



The European Migration System and Global Justice

A First Appraisal

Enrico Fassi and Sonia Lucarelli (eds)

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Reconsidering European Contributions to Global Justice (GLOBUS) is a research project that critically examines the EU's contribution to global justice.



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Preface

Reconsidering European Contributions to Global Justice (GLOBUS) is a Research and Innovation Action (2016 – 2020) funded by the EU's Horizon 2020 programme, Societal Challenge 6: Europe in a changing world – Inclusive, innovative and reflective societies. GLOBUS is coordinated by ARENA Centre for European Studies at the University of Oslo, Norway and has partner universities in Brazil, China, Germany, India, Ireland, Italy and South Africa.

GLOBUS is a research project that critically examines the European Union's contribution to global justice. Challenges to global justice are multifaceted and what is just is contested. Combining normative and empirical research GLOBUS explores underlying political and structural obstacles to justice. Analyses of the EU's positions and policies are combined with in-depth studies of non-European perspectives on the practices of the EU. Particular attention is paid to the fields of migration, trade and development, cooperation and conflict, as well as climate change.

Migration is one of the most significant issues on the EU's political agenda. It raises a large number of practical questions, but it is also a key concern from the perspective of global justice. The question of what would be a normatively adequate response to the increase in numbers of migrants has been the subject of deep disagreement amongst the EU's member states. The EU's handling of the question has been criticized and the legality of its responses has been questioned. This report is the first of several studies to be produced by the research group on migration in the GLOBUS project, and which aim to examine this complex issue through empirical analyses and normative reflection.

Helene Sjursen
GLOBUS Coordinator

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Chapter 1

Migration, justice and the European Union

Enrico Fassi

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The large inflow of migrants to Europe over the last two years has made the refugees and migrants issue a focal point of the current political debate. The strain on the Dublin System and the blatant inconsistencies of the European approach to migration have served as a 'wake up call', bringing to the fore the need to overhaul the EU's role in the governance of this policy area, riddled with tensions between Member States. Some Member States have accused the European Union (EU) of imposing regulations that affect them negatively; on the other hand, the EU has accused countries such as Italy and Greece of failing to comply with the existent rules. Inter-state solidarity has frequently been lacking, and violations of human rights with respect to the migrants have been documented. Moreover, the migration crisis has disclosed a number of normative and ethical issues connected to the current management of migration in the EU: to what extent can such a system be reasonably deemed just? Just for whom? Does the European management of migration live up to the principles of global justice?

In order to start addressing these questions, it should be acknowledged that migration is a highly sensitive area with respect to justice, one in which the tension between different conceptions of justice emerges in

all its clarity. By definition, migration stands between states, individuals and global regimes. It touches on legitimate concerns of different communities, individuals and global actors. Hence, the very possibility of managing migration in a way that satisfies the legitimate justice claims of all involved is constrained by the nature of the issue. Accordingly, the EU seems to be particularly well equipped to strike a balance among the different justice claims of states, humans and subjective individuals. This is so precisely because of the EU's nature as a complex polity with a *sui generis* governance (including states, individuals, groups), traditionally compliant with and attentive to the development of international law, and a peculiar understanding of its 'problematic' borders. Whether the Union succeeds or not in this titanic enterprise remains however to be explored, and this report presents the first steps in GLOBUS' exploration of the EU's contribution to global justice in the area of migration. The following sections of this chapter give both a brief introduction to GLOBUS' theoretical and analytical framework and how this is adopted in the study of migration, and a brief presentation of the remainder of the report.

