including the cherry.

If we go back to the world of refugee law, the question of why the EU finally agreed upon accepting non-state actors as agents of persecution in the Qualifications Directive, we might find a possible answer in the cherry example. The reasons why the Member States finally agreed upon acceptance may be many, but one of them may be that they saved the cherry picking for later, for instance in negotiating the Procedures Directive.

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[41] Article 9(1)(c) of the Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection
[42] Aumann and Maschler, *Repeated Games with Incomplete Information*, p. 2.

This way of acting contrary to one's preferences in order to win a later round is one strategy. Another is to say one thing but act contrary to it in order to give the impression that the cherry has been left out but ending up with it anyway by committing oneself to leave the cherry knowing that when the time comes to divide the cake they will get the cherry anyway. This phenomenon is called organized hypocrisy.[43]

3.5 Organized Hipocrisy

In Tampere it was established that a common asylum system should fully include the Geneva Convention.[44] The text that the European Council agreed upon concerning refugee status determination establishes that the policy shall be based upon a total inclusion of the Geneva Convention, and in particular the principle of non-refoulement.[45] Amnesty International, UNHCR and ECRE hold the opinion that the EU has failed to live up to the goals of Tampere,[46] and many critics mean that the content of both the Qualifications Directive and other pieces of European refugee legislation have been watered-down, from a human rights perspective.

The fact that the institutions of the EU discuss and make decisions in one way, to later act in another, fits in the theory of organized hypocrisy, as developed by Brunsson[47]. High morals and human rights principles are, time after time claimed to be prioritized and complied with, but in reality the rights are dismantled, and whether the Geneva Convention is "fully included" can indeed be questioned.

An organization that wants to work efficiently and rationally, but at the same time satisfy a wide range of interests faces problems. Organized hypocrisy can be one way, maybe even an inevitable way, of tackling these problems. Hypocrisy may be defined as the difference between decision and action, between rhetoric and practice. By speaking in one way, decide in another and act in a third way, organized hypocrisy is created. In controversial issues, it may be easier for an organization to act in a specific way if rhetoric and decisions indicate something else. In this way, groups with diverse interests can get the feeling that their interests have been observed and met, at least partly. When rhetoric and decision coincides, it is normally presumed by implication that the action taken will follow this same line. However, the concept of "reversed correlation of causality" in the theory of organized hypocrisy presupposes the opposite - if rhetoric and

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[43] Brunsson, *The Organization of Hypocrisy – Talk, Decision and Action in Organizations*
[44] European Council, *Presidency conclusions*, Tampere, para. 13
[45] The Council of the European Union, "Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted", p. 1(2), p. 3(36) and Article 21
[46] ECRE, *Broken Promises – Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection Tampere 1999 - Brussels 2004*
[47] Brunsson, *The Organization of Hypocrisy – Talk, Decision and Action in Organizations*

decision, in an organization subject to diverse interests, point in one direction, it is probable that the action taken will point in another. [48] In this way, rhetoric and decision compensate for action and vice versa, and hypocrisy thus makes it possible for organizations that are constantly exposed to different interests to create and maintain legitimacy.

Obviously, organized hypocrisy creates problems for actors that wish to have an influence on decision-making and action in an organization. The theory of organized hypocrisy should not, however, be interpreted so as to signify that actors that want to influence the outcome of the game should try to affect the outcome of decision in the opposite direction of that they want the action to take. It is merely an attempt to explain that words are words and action is action. This seems obvious, but Brunsson means that we are used to thinking in terms of automatics, i.e. that decisions and action will coincide.[49] It goes without saying that, to be able to influence and make a change it is important to understand how organizations and States deal with opposing values and norms.

Even though the word hypocrisy has an unpleasant ring to it, organized hypocrisy may have a great moral advantage, since it makes it possible to speak and make decisions in ways that include high moral values, even if these values can not be met in action.[50] Hypocrisy makes it possible to talk and decide in terms that include high moral values, even if they can not be followed. It may be seen as expressing the will to act in a certain way, even if that action is not possible to take right away.

3.5.1 Illegal Immigration as an Example of Organized Hypocrisy

When talking of the wanted migrant, a rather young and highly educated labour migrant is most often referred to. The focus on skilled migration does not tell the whole story though. It is apparent that across Europe there are large numbers of unskilled migrant workers, often with an irregular status and employed in the informal economy. Thus, in addition to filling gaps at the higher end of the labour market, migrants will do the lower status jobs that European domestic workers seem less willing to do, at least if the compensation is as low as for the illegal labour.[51] Policies that claim to exclude undocumented workers may often really be about allowing them in through back doors so that they can be more easily exploited. This in turn, could be seen as an attempt to create a transnational working class, stratified not only by skill and ethnicity, but also by legal status.

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[48] Ibid, p.11
[49] Brunsson, *The Organization of Hypocrisy – Talk, Decision and Action in Organizations*, p. 199
[50] Ibid, p. 9
[51] Geddes, A., *Immigration and the Welfare State*, in *International Migration and Security*, p. 159

Migration is perceived as advantageous by some groups and as negative by others and governments can usually not openly decide to favour the interests of one group and ignore the others. Following the logic of organized hypocrisy, the State tries to balance competing interests, or at least to convince certain groups that their wishes are being considered. The strength of nationalism and racism in immigration countries has made it easier to mobilize public opinion against immigration than for it. Applying the theory of organized hypocrisy, this can mean that politicians are content to provide anti-immigration rhetoric while actually pursuing policies that lead to more immigration because this meets important economic or labour market objectives. When illegal day-labourers are hired openly every morning in the streets of a Member State it may be a way of managing the contradiction that the economy of the State needs workers while public opinion will not accept a labour recruitment policy. It is said that the German Government Offices was partly built by illegal labour, whether this is true or not it provides for a good metaphor of the existing gap between the restrictionist control rhetoric and the immigration reality; between words and action.

