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Institutional Architectures of Asylum Determination:
The Historical, External, and Procedural Dimensions of Political Asylum in the European Union

This project has received funding from the European Union's Horizon 2020 research and innovation program under grant agreement No 870761.

Published by the PROTECT Consortium.

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DOI: 10.5281/zenodo.7688087

Institutional Architectures of Asylum Determination: The Historical, External, and Procedural Dimensions of Political Asylum in the European Union

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1 Introduction

The international refugee protection system comprises multiple protection tools, from preventive measures (e.g., development aid, conflict resolution, diplomacy, military intervention, support to refugee-protecting states) to direct measures (e.g., resettlement, relocation, temporary protection, protection in safe zones, and individual asylum). Amongst these, individual asylum is the most clearly defined instrument in the UN's 1951 Geneva Convention on Refugees. National refugee determination (RSD) systems are primarily about the individual asylum instrument of the international protection regime. RSD systems are meant to function as holistic sets of institutions, actors, and procedures assembled to examine asylum applications and grant international protection to those who need it. They are intended to give fair treatment to asylum claimants by clearly distinguishing between those who are eligible for international protection and those who are not. Despite this common purpose, the national RSDs are legally, institutionally, and procedurally organized in various ways.[1] Although international RSD harmonization has been going on since the 1990s, especially in the EU member states,[2] there are still significant country-wise differences in how the RSDs are organized.

Asylum decision-making is organized in a variety of ways. Central government agencies, asylum boards, civil society organizations, courts of law, police and border authorities, and foreign government agencies through bilateral agreements are deployed in different capacities and equipped with different degrees of decision power in decision-making about entry into the territory, admissibility, access to countries' protection system and return policies in normal, appeal and review procedures. Asylum decision-making bodies' location in the state apparatus and in particular their independence from the authorities in charge of immigration policy may have effects on the quality of asylum procedures. Moreover, involvement or absence of specific actors in the decision-making bodies and procedures has influence on the quality of asylum decisions. This is expected to be reflected in countries' asylum recognition rates.

[1] There are several reasons for this variation. Firstly, such diversity was inevitable in the early postwar period as each country's RSD stemmed from its national political system and its established tradition of institution-building (Sicakkan 2008a, Caestecker and Ecker 2022). Secondly, it has been argued that the diversity of national legal and institutional RSD frames persists because they are not only devised to help people who need international protection but also to limit access to the potential host states' territory out of concern for political and economic stability, preservation of the national identity, safeguarding the citizenship structure and citizen rights, and upholding the existing interstate system (Sicakkan2008a).

[2] Through regional integration processes in Europe, Africa, and America, since the late 1990s, for instance, there has been a trend toward regional harmonization of national RSDs. With the Global Refugee Compact in 2018, the international society has taken further steps to globalize the implementation of refugee protection.

Both the Global Migration Compact (GCM) and the Global Refugee Compact (GCR) imply certain frameworks of collaboration between different actors, including intergovernmental organizations, states, regional entities like the European Unio and African Union, refugee aid organizations, faith organizations, other non-state organizations participating in refugee protection work. The GCR specifies a series of actors that the UNHCR expects will participate in the governance of international refugee protection. While prescribing common goals and specific methods for the protection of refugees, the GCR proposes few procedures or institutional arrangements for governance.

The EU's reforms on asylum procedures, including the New Pact on Migration and Asylum, give a more detailed description of the asylum determination procedure that the Member States are expected to deploy. Neither the Global Compact on Refugees nor the European Union's Asylum Procedures Directive, however, give any prescription on the nature of the institutional architecture in which asylum decisions are to be made.

This study assesses which institutional architectures and procedural designs of asylum determination may be instrumental in achieving high international standards in asylum policy implementation. We do three kinds of analyses: We do a historical analysis of how different institutional architectures have emerged and affected the quality of asylum determination and identify the institutional architectures that have performed best in the past. Next, we study how the EU's external policy affects the international refugee protection system by making third countries governance actors in the EU migration and asylum policy through international agreements. Further, we assess how the UNHCR as well as the EU and the states can go about re-directing the change processes to promote the best procedural and institutional refugee status determination systems.

2 Historical case studies of Selected European Union Member States

The asylum procedure in Europe is today divided into three decisions to be made: admission, eligibility and recognition. Admission to the asylum procedure is the mere notification of an asylum application, the eligibility decision is based on a rather superficial evaluation of the merits of the case in order to decide whether the country is the first country of asylum or also whether the application is manifestly unfounded or coming from a safe country of origin or a safe third country. The third decision which is the core business of the asylum office (AO) is the recognition decision, which is a decision on the merits of an asylum application to decide whether the asylum seekers will be granted protection (refugee status or subsidiary protection). In contemporary Europe, the recognition of the need for protection is attributed to an asylum office (AO), a specialized agency, and an administrative or judicial court to decide the recognition of need of protection in appeal. Do institutional conditions matter for an optimal protection of human rights norms in immigration policy? This report focuses on the history of protection effectiveness of the Asylum Offices (AO) in continental West-Europe by a comparative approach. We first outline the history of the institutional position of the AO and then look into the relation with protection effectiveness.

2.1 Asylum institutions' position changing throughout time and place

2.1.1 Asylum offices catered by Foreign Affairs in the era of labor migration, 1951-1983

The first AOs were created in the early 1950s in France, Italy and Germany. In the Benelux this task was outsourced to UNHCR. A corps of specialized personnel with the necessary qualifications were making the recognition decisions.

During the *Trente Glorieuses*, immigration was largely managed by the Ministry of Labor and/or Social Affairs. Central were the labor needs of the mature industrial economies. Immigrants, even if they were refugees, could easily regularize their stay by filling vacancies on undervalued segments of the labor market. The Ministry of Interior or Justice which

translated more the security concerns in immigration policy had to compromise with the Ministry of Labor. They were the junior partners in immigration management, and they developed an administrative capacity in this domain. Even in times of high labor shortages this ministry insisted on managing these inflows, be it by merely regularizing the stay of the foreign workers who, for economic reasons, they could not stop from entering. Requesting asylum was a rather minor immigration flow mainly managed by the Ministry of Foreign Affairs as it derived from an international obligation. In Belgium and France the Ministry of Foreign Affairs was in charge of asylum policy, while in the Netherlands it was the competence of this Minister in tandem with the Minister of Justice, but in Belgium and the Netherlands UNHCR was functioning as the local AO. As Italy (and Greece) remained during the *Trente Glorieuses* an emigration country and hardly needed labor migrants from abroad the authorities did not develop an immigration policy. Still in Italy a refugee policy was installed as this was considered an international obligation. The Italian AO was embedded in the Ministry of Interior, but Foreign Affairs had most political cloud in this domain as the AO was composed of four members: only one of Interior Affairs, besides a representative of Foreign Affairs, and two of UNHCR, with a rotating presidency.