Migration and global justice: the GLOBUS approach

GLOBUS offers a critical assessment of the EU's impact on justice in a global system characterised by uncertainty, risk and ambiguity. The aim of the project is to provide in-depth knowledge of how the EU proceeds to promote justice within climate change, trade & development, migration and security policy areas. In order to do so, GLOBUS develops three different conceptions of justice: justice as non-domination, justice as impartiality, and justice as mutual recognition (Eriksen 2016). Non-domination refers to a condition in which an actor is not subjected to (i.e. is free of) any kind of arbitrary interference or control on the part of other actors. *Impartiality* recalls an idea of 'equal basic rights and liberties' and the pre-eminence of human rights over sovereignty rights. Mutual recognition stresses the role of reciprocity and the right of each relevant subject (individual, group or polity) to be recognised in their identity, ruling out the possibility to determine 'a priori' what is normatively right and fair. Each definition gives prominence to some challenges to global justice over others. Considering them all, ensures considering different justice claims, and underlying the intrinsic tension among them. Empirically, the project aims to discern inhibiting factors of global political justice in order to specify how the EU could further contribute to promote justice.

The GLOBUS project's overall framework rests on the assumption that states and hybrid polities such as the EU, not individuals, remain the primary actors in global politics, the ones that bear the main responsibilities in terms of global justice. The three above-mentioned complementary, 'reasonable' conceptions of justice (Eriksen 2016) have been selected accordingly, in order to investigate the normative implication of the EU polity's external relations with a set of analytical tools adequate to the current political context. Nevertheless, migration comes across as a peculiar global justice domain because, unlike climate change or trade, it concerns individuals that, by definition, are involved in complex relationships with at least two distinct states (or supranational polities) at the same time. In addition to that, since migration implies physically crossing (with or without consent) the borders of political communities, the migrant's claims are singularly conspicuous and – at least to a certain extent – impossible to be ignored by the public authority. As a result, the focus on the international dimension of migration policies in terms of global justice – in tune with the general orientation of the GLOBUS project – will necessarily be complemented by a thorough investigation of the relationship between individuals and the polities involved. This relationship reveals the inner tensions between the idea of global justice and its confinement into an international order of nation states.

States, indeed, can at the same time be a source of injustice towards individuals, as well as the locus where these injustices are addressed through the removal of specific sources of injustice, and/or the promotion of actions or policies aimed at promoting justice. The recognition of this ambivalence implies to include in our discussion of the three conceptions of justice specific questions adapted to the peculiar essence of migration. If in principle dominance or domination are acts of injustice no matter if perpetrated towards states, individuals or groups, for the sake of analytical clarity, we will use non-domination, exclusively in relation to state-like entities or political actors such as the EU, its member states and third countries. In terms of impartiality, we will inquire how the way in which legal categories are defined impacts on the application of universal norms of human rights. When dealing with mutual recognition, we will explore if and how the EU and its Member States recognise the subjectivity of migrants, hence look at their specific needs as subjectivised individuals rather than objectivised human beings.

The EU migration system of governance

In order to assess as validly as possible the EU's contribution to global justice concerning migration, the focus of the analysis has been widened to the European system of migration, so as to encompass the entire multi-level governance system of the EU – although not necessarily in compliance with the methodological assumptions of the namesake scientific approach. Accordingly, not only the supranational level of government – e.g. the border and migration policy of the EU, and the interactions within the EU institutional setting in general – but also the national one – alongside several Member States' migration-related policies, rules and practices – will be investigated. In this sense, the EU policies and regulations are conceived as part of a more comprehensive EU Migration System of Governance (EUMSG) where different levels of government are involved in partially cooperative and partially conflicting relations, but are not simply mutually exclusive or hierarchically ordered. Among the reasons for this methodological choice is also the fact that migration and asylum are shared competences between the EU and its Member States (Art. 4 TFEU). Additionally, such a comprehensive approach provides the means to grasp the inherent friction between two conflicting sets of goals – on the one hand delivering an effective management of migration flows, on the other preserving the freedom of movement across the Member States – as well as the courses of action put into practice in order to handle this divergence.

This approach does not rule out the agency of the EU. As many systems of governance, the EUMSG deploys a certain diffusion of authority, the emergence of regulatory policies that bypass state sovereignty (Higgott 2005, 578), as well as the perpetuation of states' sovereign prerogatives. In this system, the Union remains identifiable to a considerable extent as an actor in its own right, one that defines and advances (more or less forcefully) a distinct agenda in its relations with Member States and third states. At the same time, the Union as an actor emerges as inextricably intertwined with the broader migration system, whose complexity increases by the fact that its boundaries do not entirely overlap with the EU membership. The system's levels also include a number of non-EU states with formal links to the EU (such as Norway), and other third states that have nevertheless become complementary to the EU's action towards migration – e.g. Turkey after the signing of the EU-Turkey Agreement in 2016. The complex, multilevel nature of

the system is of paramount importance, both in practical and analytical terms.