4 Attempts to Foster Cooperation

To coordinate the actions of their members is generally supposed to be the very purpose of organizations such as the EU. If the EU Member States were to adopt a cooperative strategy this would be beneficial for the Union since this would make decision-making more manageable and would increase the payoffs for the Union as a whole. The individual Member State, however, is not likely to adopt a cooperative strategy if the other players do not do the same, since this could result in the individually worst outcome of CD. In other words, a cooperative strategy applied throughout the Union is Pareto optimal (no other strategy would be preferred by all the players), while defection is the Nash equilibrium (no player can benefit by switching her strategy if the other players' strategies are unchanged).

The interest of the EU to break the deadlock produced by the difference in Pareto optimality and the Nash equilibrium and to promote a cooperative strategy has led to such initiatives as the Open Method of Coordination and the European Refugee Fund. Their success, however, has failed to appear.

4.1 The Open Method of Coordination in Immigration Policies.

As mentioned above, the Member States are dependent on immigration to satisfy their economic needs. However, these needs differ from country to country and within a country over time. An EU-wide immigration system could prevent disruptive policy competition by presenting Member States with a common standard upon whose adherence fellow Member States could rely. In this way, competitive policy-making that can impose effects on other States (e.g. restrictive asylum policies that creates an increased burden on more lenient neighbours), is avoided. However, the diversity of the interests of the many players makes the danger of deadlocks impending and methods to avoid these decision traps are constantly tried out. One such mechanism is the so-called Open Method of Co-ordination (OMC), which the Commission has tried to introduce in the realm of immigration policy to encourage countries to advance their levels of national policy co-ordination through a common governance mechanism.[52] The OMC is an instrument expected to spread 'best practices' and achieve greater convergence toward common EU goals via an iterative process incorporating the following steps:
- allowing the EU to set common guidelines along with specific timetables;

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[52] COM (2001) 710 final

- establishing a system of common quantitative and qualitative indicators that allows the Member States to compare and benchmark their practices and policy performance;
- allowing the Member States to translate these guidelines into national and regional policies that set specific targets and implementation procedures, yet allow for diversity and flexibility in each individual case;
- periodic monitoring and evaluation through a peer review process whose primary goal is educative.[53]

The OMC has been praised as a "panacea for speeding up European decision making, since it aims to avoid much of the negotiation and horse trading that is part of intergovernmental policy making"[54]and is an attempt by the Commission to introduce a soft form of coordination among the Member States in the area of immigration policy. In its proposal, the Commission shows sensitivity towards the sovereignty concerns of the Member States and avoids attempting to assume direct legislative authority. Knowing the interests of the States, the Commission highlights the economic benefits that could occur as a result of coordination. On this point the Commission is quite straightforward, suggesting a balancing of resources needed to integrate migrants against their contribution to economic and social development.[55]

This offer to integrate the States in a less threatening framework shows little sign of being accepted by the States, however.[56]

From a game theoretical point of view, the initiative by the Commission to introduce the OMC is an interesting phenomenon. Clearly, the Commission sees the OMC as being advantageous to the Union as a whole, while the States' reluctance indicates that they do not consider it favourable. As being self-regarding entities, the States do not primarily look at such a thing as the common good for the community if it does not happen to coincide with the interest of the individual country. While the payoffs for the Union are increased, the payoffs for some States might decrease. The fear of being that State, combined with the fear of losing the control of the game if the OMC develops into fully fledged EU law prevents States from using the OMC in the area of immigration and asylum. Caviedes argues that there seems to be a miscalculation as to the degree of anxiety that Member States feel toward unilateral Commission legislation in this field.[57] Miscalculated or not, it is the perceived payoff that counts when a player decides which strategy to adopt.

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[53] COM (2001) 710 final

[54] De la Porte, *Is the open method of co-ordination appropriate for organising activities at European level in sensitive policy areas?*, p.39.

[55] COM (2001) 710 final, p.7-8

[56] Caviedes, *The Open Method of Coordination in Immigration Policy: a Tool for Prying Open Fortress Europe?*, p. 310.

[57] Ibid, p. 290.

A game theorist would probably not bet his last chip on such a thing as the OMC since, as in all soft law mechanisms, there is little incentive to meet stated goals, let alone enforcement. In addition, there is little assurance that the goals being set are either realistic for, or truly challenging to a particular State. If an OMC process is to achieve success in a given area and not merely constitute cheap talk, there will have to be a genuine belief that it is in the best interest of the State to follow a particular guideline. To this end, however, a soft approach as the OMC can be a useful arena for the players to test the waters, since it does not press for harmonization. Brunsson would probably argue that the OMC could be used as a tool for the States to set challenging goals, secure in the knowledge that failure to meet these goals will not be penalized. However, success depends on the true will of the State regardless of whether the intentions expressed are met or merely an expression of organized hypocrisy.

Another interesting game theoretical aspect is to look at the differences between the OMC in economic immigration and asylum policies. The emphasis in immigration policies is upon monitoring the implementation of legislation already in place, rather than using the iterative guideline process as a means for creating new legislative initiatives. Unlike the OMC in asylum, where the Commission aims at a harmonization between national policies[58], the OMC in economic immigration focuses more on coordinating and monitoring how the existing legislation is being implemented.[59] This reflects that, with respect to asylum policy, countries seek assurance that their fellow member States will not act as passive bystanders, but process asylum claimants according to common criteria. If we assume that asylum-seekers are not wanted in the European countries, each State will have to look to other countries' control policies to ensure that their own belong in the most restrictive flank. This behaviour is based on the theoretical assumption that the so-called "magnet effect" will channel the flows to the easiest accessible country.[60] Thus, while the asylum policy is an assurance game, the economic immigration policy is more of a coordination game, since the States have different preferences and needs of immigration. As we have learned, in the coordination game the access of information is fundamental, through the diffusion of information and practices among Member States, the Commission enhances the possibilities for the States to reach their preferred equilibrium. Being aware of policy changes among fellow member States allows the countries to adjust their domestic labour market and social policy to compensate for possible shortages or surpluses that could result if a fellow member facilitates or curtails immigration. Meanwhile, uniform obligations in asylum policies provide the common safeguard that is so important in an assurance game.