In France the AO was an autonomous unit, part of the Ministry of Foreign Affairs, which was led by a senior civil servant who had financial and administrative autonomy. This director of the AO was assisted –not directed- by a Council which was composed of representatives of different ministries involved in immigration policy, but also of a representative of UNHCR and a representative of the NGO's which assisted refugees. The AO was thus largely independent in taking individual decisions on asylum applications and was not taking any instructions from the Ministry of Foreign Affairs and certainly not from the Ministry of Interior or Labor who were in charge of immigration policy. Also in Germany that was the case, but the German AO was an administrative body within the Ministry of Interior in which juries of three made their decisions on the merits of applications. The recognition decisions were not conceived as administrative decisions but rather quasi-judicial in nature. These protection officers with a degree in law or administrative science had through the interview they conducted the best and intimate knowledge of the case and therefor they were considered the best qualified to decide. Hence, neither the head of the AO, a politically appointed administrator nor the Minister of Interior could decide who to recognize as a refugee. In order to ensure uniformity of decision-making outcomes there was an oversight by the Federal Representative for Asylum Affairs who received instructions from the Minister of Interior and by appealing the decisions of the AO at the asylum courts the Representative postponed any legal force to the decision of the AO until the court decided. In the 1970s it was rare for the Federal Representative for Asylum Affairs to contest decisions of the juries of the AO. In Austria, Denmark and Switzerland there was no specialized personnel handling asylum requests and the decisions on protection were taken by public servants including police officers in the Ministry of Interior. In Austria the Ministry of the Interior decided about asylum requests but when UNHCR opposed a negative decision a consultative commission with representatives of three other ministries, including Foreign Affairs was called upon to find a solution. In Denmark the civil servants who decided about recognition took the non-binding advice which the NGO in refugee aid could hand in into account. Greece, although party to the Convention of Geneva had no procedure for asylum requests and immigration, including asylum remained largely a matter for law-and-order authorities.

2.1.2 Expanding asylum offices in an era of contested immigration, 1984-2000

The post-industrial transition which had ended the need to import labor changed the interests determining immigration policy within the state. During the 1980s, in most Western European countries the Ministry under which the national police fell, be it Justice as in Switzerland and

the Netherlands or the Interior elsewhere took over command of immigration policy from the Ministry of Labor and/or Social Affairs. They started the restrictive turn in West European immigration policy. The direct line with the national police enabled a quick implementation of return policy in particular for the deportation of rejected asylum seekers and other irregular immigrants. Many more resources were liberated to deport unwanted immigrants and authorities obtained more leeway to detain irregular immigrants for ever longer terms in order to be able to deport them. At the same time the role of the AO became more important as the protection officers had to assure that no refugee would fall victim to the internment and deportation of unwanted immigrants.

Although the goal of controlling immigration became an increasingly important objective of state policy, at the same time protecting refugees remained another objective the state had to serve. An objective which was defined in different terms than in the 1950s when the international obligation to do so was paramount in asylum policy. The different objective explain that UNHCR was sidelined in the RSD procedures. Concomitant with UNHCR losing its direct input in the Italian, Belgian and Dutch RSD the influence of the Ministry of Foreign Affairs on asylum policy in the Western European countries waned. Granting protection became considered a sovereign decision and domestic considerations became much more important than safeguarding the international refugee regime. Still the stake of protecting refugees was high as in order to legitimize an increasingly restrictive immigration policy human rights norms had to be abided by.

In the Netherlands in 1980 and in Belgium in 1989 an AO within the Ministry of Justice was created with no input of Foreign Affairs. Also in Italy Foreign Affairs lost much political cloud in this domain as in 1990 the new Italian AO remained an interdepartmental office, but Foreign Affairs retained its one vote in the new AO, while three representative of the Interior Ministry (including the president, a *Prefetto*) and one representative of the Council of Ministers were having a vote too. The Ministry of Foreign Affairs had been adamant about upholding the international refugee regime and the decreasing influence of the Ministry of Foreign Affairs implied that an advocate among others for a RSD in line with the country's international obligations lost political clout. France became an anomaly as the AO remained part of the Ministry of Foreign Affairs. Reform had been delayed as the so-called efficiency arguments for institutional reallocation had been opposed by a French proudness in its early institutional design explicitly distinguishing between immigration and refugee policy underlying French commitment to human rights.

The other West European countries who had not yet specialized their administration of asylum requests did this along the line of creating an AO embedded within the Ministry in charge of immigration policy. In 1979 an AO was created as a unit within the Swiss Ministry of Justice, in 1992 within the Danish and Austrian Ministry of Interior and in 1993 within the Greek Ministry of Public Order. The creation of an AO in all countries envisaged did not imply necessarily a more knowledgeable staff specialized in recognizing refugees or a AO director sensitive to refugees' rights. In Austria several years after 1992 the AO staff and its director were permanently contested by a critical civil society, the local judiciary and even UNHCR as they did not live up to the European protection standards. In Greece it took even another twenty years after the creation of an AO before that was the case. Until 2012 the AO within the Greek Ministry of Public Order was composed of police officers mainly interested in law-and-order. Only by 2013 started recognition policy to be decided by a Greek corps of specialized personnel with the necessary qualifications. In Italy the professionalization of an expanding number of protection officers implementing the decisions of the central AO in branches all over the country proceeded in two steps, first in 2001 the deciding juries of four had a mixed character, composed of one representatives of UNHCR and representatives of national, local and law-enforcement authorities, in 2018 the representatives of UNHCR and the national authorities

remained, but the local and law-enforcement authorities, only part-time involved and less knowledgeable were replaced by full time experts in international protection who had passed a national exam.

In particular from 1983 to 1993 the challenges which these AOs had to confront were daunting due to the rising number of asylum seekers. The staff was increased manifold and the poorly trained protection officers who had hardly reliable and up to date COI-reports as support were pressurized to swift decision making. To expedite decision making protection officers all over Western Europe decided increasingly by accelerated procedures. In many countries recognition decisions were on the files without the protection officers conducting an interview. In West Germany all asylum seekers were interviewed, but for efficiency reason already in 1980 the juries were replaced by single protection officers who decided about asylum request. Efficiency arguments caused also a deconcentration of AOs in the larger countries, except for France.

2.1.3 A Ministry or Department to manage migration, including asylum in the early 21st century

While in the Southern states of the EU, Greece and Italy, only by the second decade of the 21st century the AO and its protection officers were proceeding in a manner that satisfied the (formal) standards of professionalization that Northern Western Europe had attained much earlier, some of the latter countries moved away from the asylum office as an agency specialized in protection issues embedded but separate in the Ministry charged with immigration policy towards a stronger (re-)integration of the AO in the Immigration Office (IO). The new IO/AO became a vast organization engaged in the much more resourceful and centralized management of immigration, including new domains such as integration, voluntary return…This reintegration is most conspicuous to be noticed in 2002 in Denmark and the Netherlands, when a Ministry solely dedicated to immigration was created, respectively a Ministry for Refugees, Immigrants and Integration and a Ministry of Aliens Affairs and Integration. To concentrate all policy related in some way of another to immigration in one ministry was part of the political agenda of populist parties, however when these parties were ousted from the government this ministry was discontinued. Immigration policy had become a polarized issue and there was thus no political consensus on the need for a high-profile management of migration as was expressed by a separate Immigration Ministry. A similar development is to be noticed in France where in 2007 the AO was transferred from the Ministry of Foreign Affairs to (a temporary) Ministry of Immigration, Integration, National Identity and Co-Development and in 2010 to the Ministry of Interior. Since the French AO was founded, it had been part of a different ministry than the ministry in charge of immigration policy, but since 2007 this strict separation has been lifted, albeit it remained a distinct unit within the Ministry of Interior.