Focusing on the EUMSG implies that the EU's normative behaviour and its contribution to global justice are hard to assess unless the Union's interactions with its Member States and relevant third states are taken into account. Traditionally, immigration is one of the policy areas where the Member States could exercise most independently their sovereign prerogative, barely constrained by loose common frameworks. As this report shows, the EU has generally taken action in this domain through Declarations and Directives, only recently turning to Regulation – which, unlike the others is a directly mandatory act that leaves no scope to Member States. Correspondingly, the Member States maintain distinct national legislations that put into effect the common framework in very different ways. Whether the resulting relation between national legislations and the common European framework has been one of mutual influence or sometimes tension varies widely across national cases. What has emerged in recent years is an ever-greater tension, between the principles underlying the freedom of movement within the EU (including other countries partaking in this common space) on the one hand, and the call for stricter controls over international mobility coming from a number of constituencies on the other. Remarkably, stricter controls of both European *and* national borders is demanded in view of a more flexible management of mobility and not, as one would expect, the simple reinforcement of state borders and a crackdown on transnational movements. The regulation of mobility, one could say, has come to be a crucial issue in the definition of a new institutional and political balance of the EU, with many observers seeing it as an even greater challenge than the economic crisis.

A methodological note: the focus on terms, definitions and concepts

The aim of this work is to look into the *concepts* conceived and used by the EU, the Member States and the relevant third States within the EUMSG. The expectation underlying this analytical effort is that the terms used (e.g. illegal vs irregular migrant) and the way they are defined, may provide valuable insights about deep-seated ideas and assumptions underlying public authorities' migration policies. Furthermore, it shows the existence of cognitive patterns that affect migration management and points to juridically relevant differences on how a concept is framed by different actors in the EUMSG. More specifically,

in the first place, the way specific terms are formulated, chosen and used, provides a preliminary assessment of how an issue is perceived by relevant actors and the policy approach that is most likely to ensue. Second, 'wordings' and conceptual framings outline an issue through the creation of certain patterns where terms and concepts (which may also pertaining to different domains) acquire a specific relevance. Third, the terms used, and the meaning attached to them, shed light on underlying principles and values. Fourth, when focused on, the terms allow us to analyse narratives independent of practices, and eventually assess the compliance of the latter vis-à-vis the former.

It is clear that terms and definitions can only tell one part of the story. A consistent analysis of any system of governance is one where the focus on discourses is complemented by a thorough exploration of practices. More specifically, the overall analysis has to assess first how the relevant actors frame the issue; then the way these actors act in practice and how these relate to each other. What this work aims to address is just the first step of the analysis of the EUMSG: to provide a preliminary insight of the EU's policy on migration looking specifically (and almost exclusively) at the *terms* it chooses, the *definitions* it devises and the *concepts* and understandings it endorses. The same terms, definitions and concepts used by the EU are also examined with reference to a set of national cases – Italy, France, Germany, United Kingdom, Hungary, Greece and Norway – whose selection has been based on their respective relevance in the practical and analytical definition of the EUMSG.

In the analysis of case studies, the set of terms, definitions and concepts that have been considered include 'migrant' and 'immigrant' (with an eye to the 'legal/illegal', 'regular/irregular' qualifiers), 'asylum seeker' and 'refugee', 'reception system', 'return' or 'relocation-resettlement' of migrants (with the contested concept of 'safe' countries), 'hotspot', 'smuggling-trafficking' as well as other terms peculiar to each case, and their respective semantic areas. The timeframe considered is the period 2009-2016, and the sources used consist mainly of legislation, and documents specifying general legislation (Regulations, Press releases, Court acts) as far as national case studies are concerned, and binding acts (Regulations, Directives, Decisions), and other relevant documents (Communications, Action Plans, Press releases, Court acts) with regards to the EU. Where useful and possible, secondary literature has been used to support specific interpretations.