Coordination, or harmonization as it is often called, has not been totally absent in asylum policies, however. The EU-wide initiatives of a

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[58] COM (2001) 710 final
[59] COM (2001) 386 final
[60] Brochmann, *The Current Traps of European Immigration Policies,* p. 5.

coordinated approach in asylum policies put forward by the European Commission, including the criteria for recognition of refugee status and minimum standards for the reception and treatment of asylum-seekers, have brought harmonization to the policies of the Member States to some extent, but "[…] they are best seen as attempts to harmonize the succession of ad hoc policy developments that took place at the national level during the 1980s and 1990s".[61]The biggest progress when it comes to coordination has been the setting up of the European Refugee Fund in 2000.

4.2 The European Refugee Fund

The main goals of the ERF are to help defray the costs of projects for the economic integration of refugees, and to finance emergency temporary protection measures in the case of a mass influx of refugees.[62] These two assignments reflect very well the States' main fears of adopting a cooperative strategy – to be economically burdened or flooded.

The ERF owes its origin to the Tampere meeting in 1999, which called for the establishment of a financial reserve for the implementation of emergency measures to provide temporary protection in the event of a mass influx of protection seekers.[63] Despite its rather modest budget, in financial terms it is by far the largest EU programme on asylum and immigration.[64] Its rationale is "to demonstrate solidarity between Member States by achieving a balance in the efforts made by those Member States".[65] In other words, the ERF aims to reduce the risks that a cooperative strategy could bring about. This is supposed to be done by allocating resources proportionately to the burden on each Member State in accordance with their efforts in receiving refugees and displaced persons. Game theoretically this is a valid intention with prospects of being successful since it directly addresses the disparities in the payoffs for DD and CD. As we have seen, the major risk in adopting a cooperative strategy is that the other players will defect, thus leaving the cooperative player at the worst possible outcome. For a payoff-focused measure such as the ERF to be successful however, it needs to increase the payoff for CD to a level reasonably close to that for DD, so that the players get a real incentive to try a cooperative strategy. This is where the ERF has failed. By the end of its first funding cycle (31 December 2004), the ERF had sought to distribute approximately €40 million per year according to two elements, a fixed and a proportional one.[66] The ineffectiveness of the fixed element to foster cooperation is

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[61] Hatton, *Seeking Asylum in Europe*, pp. 21-22

[62] The Council of the European Union, *Council Decision Creating a European Refugee Fund,* p. 1(4), art. 4, p. 2(10) and art. 6

[63] Ibid

[64] Thielemann and Dewan, *The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing*, p. 361

[65]The Council of the European Union, *Council Decision Creating a European Refugee Fund,* para. 11

[66] Thielemann, *Between Interests and Norms: Explaining Patterns of Burden-Sharing in Europe*, p. 261

obvious – if each Member State receives the same amount irrespective of their policies, no change in the payoffs for the different strategies is made. This seems to have been recognized by the Council already at the creation of the Fund, since the decision creating the ERF prescribes a scaling down of the fixed element.[67]

Regarding the proportional element of the Fund, its capacity to promote cooperation can also be questioned. Currently, the proportional part of the Fund is distributed based on the absolute number of protection seekers received by a Member State.[68] Thus, a particular number of protection seekers trigger the same amount of money, irrespective of the characteristics of the receiving State. This system benefits countries with large absolute numbers of protection seekers disproportionately considering that small receiving countries do not have the same possibilities to accept as large amount of asylum seekers but need to build the same type of institutions as the larger ones.

Thus, the ERF possesses potential to foster cooperation since it addresses the immediate payoffs of the game. However, the fixed element has to be skipped or scaled down and the proportional element has to be adjusted to the properties of the individual State. Nevertheless, even if the ERF were distributing its resources in an optimal manner, its overall impact would still be rather limited, given its relatively small economic size, i.e. it lacks the potential to change the payoffs enough to alter the optimal strategy of defection.

In 2004, the Council adopted a proposal for an extension of the ERF for the period 2005-2010.[69] While the size of the Fund has been roughly tripled, the allocation rules have remained virtually unchanged. Given the shortcomings of the allocation rules and the continued relatively small revenues, the ERF is not likely to influence the Member States' considerations significantly when deciding what strategy to adopt. However, in symbolic terms, the ERF is important and its impact has a potential to grow as experiences and financial funding do so.

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[67] The Council of the European Union, *Council Decision Creating a European Refugee Fund*, Art. 10.1
[68] Ibid, Art. 10.2
[69] The Council of the European Union, *Council Decision Establishing the European Refugee Fund for the period 2005 to 2010*

5 Getting What You Want

As we know, when choosing a strategy in an iterated game, a player must be aware of the fact that his choice of action will have effect on coming rounds. As in the game of chess, it is important to foresee coming rounds using backward induction, and maybe sacrifice a pawn or two, to be able to strike the king of the opponent in a coming round. It is easy to be so spellbound by avoiding a bad outcome in the present round that all possible ways for this outcome to occur are blocked, without a thought on that this may also block the desired outcome from happening in the future. In other words - even if you hate cake, you may have to accept that it is underneath the cherry that you love so much. One strategy is to deny all cake, thus loosing all cherry, another is to try to pick the cherry and leave the cake behind and yet another is to accept that the cake comes with the cherry and focus on means to make the piece of cake as small as possible.