In a more subdued manner this process of institutional concentration of immigration policies is noticed also in other countries. From 2002 onward the newly centralized decision making in German immigration (and integration) policy was implemented by the AO which knew a vast expansion to an AO/IO. In 2008 the Swiss AO was merged with the IO in the Federal Department of Migration within the Ministry of Justice, also in Austria in 2014 this merger took place with the creation of the Office for Aliens' Affairs and Asylum within the Ministry of Interior. This reshuffling of the institutional architecture reversed a decision which had been taken in the past to create a separate institution dedicated solely to asylum policy. This move was a return to an institution managing immigration policy in its totality, albeit with vast new competences in domains such as integration and (voluntary or forced) return and also vast more resources in terms of budget and staff. In several European countries asylum became one of the domains to be managed by the IO/AO and it was no longer considered that the specific expertise needed for recognition decisions, or its international ramifications did require an

institutional separateness. Was the identity of the AO after a long experience in asylum matters matured to such an extent that it could retain its mission within a greater whole dedicated to immigration management? Can a robust RSD administrative capacity withstand the temptation of an IO to subjugate protection to migration control? As the recent historical experience of the EU member states shows, countries with a long experience in recognizing refugees and abiding to the rule of law in which refugee protection is fully integrated are a testimony of this possibility.

The first decades of the 21st century have seen a homogenization within the EU as well in the professionalization of the protection officers, as in the institutional architecture of asylum policy in the member states. The French and German AO had long been outliers with respectively sticking to the strong representation of the interests of Foreign Affairs and having a quasi-judicial decision-making process within the AO. In 2007/10 the French AO adapted to the 'modern' manner of embedding asylum policy within the Ministry in charge of immigration policy, while in 2002 the recognition decisions of the German AO, similar to other countries were no longer considered quasi-judicial, but administrative in nature. This implied that the protection officers lost their independence as they were incorporated into the hierarchy of the AO which received directly binding instructions by the Ministry of Interior as in most countries.

2.2 The history of refugee recognition and the role of institutions

Does the institutional position of the AO matter? The administrative decisions of the AO have increasingly been open to appeal. Judicialization -the reliance on courts in refugee policy- was already a fact in West Germany in the 1950s and this has been expanded in other West European countries in the last quarter of the 20th century. The judgements of administrative courts have definitely contributed to the protection policy of the AO. Jurists have given extensive attention to legal doctrine as they correctly consider refugee law jurisprudence of asylum courts as the source of change in protection policy. Does the AO only react to this changing jurisprudence or does the AO also give shape to protection policy?

For detecting openness to new protection needs this research focused on the case of war refugees. The world of 2023 is different from the world of 1951. Although the Convention of Geneva (1951) was a child of the general violence of the Second World War its first steps were taken in the dichotomous world of the Cold War which located the persecution against which protection was needed in the state. From the 1970s onward the Western Europe AOs have been confronted with asylum seekers fleeing wars in which non-state parties were involved and fleeing countries where a failed state was not able to provide any protection. Recognizing the protection needs of those fleeing Sri Lanka in the 1980s, and Yugoslavia, Algeria, Somalia… in the 1990s and later Iraq, Syria… demanded an openness to new protection needs. Our analysis of recognition policy points out the great variation in responses to these protection needs. It provides numerous examples of a passive attitude of the AO towards the need of protection of war refugees in the 1990s –in particular the Austrian AO -, but also active and even pro-active policies as for example the Belgian and French AO. That we have a clearer insight in the attitude of the latter institutions is due to their greater autonomy, while the strategy of those asylum offices which were merely an administrative unit within a larger department is more difficult to disentangle. Their decision making remained opaque.

The historical experience of the West-European states with these asylum seekers has yielded an expanded refugee definition. The contemporary definition of refugee is outlined in the EU qualification directives (2004 and 2011): a combination of Convention refugees and refugees because of a need of subsidiary protection. The latter is granted when there is a danger of serious harm upon return, but a lack of reasons relevant to the Convention for this risk. People fleeing (civil) war can be granted Convention refugee status if the AO can make their persecution related to one of the five grounds of the refugee definition. For all the others fleeing

war the AO was not mandated to provide them with protection before the qualification directive of 2004 as there was in Europe no supranational "safety net" beyond the Convention of Geneva. Still the qualification directive was an upscaling of subsidiary protection, as a national kind of (mostly very weak) subsidiary protection existed in all states, except for Greece and Belgium.

It was a long and not always linear way towards subsidiary protection. In the early 1980s Tamils fleeing state persecution and civil war were largely recognized by the German AO, but the Federal Representative for Asylum Affairs opposed their recognition as refugees and indeed the Federal Courts agreed they did not qualify as refugees, victims of state persecution as defined by the German Constitution. The German recognition policy parted from the more flexible refugee definition of the Convention of Geneva which underlined the subjective fear of persecution based on the five grounds the Convention enumerates. This German Sonderweg, grounded in German national legal history, of only taking into account state persecution excluded war refugees from protection. Strangely enough this German definition of refugee became a guideline for most other European countries in dealing with war refugees. In most West-European countries the civil war refugees from Yugoslavia and Somalia in the 1990s were collectively excluded from recognition as Convention refugees. The AOs toed the German line with their emphasis on the indiscriminate violence of these civil wars which excluded all its victims from Convention protection. Denying those war refugees who qualified for Convention protection does not imply that the war refugees were deported as they were mostly tolerated on an ad hoc basis, but totally depended on administrative discretion. National norms, but most importantly article 3 of the ECHR and the jurisprudence of the ECtHR from the late 1980s onward opposed the blind return of rejected asylum seekers if their country was in war. Each country followed different paths towards the creation of subsidiary protection and the openness, also in war situations to persecution as defined by the Convention of Geneva. Sometimes it was grounded in a national sensitivity as for example in France where the situation in Algeria during the 1990s when the state failed to provide protection against radical Islamist groups opened up their interpretation of the Convention of Geneva, away from a focus only on the state.

3 The External Dimension of the European Union's International Protection Policy

3.1 Premises and puzzles

> *"The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings"*[3].

Art. 79 of TFEU broadly defines the area of competence of the EU Migration and Asylum Policy (MAP), by indicating the main activities that the Union should implement as a common strategy to regulate and control people entrance and movement within EU borders.

Through the evolution of EU policy making in MAP area, scholars have identified an External Dimension (ED, among others see Boswell, 2003 and Geddes, 2005) which represents the part of EU relations with third countries aimed to support MAP or to externalize it (Panebianco, 2022). The practice to delegate migration management measures to EU neighboring countries has been highly implemented during the last two decades, as well as the types of tools established by ED.