For each case study, the analysis is complemented with a preliminary attempt to apply the threefold theoretical approach to global justice developed by GLOBUS (justice as non-domination; justice as impartiality; justice as mutual recognition).

This report is organized as follows: Chapter 2 presents an extensive study of the terms, definitions and concepts that characterize EU migration policy. Based on this examination, chapter 3 provides a first analysis of the EU's compliance with the three notions of justice. The second half of the report is dedicated to an analogous analysis referred to the national cases – with the same emphasis on whether and how they adhere to the three conceptions of justice. More specifically, chapter 4 presents the synthesis of the preliminary analysis conducted on terms, definitions and concepts in each case study – Italy, France, Germany, United Kingdom, Hungary, Greece and Norway. Chapter 5 draws together the results of these studies, examined through the lens of the three conceptions of justice and within the context of the wider EUMSG. The conclusions in chapter 6 aim at pointing out and examining tensions and conceptual overlaps between the mentioned three notions of justice as regards their internal consistency and their actual embodiment within the EU institutional setting and policymaking.

Chapter 2

EU terms, definitions and concepts on migration¹

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University of Bologna

This chapter deals with terms, definitions and concepts in the realm of migration and asylum as conceived by the EU. The literature has spent a great amount of ink in assessing EU's policies and practices but it has predominantly failed to provide a thorough assessment of the terms and definitions employed by the EU, missing the opportunity to investigate the ideas, conceptions and understandings beneath peculiar aspects of the EU Migration System of Governance (EUMSG).

There are at least three grounds for affirming that terms, definitions and concepts employed in main legal documents are of relevance in a preliminary analysis of the EU. First, 'EUropeanised terms' suggest specific ways the EU has interpreted certain terms common in the realm of migration, or concepts adopted on migration. This category includes specific articulations of the 'migration' terminology but also specific EU institutions and devices. Second, 'EU cornerstone concepts' recalls some concepts employed within the EUMSG that can be considered key pillars of the EU's 'approach' to migration. Third, some

¹ We are grateful to Graham Finlay for precious comments and suggestions to an earlier version of this chapter and also chapter 3.

recurrent yet frequently overlooked terms suggest the (implicit or explicit) purposes of EU's migration policies, and the constraints they pose.

In the first category, 'EUropeanised terms', are terms such as 'resettle-ment'. This has not been coined by the EU but, especially in the last years, it has assumed a distinct 'EU' connotation, while also becoming an instrument to manage the 'European' migration crisis. Similarly, 'relocation', a largely used word today, is not an EU term but it has acquired a specific meaning within the EUMSG, clearly associated to the 'emergency' situation facing the European Union. Related to the concept of relocation, 'hotspot' is neither an original term nor one of first usage in the EU's jargon. Yet, in the realm of migration, it has been associated with the 'migration crisis' and invariably referred to an area, a system and an approach. Some other terms and definitions, instead, are immediately associated to the governance of migration as approached and played out by the EU. This is the case for example of terms such as the 'Blue Card' for highly skilled workers, the 'Global Approach to Migration and Mobility', intended as the overarching framework of EU external migration policy and the recent 'Partnership Framework (Compacts)' for relations with third states. Seemingly, some Agencies that are part of the governance of migration, entail a specific understanding of how flows need to be regulated. A diachronic analysis allows uncovering how some of these peculiar tools have been assuming different meanings through time, conflating purposes to combat irregular immigration and to address asylum claims. This in turn opens for a number of questions from a justice perspective. Not only the functions but also the juridical nature, the autonomy and the underpinnings upon which these tools were originally created are changing, and with them their definition and role in the EUMSG. Missing this point would mean failing to understand how this specific system of governance is currently being re-defined.