5.1 Weeding out the Unwanted

The first major response to the Tampere conclusion in the area of immigration was the "Communication on a Community Immigration Policy".[70] At the heart of this communication was the declaration that "the existing zero immigration policies which have dominated thinking over the past 30 years are no longer appropriate within the new economic and demographic context".[71] In accepting it to be true that immigrants have a positive effect on economic growth and do not burden the welfare State disproportionately, this policy targets a particular subset of immigrants, namely the wanted. As put by Caviedes: "if one employs the image of a "fortress Europe" whose gates now swing open, one must concede that admission yet remains by invitation only".[72] A striking example of this is the introduction of the so-called integration potential criterion in national resettlement programmes. The term "integration potential" suggests that emphasis is put on immigration criteria rather than protection needs when it comes to selecting refugees for resettlement.[73] Even though most resettlement countries claim that the protection of the refugee is the number one priority in their refugee resettlement program, at least some of these countries admit that integration potential would show up positively in the selection process.[74]

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[70] COM (2000) 757 final

[71] Ibid, p.6.

[72] Caviedes, *The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?,* p.310.

[73] UNHCR, *UNHCR concerned about proposed changes to Danish Aliens Act*, UNHCR News, 9 November 2004

[74] International Conference on the reception and integration of resettled refugees, Proceedings Report, *Global Overview: Refugee Resettlement and Integration Models and Methods,* p.12

The game of keeping out the unwanted migrant is one of lowering the payoff for leaving the country of origin, so that it is lower than the payoff for staying. Hatton divides these measures into four types: those designed to tighten access to the country's borders by potential asylum-seekers, those designed to toughen asylum procedures, those relating to the outcome of asylum claims and those relating to the treatment of asylum-seekers during processing.[75]

However, lowering the payoffs for immigrants may have the undesired effect of scaring off not only the unwanted, but also the wanted migrant. The current demand for migrant workers in the EU is fuelled by labour market and skills shortages and by the effects of population change, low fertility rates and ageing populations.[76] The European Commission stated that immigration would be necessary if Europe was to attain its objective of becoming the world's leading knowledge based economy.[77] Continued migration to the EU as well as efforts to promote more flexible European labour markets are thus necessary attempts to secure economic reform objectives. This has made migration one of the strategic priorities in the external relations of the Union and helps explaining the very different social and legal contexts facing a highly skilled migrant from that facing an asylum seeker.

Another consequence of this will to separate the wanted from the unwanted is the reaching out by the EU to third countries in issues concerning migration management. Thus, the Union, as one Player, wants to cooperate with third countries in order to better control the migratory flows. Regarding this cooperation, The Hague Programme stated that the "EU should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return".[78] As mentioned above, however, the Union is dependant on immigration and the measures of the restrictive measures of the Hague Programme need to be completed with measures to let the wanted migrant in. In a communication from the Commission to the Parliament, this need is expressed by stating, "Until recently the external dimension of the migration policy has been prevalently built around the objective of better managing the migratory flows with a view to reducing the migratory pressure on the Union. Although this remains a valid goal, the additional challenge today lies in the development of policies which recognise the need for migrant workers to make our economies function".[79] Thus, the techniques of frontier controls are obliged to change because the old paradigm of the sealing of the

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[75] Hatton, *Seeking Asylum in Europe*, p. 22

[76] COM (2004) 811 final, p.3

[77] COM (2003) 336 final, p.3, 9-10

[78] The Council of the European Union, *Presidency Conclusions – Brussels*, Chapter 1.6.1

[79] COM(2006) 26 final, p.9

border does no longer serve the interests of the State.[80] The focus has shifted from lowering the number of migrants reaching the borders of the Union, to constructing a net that keeps out the unwanted and lets the wanted in. Given this current debate in the Union combined with the logics of game theory, it seems that the EU approach to controlling migratory-flows is no longer primarily control or security based, but follows a need-based selection process. As expressed by the Commission: "it is necessary to move from a "more development for less migration" approach to one of "better managing migration for more development"".[81]

Thus, the EU immigration policy is not merely the extension of a protectionist nation-state mentality, but possesses a dual approach. While the issue of controlling immigration flows and preventing illegal migration remains central, the other major emphasis is on creating a coherent system for addressing the needs of the European labour market. At the same time as facilitating the economic immigration, the approach towards "uneconomical" immigration is hardened. This is a cherry-picking game where the fear of getting the unwanted creates restrictive immigration policies, but at the same time steps are taken to avoid the potential side effect of preventing the wanted from satisfying the economic needs that can only be met by foreign labour.

The Commission states that "admission should be conditional on the existence of a work contract and on the "economic needs test"".[82] The contents of the economic needs test is not specified in the communication, but it would probably not be a shot in the dark assuming that it means the same as in the Commission's communication on the OMC, i.e. that there should be a net benefit for the State letting the migrant pass the border. It seems that the expression "economic migration" has shifted its' negative connotation of "bogus refugees" to a positive one, meaning legal migration that is economically beneficial for the Union.

5.1.1 Externalization of Migration Control

The externalization of migration control provides for a great example of the EU, as one sole actor, playing against countries of origin and/or countries of transit. Thus, we now deal with a two-player game as opposed to the N-player game that the negotiations between the EU Member States present.

Policy measures aimed at deterring unwanted migration have often been ineffective because of the fact that the key determinants of an asylum seeker's choice of host country are historical, economic and reputational; factors that largely is beyond the control of policy makers.[83] Given the shortcomings of traditional migration control policies played against the

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[80] Bigo and Guild, *Controlling Frontiers – Free Movement Into and Within Europe,* p.9
[81] COM(2006) 26 final, p.10
[82] COM(2005)669 final, p.6
[83] Thielemann, *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration*, p.2

asylum-seekers, the European States have looked for alternative strategies. As stated in the previous chapter, EU States have increasingly sought to address migration management dilemmas through cooperation with migrant-sending countries and the transit countries through which migrants and refugees travel. This area of cooperation with third countries has become known as the "external dimension" of EU cooperation in Justice and Home Affairs and has been stated inter alia in a series of European Council conclusions.[84]