To date, the Union has set different instruments (arrangements, common agendas, compacts, deals, migration clauses, migration dialogues, statements, and partnerships) through diverse forms of cooperation (formal/informal, bilateral/multilateral, legal/political).

[3] Art. 79 of TEUF (former Article 63, points 3 and 4, TEC) see https://lexparency.org/eu/TFEU/ART_79/

These policy tools seem also to be increasingly related to the security sphere, rather than the concrete management of people movement and rights' protection. As MAPs were invested by a process of securitization, the ED represented the concrete way to control flows by securing EU borders (Huysmans, 2000; Lazaridis & Wadia, 2015).

Within this externalization-securitization nexus, we focused on three key topics in current research about MAP:

- The classification and mapping of the instruments of externalization in the last twenty years.
- The relationship between ED instruments and external security, in order to understand how this process impact on EU MAP as a whole.
- The organized gap between talks and actions between talks and actions in EU relations with Southern Neighbor countries (SNCs) that constrains international protection.

3.2 Data and object of analysis (Longo & Fontana 2022)

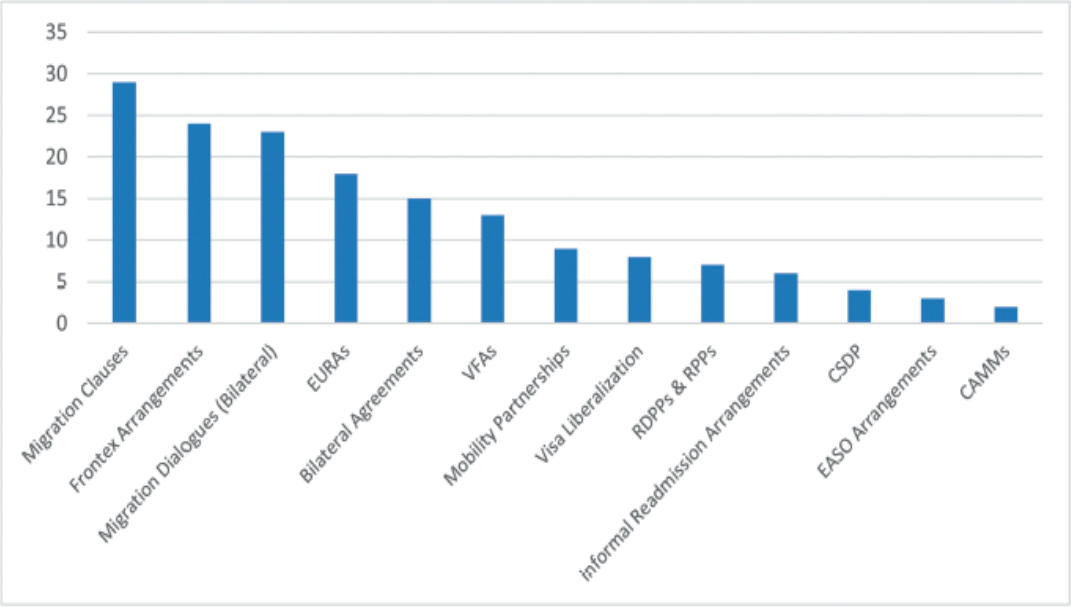
We collected information about ED instruments of the European Union within MAP through the scanning of both official documentation and academic literature. We coded this information on a comprehensive dataset including 153 tools (cases) established in the period 2000-2020. Variables include different characteristics such as geographical location, aim of the instrument, dates, etc.

We analyzed the cases both quantitatively and qualitatively in order to provide: 1) a comprehensive description of types of tools, 2) a classification and 3) a visual representation of ED by different instruments. We finally observed longitudinally the evolution of the tools from a securitization perspective.

3.3 Results

We identified 13 key ED policy tools ranging from binding and formal agreements to soft or even informal relationships. They provide an analytical frame to describe policy initiative on both a longitudinal and geographical dimension.

Figure 4.1 The ED of EU Migration Policies: Number and Types of Detected Tools



Source: Longo and Fontana, 2022: 501.

The analysis of these policy-tools revealed some key findings:

1) political and operative tools prevail over formal legally binding instruments.
2) the gap between political/operative tools and legal tools has increased in recent years.
3) few tools deal with international protection, asylum, and legal mobility while most of them concern border control, return and readmission, as well as fight against human smuggling (i.e., security).
4) returns and border control are not only the very first focus areas, their scale significantly increases in time, with a peak during the years of the migration crisis.

Moreover,

- only a few tools refer to international protection, which is clearly downplayed;
- the engagement of transit and origin countries - mainly through enforcement measures and repatriation - do not only curb flows but also permits a form of 'refoulment through remote control' (Longo and Fontana, 2022).

We implemented the analysis at geographical level by creating an interactive map available at https://umap.openstreetmap.fr/en/map/eu-external-migration-policy-tools__783920

Geographical analysis revealed the prevalence of specific types of tools for different areas. The table below summarizes them.

Western Balkans	Mainly formal tools embedded into a binding and 'constraining' cooperation framework (no informal cooperation).
South Caucasus and Eastern European countries	Mixture of formal legal tools and bilateral political agreements.
Southern Mediterranean	Bilateral political arrangements prevailing over formal legal cooperation embedded in the migration clauses of the bilateral Association Agreements
Sub-Saharan Africa and in the Horn of Africa	Informality and non-legally binding policy tools; border control and return are markedly the prevailing subject areas with these countries.

3.4 EU relations with SNCs as a case-study

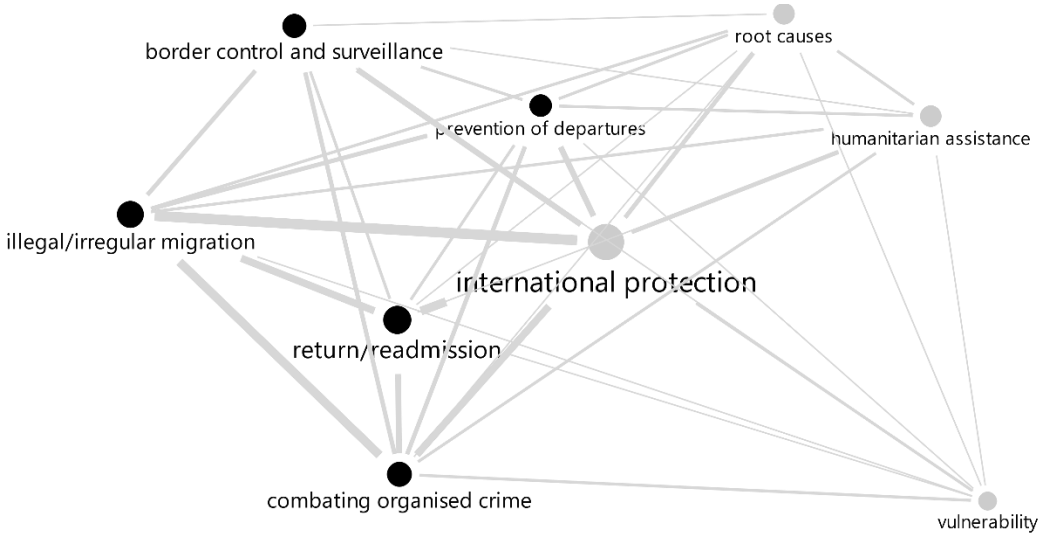
Deeper research has critically analysed the EU's cooperation with SNCs concerning migration, as codified in association agreements, action plans and mobility partnerships (Longo, Panebianco & Cannata, 2023). Via qualitative document analysis, we explored the incompatibility between the European MAP instruments and international protection. The analysis revealed that the external dimension of the European MAP affects the capability of the EU to comply with the international regime on international protection, because cooperation on migration flows impacts refugee protection and the human and mobility rights of migrants. Existing agreements with SNCs make access to European borders increasingly difficult and have a strong impact on the right to apply for international protection. Barriers to entry, procedural restrictions to asylum-seekers, interception and return of irregular migrants challenge the right to asylum and international protection and establish a structural bias in the protection policy of the EU. MAP, thus, represents a clear mismatch between EU talk and action, outlining another case of organized hypocrisy.