The second category, 'EU cornerstone concepts', includes some concepts that equate to veritable pillars of the EU's migration policy. This is the case for example of the 'Common European Asylum System', which underlines the purpose of a common understanding of what asylum implies in the European Union. 'Burden sharing' is another evocative concept widely surfacing in this work, mostly referring to relations with third states and mainly recalling the necessity that these states 'fairly' contribute to the management of migration. 'Solidarity' is mainly used to underline the necessity to share the burden within

the EU, among Member States. The evocative concept of the 'Dublin system' is a cornerstone of the Common European Asylum System. The Dublin system's contribution extends further than the simple determination of the country responsible to examine an asylum application: it also entails a specific understanding of Member States' reciprocal responsibilities within the Union. 'Return' is another evocative concept intended as the key recipe to properly address irregular immigration, but also to provide a credible asylum and admission policy in the EU. Return to 'transit countries' is a peculiar variant of the EU's approach to the matter. Seemingly crucial is the concept of 'External dimension', mirroring EU's understanding of the role of third countries in migration management. The meaning of 'integration' as reported in the few documents on the matter, is aimed at the fulfilment of broader EU (and not necessarily Member States) goals, such as remaining competitive, facing the challenge of demographic ageing and being an effective promoter of basic values and the rule of law.

Finally, the third category, 'EU forgotten words', regroups crucial and yet overlooked terms in the assessment of the European approach to migration. Failing to emphasize them would mean losing the opportunity to grasp the 'constraints' these terms implicitly entail. For example, 'secondary movements', 'asylum shopping', 'mixed migratory flows or hybrid migratory flows' and 'orderly and managed arrivals' are already telling of EU's understanding of migration and of the ways to cope with it. 'Mixed migratory flows' suggests the idea that flows are constituted by both persons likely to fall under EU's criteria of protection and by persons who do not, no matter for example of the severity of their economic needs. The almost automatic and widely repeated use of these terms should be given greater attention, as done in this work.

For the sake of simplicity, the work follows the division of asylum into irregular immigration, legal migration and the external dimension of migration.² Ultimately, this allows entering deep into each domain and

² The work draws on the most relevant legal documents produced by the EU on migration and asylum. The work does not focus on all terms, definitions and concepts provided by the EU. Rather, in order to start reasoning on the EU's contribution to global justice, it puts the focus on terms that provide a better understanding of how the EU conceives how the governance of migration should look like. The analysis of terms, definitions and concepts also covers the last proposals for Directives and Regulations drafted by the European Commission as they seem to significantly shift from previous legislative acts (for a critical assessment of the role of 'legislation' in the current EU's migration policy see for example Menéndez 2016).

understanding the main idea behind them as conceived by the EU. Additionally, it opens for uncovering how concepts have changed through time (the approach is diachronic) and the direction this change has taken. Indeed, it is fair to underline that contamination between these domains has been wide and that some words and concepts are key in most of the domains.

Asylum

Asylum can be considered an (almost) universal term. However, a crucial issue in this domain is to understand what 'asylum' means for a political system and more so on what 'providing asylum' implies for the same political community. As any other policy, it entails selection, prioritization and discrimination. Undoubtedly, more than in other fields of political action asylum embodies broader ethical and justice considerations, irreducible to easy solutions. Thus, assuming that asylum is perceived and defined (not to say practiced) differently in different political contexts is a wrong and misleading starting point.

With this in mind, analysing how the EU defines 'asylum' is far from trivial. Reading through EU documents leads to the disclosure of a specific pattern constituting the understanding of 'asylum' in the EU. What emerges from this analysis is a pattern of words substantiating the leading concept in the domain, that is, the Common European Asylum System (CEAS). These words are: 'secondary movements', 'asylum shopping', 'mixed migratory flows', 'safe country of origin', 'safe third-country', 'first country of asylum', 'burden sharing resettlement', 'relocation' and 'hotspot', among others. Related terms that may be found in other domains of the EUMSG but when used in the realm of asylum assume a specific meaning are 'return' and 'external dimension' for example. Even in the case of 'predictable words' (such as 'protection', 'family reunification', 'refugee' etc.), there is still need for close analysis as each may come with its own specificity in terms of rights, obligations, duration, exceptions. That is, terms are not neutral, and their meaning may well change through time.