If the EU is to make this external dimension work, it will have to provide incentives for third countries to cooperate in migration management. This follows the simple logic of a rational player pursuing the strategy with the highest payoff. If the current game does not provide the payoffs for making cooperation the dominant choice, one can either decrease the payoff for defection or increase the payoff for cooperation. This "carrot and stick" approach has been used by the European States in their relations to the Maghreb countries, offering sizeable financial and in-kind assistance, partly in relation to areas unrelated to migration.[85]

In the early stages of this search for new forms of cooperation to limit migration flows, two distinct strategies emerged. The first was what has been named the "externalization" of migration control, which in turn involved two main components. First was the exportation of classical migration control instruments to sending or transit countries outside the EU. The main instruments here were border control measures to combat illegal migration, smuggling and trafficking, and capacity-building of asylum systems and migration management in transit countries. The second element of externalization comprised a series of provisions for facilitating the return of asylum-seekers and illegal migrants to third countries. Here, the emphasis was put on readmission agreements with third countries committing them to readmit irregular immigrants who had passed through their territory into EU countries, or were their nationals. Other provisions on safe third countries allowed EU States to return asylum-seekers to countries from which they came or through which they had passed which were considered "safe"[86], to impose visa restrictions[87] and airline sanctions[88] etc. Such policy measures are often justified with recourse to the argument that ''a rising number of

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[84] European Council, *Presidency conclusions*, Tampere,
European Council, *Presidency conclusions*, Laeken,
European Council, *Presidency conclusions*, Seville
[85] Schuster, *The Realities of a New Asylum Paradigm, p.18*
[86] Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, art. 36.
[87] Council Regulation Listing the Third Countries whose Nationals Must be in Possession of Visas when Crossing the External Borders and those whose Nationals are Exempt from that Requirement
Council Regulation amending the Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism.
[88] Council Directive on the Obligation of Carriers to Communicate Passenger Data

applicants for asylum in the Member States are not in genuine need of protection''.[89]

The second approach to the external dimension is based on a logic of prevention, seeking to influence the factors forcing or encouraging migrants and refugees to travel to the EU. This approach generated proposals for addressing the "root causes" of migration and refugee flows in countries of origin, through more targeted use of development assistance, trade, foreign direct investment and foreign policy instruments. It also generated proposals to promote "reception in the region", that is to say support for refugee protection in countries or regions of origin, so that they would not be obliged to seek asylum in Europe.

In a communication on "Integrating migration issues in the European Union's relations with third countries", the first real attempt to develop a strategy for targeting external relations to address migratory pressures was presented.[90] In this document, the Commission clearly prioritized preventive, root causes approaches over control-oriented approaches. Attempts to enlist the cooperation of sending countries through binding them into mutually beneficial areas of partnership is in this Communication seen as the most efficient means of decreasing migration flows. Cooperation on migration management, including readmission agreements, border control and combating illegal migration is treated as largely subordinate to the central strategy of reducing migratory pressures through development aid. By paying more attention to the concerns of sending countries, it both provides incentives for third countries to cooperate on migration issues and could go some way towards addressing the negative impact of emigration and migration control policies on development. The aim of the root cause approach is to limit flows through expanding opportunities for potential migrants to stay put, rather than limiting possibilities for movement. The root cause approach is a good example where the self-interest of States could lead to positive results for third world countries, in terms of development and human rights.

However, since the driving force of these projects is to limit migration flows, the target group is refugee producing countries rather than the countries most in need of development aid. In addition, it is not necessarily bad for a country to have a population inclined to migrate. According to some estimates, current annual remittance flows to developing countries are actually higher than the total official development assistance and hence provide an important positive contribution to the balance of payments and are a major source of foreign exchange.[91]

The root cause approach carries its own problems and risks. The impact of development on migration choices remains under-researched and may reduce migration pressures only in the longer run. Moreover, a policy

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[89] European Council, *Resolution on Manifestly Unfounded Applications for Asylum*, p.1
[90] COM (2002) 703 final
[91] Martin, *Remittance Flows and Impact*, p.1

targeting development to reduce migration pressures assumes that recipient countries will be "good performers", using development aid effectively. This can not always be assumed to be the case since, as we have seen, games will often give the optimal outcome for the player if she promises to cooperate, but chooses to defect.

In 1999, the High Level Working Group made action plans for Afghanistan, Albania, Iraq, Morocco, Somalia and Sri Lanka, focusing on root causes of migration.[92] The intentions was to co-ordinate the EU response and bring the interests of security, foreign policy and development to bear on the protection of human rights, democratization and constitutional governance, combating poverty and conflict prevention and resolution. "The Action Plans contain proposals for measures for cooperation with the countries concerned in three integrated categories: foreign policy, development and assistance as well as migration and asylum. The Action Plans can be considered as a first attempt by the European Union to define a comprehensive and coherent approach targeted at the situation in a number of important countries of origin or transit of asylum-seekers and migrants".[93] However, the HLWG was composed of mainly JHA officials with relatively little experience of dealing with third countries or with development aid, and security has been the watchword. The primary focus has been on exporting migration control measures, such as airline liaison officers, anti-immigration information campaigns and readmission arrangements to the source countries.[94] NGOs have criticized the Action Plans for failing to adequately address human rights violation in countries of origin[95] and the HLWG itself found that several countries of origin were reluctant to cooperate since they felt that they were "the target of unilateral policy by the Union focussing on repressive action".[96]

In 2004, the Parliament and the Council adopted a regulation establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS)[97]. The programme reflects the continued emphasis placed by the EU on the incorporation of migration related objectives into the external relations of the Union. One of the main purposes of the AENEAS is to support and provide financial incentives for third countries that are actively engaged in preparing or implementing a readmission agreement with the EU. Yet the negotiations of such agreements, which for obvious reasons are less attractive to third countries than the EU, have made very slow progress.[98]

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[92] Council of the European Union, *High-Level Working Group on Asylum,*
and Migration – Adoption of the Report to the European Council in Nice
[93] Ibid, para. 10
[94] Castles, *Why migration policies fail*, pp. 219-220
[95] Human Rights Watch, *World Report 2001*, p.4
[96] Council of the European Union, *High-Level Working Group on Asylum,*
and Migration – Adoption of the Report to the European Council in Nice, para. 53-55
[97] Regulation of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS).
[98] Miles, *The European Union: Annual Review 2004/2005*, p.134