3.5 Implications

The construction of migration as a security issue results in policy tools focusing more on the containment by border control than on the management of human mobility.

The EU is delegating to neighboring countries the management of irregular flows, placing international protection at risk instead of playing the role of humanitarian actor in accordance with the ideals and principles it defends, as claimed in EU documents. The fact that EU Treaties group MPA under one single chapter – no matter if they concern asylum, police, visa et. – had a spillover effect of the securitization on asylum and protection. The over-securitization of MPA should be then re-balanced by tools that entail safe and legal channels such as humanitarian corridors and resettlement practices.

Figure 1. Visual map of EU talk based on framework documents concerning the external dimension of the European MAP[4]



[4] In the figure, the size of each dot reproduces the absolute number of occurrences of the concerned code, while the thickness of the lines refers to the number of code intersections in continguous segments of the documents. We assigned the different colors to codes relating to 'security' (in black) and 'humanitarian' framing (in grey).

Externalization had different forms per geographical area, but, on the whole, the EU ED of MAP moved beyond geographic border countries pushing the EU frontiers beyond actual physical borders.

Our research provides empirical evidence for the assumption that the EU enacts organized gaps between action and talk in cooperation with SNCs concerning migration and asylum issues. The policy instruments that the EU has agreed on with SNCs, while hinging on humanitarian discourses, fail to provide adequate means to strengthen international protection, focusing on – in parallel with the externalization of borders and border controls – some sort of 'externalization of international protection'.

4 The Effects of Institutional and Procedural Arrangements on International Protection

Although the 1951 Geneva Convention is the principal legal ground for granting refugee status, there is significant cross-country variation in the signatory states' asylum recognition rates for people fleeing similar situations. In this research component, we explore whether such variation is due to how national refugee status determination (RSD) systems are organized, endeavoring to identify the legal, institutional, and procedural aspects that produce fair outcomes. We study the role that different national RSDs play in the international protection system. By comparing the impacts of different features of RSDs with other known determinants like political, economic, demographic, and human rights conditions in the origin and host countries, we assess how different national RSD systems support refugee protection.

In the first phase of this research, we assessed the role of national RSD administrations in countering political pressures to expand or limit the right to asylum (Van Wolleghem and Sicakkan 2022). We found that state administrations that commit to the rule of law and that are at the same experienced in asylum matters perform their asylum recognition task effectively regardless of the government's policy preferences and the country's general political mood about immigration and asylum. That is, a robust legal-administrative machinery around RSD is key to ensuring the effective implementation of the international refugee law.

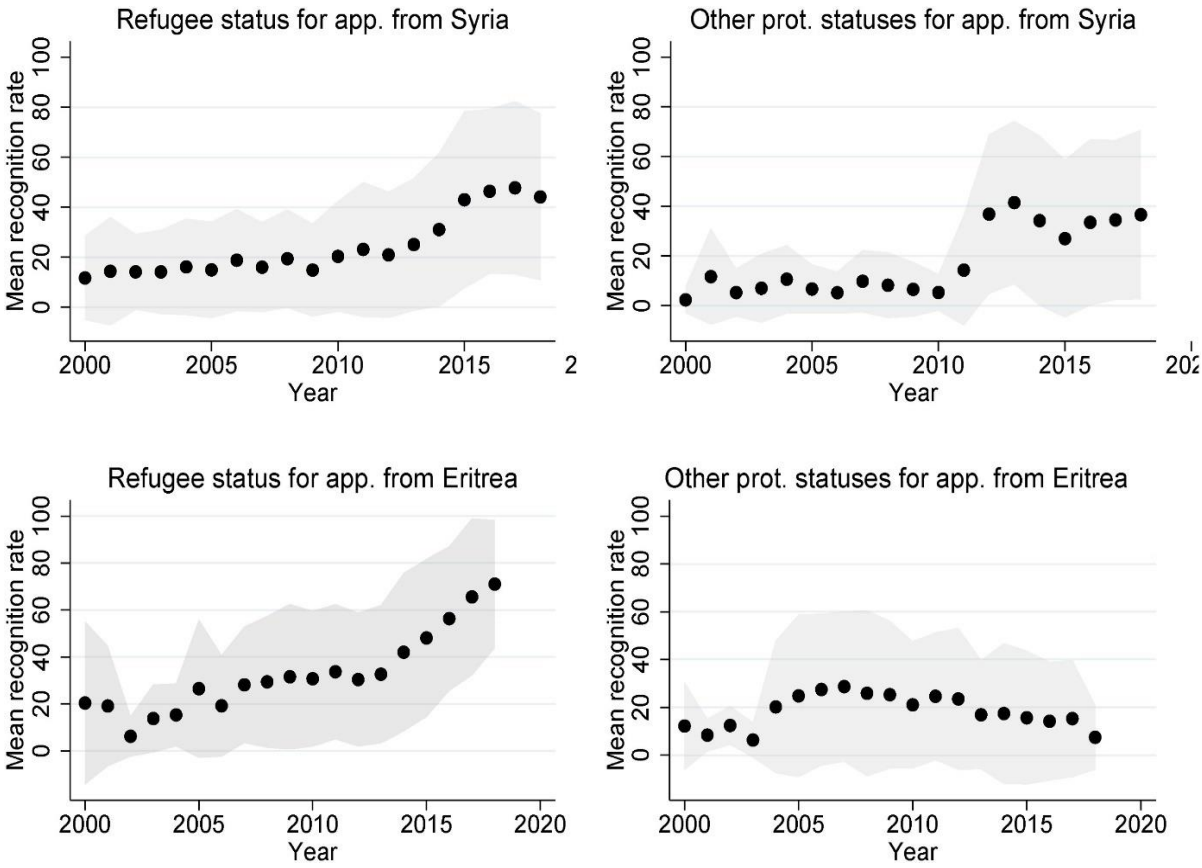
This brings to the fore the question of what makes a robust RSD administration. Thus, in the second stage of our research, we opened the black box of "national RSD administration" and explored the legal, institutional, and procedural RSD features that affect the outcomes of national RSDs. This includes the legal norms according to which asylum applications are examined, the roles of different actors in asylum decision-making as well as provision of legal and interpreter help, delivery of other services/benefits, and organization/funding of these at different stages of the RSD processes. Based on the theoretical approach and an expanded version of the data collection grid introduced by Sicakkan (2008), we have coded the RSD features of 14 EU member States, the UK, Canada, and South Africa between the years 2000 and 2020 into more than 1500 variables.