Accordingly, a first element to be taken into account is that the creation of a Common European Asylum System (CEAS) – which should first lead to the setting of basic common standards among Member States and then to a whole harmonization of asylum practices – is a very long term *process*, dating back to Tampere Council of 1999. A second element, which is provided by the term itself and that will be crucial in

the following analysis, is that the EU conceives 'asylum' as a system, composed of multiple facets and that the system should be shared (common) among Member States.

For the sake of simplicity, this section on asylum keeps the partition operated at the EU level, and is divided in three sub-sections: procedures, qualification, Dublin system and reception.

Procedures

The first fundamental pillar of the CEAS is the definition of common procedures for international protection. Overall, the EU's reasoning behind 'common procedures' was to 'improve the quality of examination and the speed of procedures' (European Commission 2003b, 8).

The very first document produced after the Tampere Council discussing common procedures for international protection, was very clear in explaining that 'protection' in the EU could no longer be granted only on the basis of the Geneva Convention, given the increasing mismatch between 'the nature of the demand and the criteria of the Geneva Convention' (European Commission 2000, 5). Probably, the legacy of the Balkan wars left space for a broader interpretation of protection responsibilities within the Union. Reference was made to the European Convention on human rights, which was said to have set the basis for many alternative forms of protection at the national level aside from the one granted by the Geneva Convention.

However, already in this first document, where much of the attention was focused on rendering the EU a space of protection, the objective to limit 'secondary movements' was mentioned. This entails the possibility for asylum seekers to move from a Member States to another without prior authorization, something that common procedures for Member States could prevent (European Commission 2000, 6). Ultimately, this is intended to describe a situation whereby asylum seekers tend to go to states with 'easier procedures', which would disproportionately affect certain Member States. A related term started to surface the public debate and made its appearance in a EU 2000 Commission document (European Commission 2000, 10), that of 'asylum shopping', referring to the ever frequent practice to apply for asylum in different Member States even at the same time, duplicating costs and efforts in the EU.

In setting the first stones of the CEAS the European Commission brought to relevance another term/concept normally used on irregular immigration but said to be key for the 'credibility' of the EU asylum system: 'return' (European Commission 2000, 10-11). In this context return was intended as the effective possibility to send back those people found ineligible for any form of protection and not risking any sort of persecution in their country of origin or of residence. Return as a building block of the asylum system was further urged in 2003, when the European Commission delivered a Document addressing the proposal by the United Kingdom to look for forms of protection outside the EU and close to displacement areas. This reflection was seemingly undergone by the UNHCR at the time through the 'Agenda for Protection' and the 'Convention Plus' initiatives (European Commission 2003a). The concepts of 'mixed migratory flows' (European Commission 2003a) or 'hybrid migratory flows' (European Commission 2003b) were guiding UK's proposal but also EU's reflection. . The concepts inferred that asylum seekers were not only people searching for international protection, but to an increasing extent economic migrants 'abusing' the EU asylum system (European Commission 2003a, 11). Again, properly facing mixed migratory flows was considered key to EU asylum system's 'credibility'. The argument of the UK (endorsed by the EU) was that by effectively enforcing return of 'economic migrants' they would eventually be discouraged to abuse the asylum system, thus reducing the caseload of applications the EU would have to consider. In turn, this would save resources to help countries and regions of origin to face the immediate need of displaced persons and refugees. It is noteworthy to notice how the CEAS concept was broadening to encompass an important 'external dimension': the EU asylum system had to be intended to gradually improve protection capacities in third countries in order to reduce the necessity of people in need of protection elsewhere (i.e. the EU) (European Commission 2003a, 13). Accordingly, 'burden sharing' meant that third countries had to contribute to offer protection to persons in need given that providing assistance timely and as close as possible to the real needs was the 'logic and preferred protection option' (European Commission 2003a, 16).

This further elaboration of the CEAS concept is fundamental to understand future EU policies in the domain. In particular, in these first documents there is reference to 'orderly and managed arrival' of persons in need of international protection from the countries of origin. This

implicitly made resettlement³ a preferred option and long-term objective for the European Union (European Commission 2003a, 13). Later on the EU would be clearer in maintaining that ‘the approach aims to end irregular and dangerous movements and the *business model of smugglers*, and to replace these with safe and *legal ways* to the EU for those who need protection. Protection in the region and resettlement to the EU should become the model for the future, and best serve the interests and safety of refugees’ (European Commission 2016a, 2).