From a game theoretical perspective, the root cause approach has potential to be successful. The aim to reduce poverty and promote human rights is not only morally attractive but creates a basis for a mutually beneficial cooperation. Existing quantitative studies of the causes of flows of refugees and IDPs find that political violence and civil war are the main reasons why people flee.[99] Western Europe can contribute to mitigating asylum migration pressure if its policies help to solve the fundamental causes of conflict and human rights abuse. The conflicts in the former Yugoslavia, with its hundreds of thousands of people fleeing to Western Europe, represent a striking example. Economic conditions in countries of origin are also statistically significant and substantively important determinants of the numbers of asylum-seekers coming to Western Europe.[100] This implies that policies aimed at improving economic conditions in these countries, such as generous development assistance and the opening of protected European markets to imports from developing countries, can lower the migration pressure from these countries.

The mutuality has failed to appear however, and the beautiful wording of the communication from the Commission on migration issues in the relations with third countries[101] has in practice taken the form of a much less beautiful policy of repressive unilateralism, taken one step further through the establishment of AENEAS. Again, we face words and decisions that differ very markedly from the action taken.

5.2 Motivating Migration

A key factor when having a root cause approach is, of course, to identify the root cause of migration. The question of what motivates asylum-seekers to leave their country of origin has received a great deal of prominence in the popular debate and the most obvious issue is what proportion of asylum-seekers are genuine refugees and what proportion are "economic migrants". Posing this question as a sharp dichotomy is at best unhelpful, however. As the UNHCR puts it, "Many people leave their home for a combination of political, economic and other reasons. The mixture of motives is one factor creating a perception of the widespread abuse of asylum systems, which is often manipulated by politicians and the media".[102]

Attempts made by States to limit or manage immigration and refugee flows in their territory have had only limited success. These measures have generated an increase in levels of illegal migration and have driven migrants and protection-seekers to use more dangerous routes to enter Europe.

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[99] UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian action*, p. 10-11

[100] Neumayer, *Bogus Refugees? The Determinants of Asylum Migration to Western Europe*, p. 405

[101] COM (2002) 703 final

[102] UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action,* p. 156

Control strategies imposed by the authorities of receiving countries have given rise to counter-strategies or strategies of circumvention by actual and potential migrants. Migrants are actors who will react to restrictive policies by utilizing whatever channels are available. Thus, effectivization of control gives rise to another tendency, namely clandestinization. The restrictive migration policies have also created unwelcome effects on the relations with other players; they have reduced the supply of workers to many sectors in need of labour, have placed a strain on race relations and have created tensions with migrant sending countries.

Humanitarian concerns notwithstanding, all countries have used asylum policies to further their own interests. For instance, asylum was rarely denied people fleeing in small numbers from Eastern European Communist countries. On the contrary, such asylum-seekers served to ''embarrass and discredit adversary nations''[103]. Things changed in the 1970s and 1980s when the "deserving" dissident fleeing the political persecution of the cold war era was no more. Instead, forced migrants were more and more perceived as "undeserving" economic immigrants who have made no prior contribution to the host State and should therefore expect little in return.[104] Thus, asylum-seekers were no longer the same as before: ''they were increasingly third world in origin; they had less in common culturally with Europeans than previous asylum movements; and they arrived, often illegally, through the use of traffickers and/or false documentation''.[105] Giving asylum to these people carries much less geopolitical reward to developed countries than did the welcoming of asylum-seekers fleeing Communism.

According to human capital economic theory people of working age are most likely to migrate as they have a higher chance to increase their living standards than others.[106] In addition, attempts to prevent migration will firstly stop the most vulnerable, while those most able and willing to move (usually young males) will be the last ones to give up the idea of leaving. These young males with a whole working life in front of them are comfortably enough also the most valuable for the receiving countries; the most wanted of the unwanted, if you so like.

Naturally, an individual weighs the costs of staying in her country of origin versus the costs of migrating to the country of destination. If the costs of staying exceed the costs of migrating, then the individual, or in some cases the whole family, will decide to migrate and file an application for asylum. It is likely that a complex range of mutually non-exclusive factors influences this decision-making by asylum-seekers. The costs of migration are normally high given that a migrant leaves her familiar surroundings

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[103] Teitelbaum, *Immigration, Refugees, and Foreign Policy*, p.429.

[104] Dwyer, *Governance, Forced Migration and Welfare*, p. 636-637

[105] Hansen and King, *Illiberalism and the New Politics of Asylum: Liberalism's Dark Side*, p. 398

[106] Neumayer, *Bogus Refugees? The Determinants of Asylum Migration to Western Europe*, p. 392

and culture and then needs to adapt to new living conditions, possibly a new language and a different culture in the country of destination, where the existing population might view immigrants with suspicion and hostility. As The Economist has put it, ''Leaving one's home to settle in a foreign land requires courage or desperation''.[107] In addition, there are also the direct costs of migration in the form of transportation and information costs. Factors such as generous welfare provisions for asylum-seekers lower the costs of migration. Conversely, deterring measures such as restrictions on welfare benefits and working rights, the risk of one's application becoming rejected because of low recognition rates, limited appeal opportunities, and the threat of forced removal all raise the costs of migration. Developed countries have gone a long way over the last decade or so to raise these costs of migration. Ironically, this has meant that asylum-seekers have resorted more to the help provided by smugglers, [108] which is then regarded with great suspicion in the destination country. Thus, for many, the cost of migrating has not exceeded the cost of staying put. Migration theorist often name these costs and benefits of leaving one's country push and pull factors, suggesting that there are push factors in the countries of origin that cause people to leave, and pull factors that attract migrants to a receiving country. In the area of forced migration pull factors are not assumed to be the driving force behind persons leaving their country and push factors are assumed to be limited to persecution of the kind listed in the 1951 Refugee Convention.[109] Refugees must thus be separated from economically motivated labour migrants, as the former move involuntarily, while the latter have a choice in their decision to migrate. In practice, however, political and economic causes often join forces in producing movement and freedom of choice is limited in both types of migration.[110]