To make sense of this massive amount of legal, institutional, and procedural data, we did an initial explorative analysis, deploying a methodology that enabled us to identify the most impactful RSD features concerning states' asylum recognition performance. We did this by using an artificial neural network (ANN) approach, which estimates the relative importance of each explored RSD feature in relation to other factors that have previously been shown to be relevant determinants of countries' asylum recognition rates. The latter includes, among others, host-country and origin-country specific factors related to politics, economy, demography, immigration pressure, human rights conditions, conflict intensity, and life danger. In the final paper, we used the results obtained here to build a probabilistic model devised to discover the features of a well-functioning RSD with higher precision. We present the findings from the final study below.

4.1 Findings

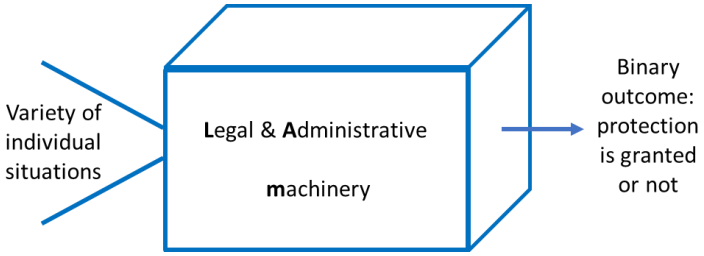
With the adoption of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, United Nations member states affirmed their commitment to protect people facing serious threat to their life or freedom in their country origin. Despite the application of the same text for more than 50 years, there still exists large cross-country differences in terms of protection recognition. Put bluntly, two asylum seekers fleeing persecution from the same country may end up in a very different situation if refuge is sought in country A or in country B, thus casting shadows on the ability of the international protection apparatus to protect those who flee persecution. Figure 1 displays recognition rates (in percentage of decisions) in the EU28, from 2000 to 2018. It showcases three sources of variation: recognition varies according to countries of destination, countries of origin, and over time.

Figure 1. Variation in protection recognition rate for Syrians and Eritreans in the EU28, 2000–2018, refugee and other statuses (mean and standard deviation).



Processing asylum claims equates to transforming a variety of individual situations into a binary outcome: either protection is granted or it is not. This complex process takes place at the heart of states' administrations and thus likely depends on the capacity of the latter to process applications in a predictable and legitimate manner. Acknowledging the legal-administrative nature of Refugee Status Determination (RSD) processes, PROTECT opens the black box of national administrations and investigates the ways in which institutions and procedures affect recognition of protection, for both refugee status and other statuses.

Figure 2. Refugee Status Determination: opening the black box



More precisely, we proceed in two steps. First, we consider a general approach to the effect of administrative machineries through **administrative capacity**. How effective the administration is (quality of policy-making and insulation from political pressures) and how much experience it has with asylum matters (density of rules guiding RSD decision-making) determine its ability to evaluate asylum claims on the basis of their merit. Secondly, we propose a more precise approach by breaking down the various **institutional arrangements** in place through time and space. Which actors are involved in decision-making and what rights are granted to claimants in RSD procedures affect the way claims are evaluated and, eventually, whether protection is recognized or not.

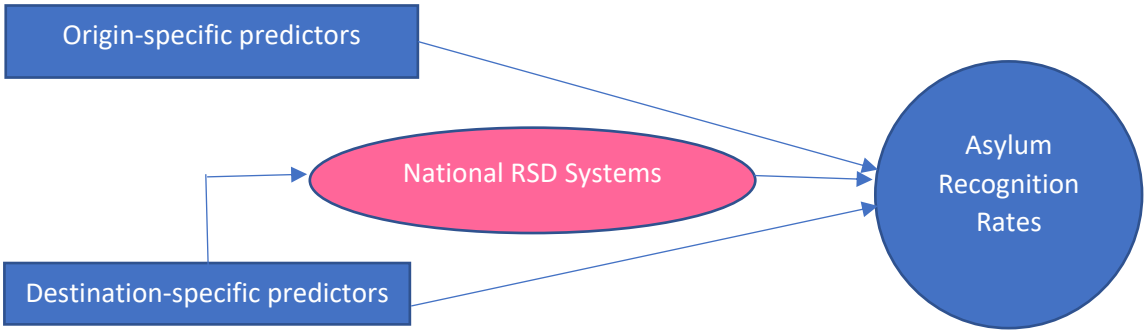
4.2 The role of administrative capacity

We find robust evidence of the effect of administrative capacity on recognition of protection. First, recognition of refugee status is lower where administrative capacity is higher. This suggests that, in those cases, the processing of claims is more stringent, thus placing greater burden of proof on claimants. Notwithstanding, administrative capacity leads to higher recognition rates in cases in which the conditions in origin-countries warrant it. Second, we find that there exist two distinct patterns of protection recognition, a trade-off between refugee status and other statuses. Where the overall political climate is rather open to migration, more asylum seekers are granted refugee status, which is more favourable to its holder. When the political context is more restrictive, then asylum seekers are granted lower protection statuses. The capable administration, which is itself embedded in the overall political context, carries its tasks accordingly, with a tendency to decrease recognition rates altogether, albeit less so for refugee status.

4.3 The role of RSDs compared with the role of the conditions in the sending countries

All RSD systems included in this study comprise detention, access, and normal procedures. When an asylum application is lodged in a country, it is first screened for admissibility and inclusion in the fast-track procedure. Inclusion in a fast-track procedure usually implies inadmissibility and a high probability of rejection and return. If the application is deemed admissible, it is assessed in the normal procedure with respect to the 1951 Geneva Convention and additional, national legal grounds applicable in the respective country. Asylum seekers are sometimes held in detention during parts of these stages, depending on the national rules for detention. Although asylum seekers should in principle not be detained, there is an increasing trend to detain them on suspicion of false identity and travel documents and other reasons. The countries apply a range of legal grounds in their detention, access (admissibility and fast-track), and normal procedures. Regarding applicable legal grounds and organization and funding of the decision-making and legal/interpreter aid mechanisms, countries still have different profiles even after a long history of global and regional/ European policy harmonization processes.