Fact sheet 2.1: Resettlement

Resettlement as a concept has only recently found greater usage in the European Union. Resettlement has always existed but there was no common EU framework on the matter. Yet, since the very starting of talks on a common asylum system resettlement has been considered a key instrument. Similarly, to other words examined in this work it does not simply imply a ‘procedure’. A patterned scheme of related words, concepts and tools together make sense of what resettlement means. Hence, pertinent terms encompasses Regional Protection Programmes, durable solutions, orderly procedures and legal and safe arrivals, external asylum policy, the United Nations High Commissioner for Refugees (UNHCR), the European Asylum Support Office (EASO) and the new European Agency for Asylum, relocation and integration. Even though there exists a definition of ‘resettlement’ shared among international protection Institutions, an interpretative analysis underlines the nuances that the term has assumed throughout years, the new objectives supporting it but also the new shape it is about to assume.

In its bare definition resettlement is intended as ‘the transfer of individual displaced persons in clear need of international protection, on request of the United Nations High Commissioner for Refugees, from a third-country to a Member State, in agreement with the latter, with the objective of protecting against refoulement and admitting and granting the right to stay and any other rights similar to those granted to a beneficiary of international protection’ (European Commission 2015a, 4). It was considered as a possible ‘durable solution’ for persons in need of protection, persons to be identified by the UNHCR (European Commission 2009, 3). An ‘European’ idea of resettlement (as different from Member states’ practices)

³ Resettlement is here described as ‘transferring refugees from a first host country to a second, generally a developed country, where they enjoy guarantees of protection, including legal residence, and prospects for integration and autonomy’ (European Commission 2003a, 14).

concretely emerged in relations with Regional Protection Programmes established by the EU. The main idea was that resettlement was central to provide assistance to the countries envisaged under these programmes (Tanzania, Belarus Moldova and Ukraine at that time) (European Commission 2009, 2). Hence, before the Arab Spring, resettlement was considered as a way to show solidarity with third countries of first asylum (European Commission 2009, 2) but also a way to ensure orderly procedure for recipient countries while assuring safety for resettled refugees (European Commission 2009, 3). However, resettlement plans were intended to be voluntary, with EU only providing financial contribution through the EU Refugee Fund and the support of EASO on information sharing (European Commission 2009, 2, 3).

It was specified that resettlement had a different understanding with respect to intra-EU resettlement of refugees (relocation). In fact, it implied the transferring of persons from outside of the EU into a Member State and had to be intended as a humanitarian measure and an expression of solidarity with third states instead of a measure of burden sharing among Member States (as relocation was) (European Commission 2009, 3).

With the recent massive arrivals of migrants and asylum seekers into the European Union, the EU started to conceive resettlement as an ever necessary tool to be developed at the EU level to avoid that displaced persons and refugees had to resort to criminal networks, to prevent the further loss of lives and to hamper secondary movements of resettled refugees among Member States (European Commission 2015a, 3). The idea evolved that resettlement would also entail specific obligations of the resettled persons: to remain in the Member State of resettlement (European Commission 2015a, 5). Additionally, resettlement plans were referred to specific countries, such as North Africa, the Middle East and the Horn of Africa (European Council 2015a, 4).

A thorough assessment of what resettlement is today can be found in the Commission's proposal for Regulation that, if accepted, will be the first 'legal' document ever produced on resettlement by the European Union. The most important novelties brought to the understanding of resettlement are 1) a common EU approach must be developed on the matter, and 2) (somehow related) resettlement cannot only be voluntary but also a binding EU mechanism regulated by specific procedures at the EU level (hence part of the reason for the choice of a Regulation). Ultimately, the proposal is to create a Union Resettlement Framework (European Commission

2016b). The fundamentals of the revised understanding of resettlement and in particular of the Union Resettlement Framework are:

To provide a common approach to safe and legal arrival in the Union for third-country nationals in need of international protection, thus also protecting them from exploitation by migrant smuggling networks and endangering their lives in trying to reach Europe; help reduce the pressure of spontaneous arrivals on the Member States' asylum systems; enable the sharing of the protection responsibility with countries to which or within which a large number of persons in need of international protection has been displaced and help alleviate the pressure on those countries; provide a common Union contribution to global resettlement efforts.