To have an effect on the game, lowering the payoffs for a player requires that the player is aware off the new payoffs, a fact often neglected by the policy makers. Recent research shows scepticism of the effectiveness of asylum policy in steering migration flows. A research based on interviews with asylum-seekers in the UK found that the respondents did not have sufficient knowledge to make an informed choice based on rational evaluation of reception conditions and welfare benefits in the potential destination countries.[111] Another survey of individuals in the Netherlands, Belgium and the UK found that asylum-seekers were influenced by historic ties with the destination, language, existing networks of migrants, ease of access and transportation and perceptions of economic and social conditions.[112] The more urgent and unanticipated the flight and the more limited the individuals' resources, the more important are factors related to

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[107] The Economist, *Irresistible Attraction*, 2 Nov 2002
[108] UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action*, p. 276
[109] UN Convention on the Status of Refugees, art. 1
[110] Thielemann, *Does Policy Matter? On Governments' Attempts to Control Unwanted Migration*, p. 9
[111] Robinson and Segrott, *Understanding the decision-making of asylum seekers*, p.63
[112] Hatton, *Seeking Asylum in Europe*, p. 17.

accessibility. Thus, a varying balance of choice and constraint determines the destination.[113]

[113] Böcker and Havinga, *Asylum Migration to the European Union: Patterns of Origin and Destination*, p.265

6 Getting What You Want Being a NGO or Another Non-player

We are used to perceiving games as a phenomenon with only one winner. Luckily, the world is not constituted that way, in an enormous amount of situations, cooperation may be better for both sides than mutual defection.

Three categories of possible ways of promoting cooperation is presented by Dr. Axelrod - make the future more important in relation to the present, change the pay-offs and teach the players values, facts, knowledge and skills that promote cooperation.[114]

Let us look at how non-players could have an impact on the game of migration, applying what we have learned from the chapters above.

6.1.1 Don't Hate the Player, Hate the Game

To properly analyze a game means to identify the players, their possible strategies and the payoffs related to each of these strategies. To constantly attack the player for playing the game wrong is often a dead-end approach since a rational player will choose the strategy with, what she perceives is the holder of the highest payoff. Instead of putting the players in focus, one should look at how the game is constructed and work for shifting the payoffs.

As we have seen, an enforcement mechanism with a mandate to punish the player who defects will make it economically impossible to do so, if the punishment is hard enough. The fact that reciprocity is built on the principle of revenge (the answer to defection is defection in the next round) makes it sensible for ending in an endless series of mutual defection. This unwanted effect can be avoided through establishing a central authority supervising the players. To have an impact on the game, however, this authority needs a mandate to punish the players in a way that the payoffs for defection are cut below the payoffs for cooperation. Perhaps, this type of enforcement mechanism is too much to hope for in the arena of refugee law. Since an enforcement mechanism would lower the perceived payoffs for the States, it would be hard to convince them of its establishment. Nevertheless, it is a very potent game-changer.

Another consequence of a shift of focus from the players to the game is a recognition of the fact that States may be insensitive to moral arguments, or at least that these arguments are holders of little payoff. Instead of moral arguments, economical or security based arguments should be used.

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[114] Axelrod, *The Evolution of Cooperation*

Focusing on the game rather than on the players also means recognition of the fact that other games than the PD exist. So far, when scholars have taken a game theoretical approach to migration, the PD has gotten a disproportionate amount of attention. In addition, States play several games at the same time with different counterparts, mainly with other States, the electorate and (potential) migrants. By exposing information from a parallel game, the outcome of a game can be changed (media's influencing of public opinion is built around revealing the games played by the State with migrants and other States to the general public. By revealing information on how a Member State plays against another Member State or against migrants, the strategy of a third State can be changed about etc.)

6.1.2 Increase the Importance of the Future

Cooperation can be made stable if the future is important enough in relation to the present. Normally the future is less important than the present because of the fact that the game might not continue and that most players rather collect a certain benefit today than wait for tomorrow to get the same, or an even higher benefit.[115] Migration processes are of a long-term nature, while the policy cycle is essentially short term and often determined by the length of electoral periods. The term of office puts limits to the significance of the future and makes it more tempting to defect in the first round in order to get the highest possible payoff in the current round. Regrettably, all future rounds will be rounds of defection (following the principle of reciprocity). The limited time in power for politicians gives an incentive to short-term results, even if the long-term effect will be negative. Thus, if the future can be made important enough, cooperation built on reciprocity is stable and the most rewarding strategy.

6.1.3 Separate Talk from Decision and Action

The theory of organized hypocrisy presents several possible traps, one of which consist of confusing talk and decisions with the actions they describe. Observers might make the mistake of assuming that statements and decisions agree with organizational actions. Talk and decisions are important in politics, but they should be analysed as autonomous activities. A trust in traditional theories have taught us that talk and decisions pointing in a particular direction increase the likelihood of action occurring in that same direction. Without this belief in traditional theories, hypocrisy would not work since talk and decisions would not be of importance. If people believed in the theory of hypocrisy, this theory would not hold since people then would certainly pay attention to talk and decisions, but they would not be taken in by talk and decisions about their preferred action, since they would suspect it to lead to the opposite action.[116]

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[115] Axelrod, *The Evolution of Cooperation*, p.109
[116] Brunsson, *The Organization of Hypocrisy*, p. xv

The general view of hypocrisy is of something questionable and morally dubious that should be avoided altogether. However, moral values are better suited to be handled in talk than in action, and in reference to the future rather than the present. If we do not allow ourselves to possess and to propagate higher values than those portrayed in our actions, we run a risk of not having high morals at all. Thus, the maintenance of high values involves a discrepancy between values and actions and one should therefore not always attack a player for not doing what he said he was going to do, as long as the high morality expressed is truly his intention. The true intention of a player can be hard to find, but indicators such as repentance and reform is necessary if the values are to be approached or attained at some time in the future.