Figure 3: A Model for Assessing the Importance of National RSDs in International Protection



We explore whether and to what extent differences in national RSDs affect the outcome of asylum applications, or more precisely the asylum recognition rates of countries for different origin countries. Figure 4 generically visualizes the predictors of countries' asylum recognition rates, that is, origin-specific factors, destination-specific factors, and the national RSD system features. An asylum application is primarily evaluated with respect to the relevant human-rights violations in the applicant's country of origin or habitual residence, how s/he is personally affected by this situation, or simply a well-established (documentable/ documented) fear of persecution because of one or several of the five reasons listed in the 1951 Geneva Convention. Therefore, human rights violations, conflict intensity, deaths and casualties, torture incidents, and liberties and rights in the applicants' country, that is, origin-specific factors, should be added as predictors in any attempt to explain countries' asylum recognition rates.

If there is widespread oppression and persecution of groups or individuals in a country because of the five reasons listed in the 1951 Geneva Convention, the probability of being granted refugee status for the applicants coming from that country is greater than for those fleeing other origin countries where there is not such persecution. Indeed, seen from a legal perspective, such conditions in the origin country and the extent to which an asylum applicant is affected by them should be the sole basis of any asylum decision.

We find that two origin-specific factors that increase the probability for persecution and cause fear of death, *casualties* and *deaths in the last five years* in the origin country, are among the most important predictors. This means that the two origin-specific features with direct and high relevance for the 1951 Geneva Convention's criteria for granting international protection are the primary criteria for granting asylum in practice.

The third most important factor predicting a country's asylum recognition rate is a legal norm: whether a destination-country accepts *applications from abroad* or not. Indeed, from an international protection perspective, the fact that this emerges as such an important factor is quite problematic an aspect of the current national RSDs. The 1951 Geneva Convention requires being outside one's own country of origin or habitual residence; however, it does not impose a rule on being in or at the border of the destination country to qualify for getting international protection. This rule weakens especially the survival chances of people who do not have sufficient resources to cross the state borders and travel to a safe destination.

GDP per capita of the origin country emerges as the fourth most important predictor of asylum recognition rates. Certainly, this is not a legal ground for granting international protection. However, it emerges as an important predictor because of the high correlation between refugee-producing conditions and the economic situation in the origin countries.

The next most important predictors are destination-specific: *Government's position on migration*, *the role of the police and local authorities in decision-making in normal procedures*, and *the role of the UNHCR in decision-making on detention of asylum seekers*. Thus, the main

pattern is that a set of predictors of asylum recognition are among the most important factors, although they do not have anything to do with the 1951 Geneva Convention's criteria for defining a refugee. More importantly, there are many RSD-features among the destination-specific factors. These affect the international refugee protection system.

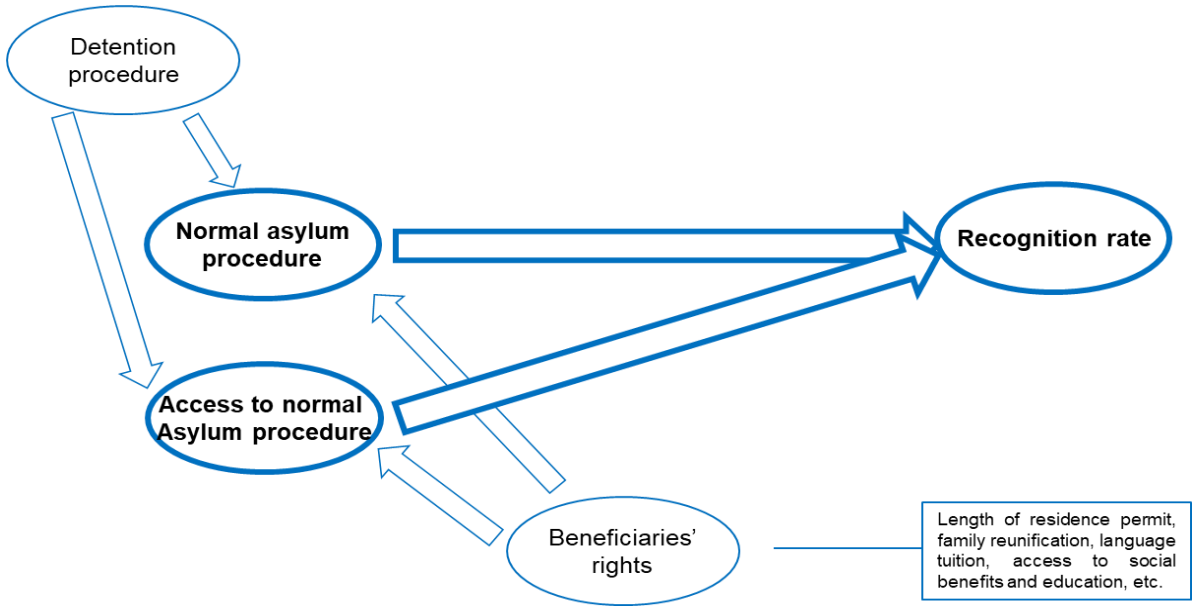
From a policy-making perspective, if one is targeting to improve the international protection system, there are several ways to go. As the origin-specific predictors suggest, focusing on the root causes that produce refugee situations, e.g., improving the human rights conditions, democracy, and economy in the origin countries, as well as using diplomacy and conflict resolution in instances of inter-state and intra-state conflict, is one way to go. The international community is already trying these measures.

But what can we do in our own countries to improve the implementation of international protection? How can we improve our international protection arrangements? The results suggest several indicators to focus on. In this respect, the effect of the general political landscape and atmosphere as well as daily politics on the legal rights of the refugees is the most important challenge to address in the destination countries. Robust RSDs with high administrative capacity, based on the rule of law and experience in asylum matters, are efficient tools to resist the contingencies of daily politics. Thus, the main question is to discover the legal frameworks, institutional architectures, and procedures around asylum decision-making that both meet the needs of the people who ask for protection and at the same counter the impact of the fluctuations in daily politics on the legal right to international protection.

In this respect, we find that (i) the legal grounds other than the Geneva Convention, (ii) the actors involved in decision-making, funding, and organization of the national RSDs, (iii) the design of the decision-making as centralistic or pluralistic, and (iv) countries' approaches to the provision of procedural rights (universalistic vs particularistic and entitlement vs charity) are the areas that need special attention when designing institutional architectures and procedures around asylum decision-making.

4.4 The role of institutional and procedural arrangements

Figure 4. The effect of institutional arrangements on recognition of protection



Once the effect of administrative capacity is ascertained and the most relevant predictors are identified, we proceed with evaluating the effect of different institutional architectures relating to normal and access procedures which have a direct effect on recognition of protection. The

normal procedure is the formal set of rules whereby claims are evaluated against the protection grounds established in the Geneva Convention. Not all claims follow the normal procedure; some are deemed inadmissible and are rejected without scrutiny, others are fast-tracked due to unlikely protection needs, thus declared ineligible. We also assess the effect of arrangements that indirectly affect recognition of protection: detention procedures and rights granted to beneficiaries of protection. Detention procedures may hinder asylum seekers' ability to submit their claims efficiently by preventing detainees from seeking adequate legal counsel. Generous refugee policy increases the attractiveness of the country for would-be beneficiaries, which may spur the administration to apply the rules more stringently.