6.1.4 Picking up the Pieces?

NGOs have been key welfare providers for forced migrants for a long time, especially in certain southern European States. Previously concerned with campaigning in support of refugees and asylum-seekers, the NGOs now have to play an increasing role in meeting basic needs.

By picking up the pieces where the State fails, the payoffs lowered by the State by e.g. cutting off welfare benefits are again heightened. Besides taking the resources from other important work, picking up the pieces may help creating an image of the States taking on a greater responsibility than it in fact does. Leaving the pieces may create an intolerable situation that provokes a reaction with the public, which in turn would force the State to take on a greater responsibility. However, this is a game with high stakes since it most probably will create human suffering in the short run and whose long-term results are hard to predict.

6.1.5 Opinion-building

In a democracy the politicians depend on the confidence of the public in order to be allowed to play the game at all. The public opinion is susceptible and influenced from many directions. Metaphors like "flood", "invasion", "hungry hordes" etc. are frequent in the media when describing immigration and play on people's fear and insecurity in the receiving countries. These feelings have created a seedbed for rightist or populist forces in a number of receiving countries and have helped to legitimize restrictive asylum policies. The probability and realism in the scenarios on which threat perceptions are built may be discussed, and among experts there seems to be near consensus that both politicians and the media tend to dramatize the prospects. Research tends to suggest that while there are winners and losers in both sending and receiving countries as a result of international migration, the overall effects of immigration in socio-economic terms are broadly positive.[117] However,

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[117] COM (2003) 336 final, p.10

even if the costs for immigration in reality are small, they are widely perceived as being significant.[118]

From a game theoretical point of view, immigration and asylum policy should be determined by the perceived net benefits. There is a large literature that attempts to measure the economic effects of immigration and in general, the negative effects are often found to be modest or non-existent. Evaluations of the net fiscal costs of immigration often find them to be positive, although usually small. The real constraint to more open asylum policies appears to be public and political opinion rather than economic costs and benefits. Surveys of public opinion typically find that most voters do not want to see immigration increased. By contrast, the majority opinion in most countries is that genuine refugees should be given a safe haven.[119]

6.2 Alternatives

An important question for any player is how long she should stick to a strategy that does not work. Maybe the time has come for the advocates of a more generous policy on asylum to change the strategy and look for alternatives. One such alternative is a common system for immigrants and asylum-seekers.

As we have seen, immigration and asylum are two separate streams marked by distinct admission criteria. In general, the decision to admit someone as an immigrant gives no weight to humanitarian considerations while the decision to admit an asylum seeker is based solely on these types of considerations. Thus, the term "economic migrant takes a negative connotation when applied to asylum-seekers but not when applied to other immigrants. Yet they are all immigrants. Given that at least some asylum-seekers have skills or characteristics that would lower the costs to the receiving country, there is a case for combining the two streams under a common set of criteria. This combined system would rank each potential candidate for admission in terms of net benefits to the receiving country. In addition, there are humanitarian points that reflect the society's cardinal values towards protection seekers. While those who would qualify under the 1951 Refugee Convention would gain sufficient points for admission, others with less pressing claims would need additional points for other characteristics in order to reach the threshold points.

Combining these two games into one would have several advantages, the most important would be that the asylum seeker will compete directly on equal terms with other migrants. This would help remove the stigma attached to asylum-seekers as "economic migrants", "bogus refugees" or a "burden" for the receiving country. Furthermore, as we have seen, some States have created a zero-sum game by establishing fixed quota of asylum claims to be accepted. A system combining asylum and other forms of

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[118] Hatton, *Seeking Asylum in Europe*, p. 59.
[119] Ibid

immigration would be more elastic at times of humanitarian crisis, as an influx of those with strong humanitarian claim would crowd out other immigrants, even if the total quota were fixed.

The downsides of a combined system would be the difficulties in getting it started. As we have seen, the first player to cooperate will risk arriving at the least preferred position of CD, thus potentially finding itse
lf facing a rapid growth in asylum claims if the policy was seen as easing the entry conditions. Another downside is that the combined system would select the most able and well-qualified asylum-seekers and hence it might contribute to the brain drain from less developed countries.

To give points to asylum-seekers according to the net benefits they produce for the receiving country may seem cynical and is very different from policies that currently exist within the EU. However, States already think in terms of net benefits. Openness to skilled labour migration has been accompanied by a stricter demarcation between those forms of migration seen as contributing to the national welfare state and those that are construed as a threat to it, such as asylum-seekers.[120] The cardinal values exist chiefly among the public. Through playing parallel games, the State makes the public believe that their cardinal values are satisfied. Bringing the games together would make these parallel games harder to perform. On the other hand, an NGO advocating this alternative system would probably have to play a parallel game in relation to their voluntary financial donors, since they would presumably not accept the arguments listed above.

6.2.1 The Price of Pursuing a Method

Being in the habit of using moral arguments and driven by an anger of inequalities I have many times found myself frustrated having to use a method that questions whether morals truly can exist in such entities as States and that establishes that the world is unfair since the best skilled player is the rightful winner of the game. Dedicating the chapter above to proposing an alternative method that may seem immoral and cynical, it is the result of pursuing my method of choice. Game theory forces the one that applies it to accept it that States are only interested in net benefits and that this is an inherent, unchangeable characteristic of any player. The only way to change the outcome of a game is thus to play it right – to change the payoffs of the game to your benefit, and not to try to change the qualities of your opponent. Even though most people, including myself, do not fully agree with all of game theory's assumptions, I am convinced that there is a lot to gain from being familiar with its reasoning.

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[120] Geddes, *Immigration and the Welfare State*, p. 159

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