The direct effect of normal and access procedures

Our analysis shows that inadmissibility (i.e. in access procedures) on grounds connected to claimants' failure to provide travel documentation (passport or visa) leads to significantly lower refugee status recognition rates. This is highly problematic insofar as proving identity and provenance is often difficult for people who have fled their countries in haste, travelled long distances--sometimes for years—or destroyed their documents to reduce risks of persecution. Similarly, applying the first country of asylum concept (i.e. claimant has transited through a country where s/he could have applied for asylum) in access procedures translates in significantly lower recognition rates for other statuses.

We also establish that extensive procedural rights in access procedures provide more guarantees of claims being examined on the basis of their substantive merits, both for refugee status and other statuses. Unsurprisingly, having unconditional appeal rights and suspensive effects of appeals lodged significantly increase recognition rates, although it does so only for refugee status. Similarly, the right to legal counsel, both in first and second instance, significantly raises recognition rates, both for refugee and other statuses. These are important findings as proper remedy as well as access to legal counsel guarantee the legitimacy of access procedures. The fact that these aspects of procedural rights increase refugee status recognition and not (or less so) other protection statuses hints at the fact that, would they not be properly challenged, decisions in access procedures could very well lead to wrongful expulsion orders.

Procedural rights' governance structure is also an important matter insofar as extensive rights are unlikely to be effective if not accompanied with positive means to ensure their enjoyment. As states disengage from actual provision of procedural rights, thus leaving it up to third sector's initiative and resources, systematic enjoyment of rights is not ascertained throughout the territory and for all claimants. Our results show that positive implementation of these rights by the authorities, both in access and normal procedures, leads to higher recognition rates for refugee status and, to some extent, other statuses.

The indirect effect of detention procedures and beneficiaries' rights

Our analysis reveals that a wider use of detention in national legal frameworks significantly decreases recognition of statuses other than the refugee one. As for rights, more generous rights tend to be associated with lower recognition of protection. The longer the residence permit granted, the lower the recognition of refugee status.

5 Conclusion

There is a quite clear conclusion about the effect of national refugee status determination systems on international protection. A robust legal-administrative decision body increases the fairness of the decision-making on asylum. There are three dimensions to a robust administration: the legal norms it deploys for granting or rejecting asylum, the actors it includes in its institutional architecture for decision-making, and the procedural guarantees it provides to asylum applicants.

Regarding legal norms, our study finds that inclusion of migration and asylum related concerns and arrangements in the EU's external policy is detrimental for the right to asylum. This means that international protection policy should be kept apart from foreign policy, security policy, and migration policy norms if the aim is to live up to the state responsibilities that are described in the 1951 Refugee Convention. The harmful effect of merging asylum policy with migration policy is also documented in our quantitative analysis: applying the regular migrant entry rules to asylum seekers, e.g., strict requirements of passport, visa, proof of identity, and detention measures, does not only violate the 1951 Geneva Convention's requirements but also weakens the right to political asylum. Our historical study finds that specialized asylum offices of some countries have been important actors in adapting to new conditions that generate refugees, even extending the category of people to be protected. This culminated in the inclusion of subsidiary protection among the latest EU protection norms.

Regarding institutional architectures, our historical study argues that robustness is achieved by organizing asylum decision making in autonomous bodies in which professional protection officers sensitive to abiding to refugees' rights make decisions on asylum-requests. Also, in accordance with the 1951 Refugee Convention (article 35) UNHCR should have full access to all decisions being made in these bodies as a guarantee that the high standards in refugee protection are upheld. Our quantitative analysis of the impact of different RSD systems supports this finding from the historical study and elaborates it further. States' involvement in asylum decision-making and procedures are utmost important. Institutional setups where non-state actors are left alone in providing help to asylum seekers without state support at different stages of the asylum procedure do not increase the fairness of the system. This also concerns states' involvement in the provision of procedural rights like legal help and interpreter help.

Extensive procedural rights in access procedures provide guarantees of claims being examined on the basis of their substantive merits, increasing the fairness of the system. This comprises providing unconditional appeal rights with a suspensive effect. Also, another factor that increases fairness is introducing institutional arrangements for enabling multiple non-state actors to observe the detention conditions and giving them access to the detention areas.

In addition to contributing to the emerging research agenda on RSD, our research has policy relevance to recent policy advances in international protection. The UN's Global Compact on Refugees encourages collaboration between international organizations, states, regional entities (EU, AU), refugee help organizations, faith organizations, and other non-state actors. For this purpose, it introduces new global platforms to coordinate international collaboration. The EU's Migration and Asylum Pact outlines the procedural functions and rights guarantees regarding refugee protection that should be in place in its member states. It introduces new supranational arrangements to materialize some of these. If the international society is in search of well-functioning national asylum recognition systems as part of these global and regional initiatives, it is imperative to know how various RSD systems affect the chances of asylum seekers and the states' ability to provide protection to them.

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For a more in-depth understanding of the results presented here, please refer to the research working papers and academic articles listed below. They will be available at:

Publications - PROTECT The Right to International Protection (uib.no)

For the historical analysis of RSD institutional architectures:

Caestecker F. and Ecker E. (2022) The Right to International Protection. Institutional Architectures of Political Asylum in Europe (Part I, 1970-1992). *PROTECT Working Paper series*. DOI: https://zenodo.org/record/7437875

Caestecker F. and Ecker E. (2022) The Right to International Protection. Institutional Architectures Historical Analysis in Selected EU Countries (Part II, until 2018). *PROTECT Working Paper series*. DOI: https://zenodo.org/record/7525600

Linley C. and Atak I. (2023) Mapping Canada's Refugee Determination System: 1950-2020. *PROTECT Working Paper series*. DOI: https://zenodo.org/record/7521407

Maple N., Vanyoro K. and Vearey J. (2022) The Role of Institutional Architecture in the Reception of Refugees in South Africa. *PROTECT Working Paper series*. DOI: https://zenodo.org/record/7437478

For the effect of RSD institutional architectures on protection recognition:

Van Wolleghem P.G. and Sicakkan H.G. (2022) Asylum seekers in the machinery of the state: administrative capacity vs. preferences. Recognition rates in EU member states. *European Union Politics.* DOI: https://doi.org/10.1177/14651165221135113

Van Wolleghem P.G. and Sicakkan H.G. (2022) The role of the quality of the administration in asylum decision making. Comparing recognition rates in EU member states. *PROTECT Working Paper series*. DOI: https://zenodo.org/record/6334203

Van Wolleghem P.G. and Sicakkan H.G. (2023) Recognizing international protection: do institutional architectures matter? *PROTECT Working Paper series.* Soon to be available.

Sicakkan H.G. and Van Wolleghem P.G. (2023) Do National Refugee Status Determination Procedures Affect International Refugee Protection? PROTECT Working Paper series. Soon to be available.

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For the external dimension of the EU's migration and asylum policy:

Longo F. and Fontana I. (2022) Mapping the external dimension on EU migration and asylum policies: what impact on the governance of asylum?, *PROTECT Working Paper series.* DOI: https://zenodo.org/record/6483343

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