(European Commission 2016b, 3)

Hence, the idea was also there that, aside from its 'external dimension' resettlement could work as a tool of migration and crisis management (European Commission 2016b, 2) supported in its task by the new European Union Agency for Asylum. The eligible persons would fall well beyond a traditional understanding of refugees according to UNHCR practices by encompassing for examples socio-economic vulnerabilities, displaced persons, and those with family links (European Commission 2016b, 10-11).

Finally, two main understandings have been underlined in the proposal: first, that secondary movements have to be prevented (which partly explains the choice for a Regulation); and second, that irregular movements are absolutely to be avoided and punished. In this sense, persons who have irregularly entered, irregularly stay, or have attempted to irregularly enter into the territory of the Member States during the last five years prior to resettlement have to be excluded from resettlement schemes (European Commission 2016b, 11).

The first Directive on minimum standards on procedures for granting and withdrawing refugee status in the EU, delivered on 2005 (European Council 2005), listed applicants' rights: legal assistance, proper translation, assistance by relevant agencies, an interpreter, the possibility of an interview and indeed the right to be informed about the motivations of a negative answer and the right to appeal (European Council 2005, Art. 10). 'Minors' were also recognized to be in need of specific procedural guarantees. Yet, in this first Directive, a request for protection was understood to fall under the Geneva Convention (and

its 1967 Protocol). The recast 2013 Directive on common procedures for granting and withdrawing international protection (European Parliament and Council 2013a) confirmed these rights, extending them to encompass provisions in terms of medical needs; 'free' legal assistance in appeals; strengthened information rights at maritime borders and territorial waters; inserting a peculiar attention to the 'gender perspective' and to unaccompanied minors (European Parliament and Council 2013a, Artt. 8-12). With respect to the 2005 Directive, the 2013 one enclosed 'subsidiary protection', as a legitimate form of international protection.

Already in the 2005 Directive on procedures, three key concepts were mentioned: 'safe country of origin', 'safe third countries' and 'first countries of asylum'. In all cases, the aim was to expedite the application examination procedure by either evaluating requests' soundness (in the case of safe countries of origin) or their possible consideration in another 'safe' country, hence their inadmissibility (safe third-country and first country of asylum). In the words of the Commission, expedite procedures would allow focusing more thoroughly on persons in true need (European Commission 2003b, 8). These concepts were largely specified in the proposal for Regulation on common procedures for international protection delivered in 2016 (European Commission 2016c). The 'safe country of origin' concept indicates a country where

on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally no persecution (...) no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

(European Commission 2016c, Artt. 44-50)

Fact sheet 2.2: A common list of safe countries of origin

The concept of safe country of origin has acquired great relevance in the last years. The concept specifically refers to unfounded applications for international protection, which especially given the 'migration crisis' are a burden for the proper working of the asylum system and should therefore be dealt with quickly.

In a proposal for Regulation put forward by the Commission in 2015 (European Commission 2015b), a common list of safe countries of origin is mentioned, and it is exactly this concept that is of extreme

interest for the purpose of this work. In fact, through the concept, the EU aims at defining the criteria for the assessment of a safe country of origin, at standardizing different understandings among Member States, at possibly introducing the concept in the legislative framework of some Member States that do not have such list (see below) and at avoiding secondary movements of applicants.

The common list of safe countries of origin draws from Directive 2013/32/EU (European Parliament and Council 2013a) on procedures (recast) (see above), which specifies that safe countries of origin should be evaluated according to:

(a) the relevant laws and regulations of the country and the manner in which they are applied; (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention; (c) respect for the non-refoulement principle in accordance with the Geneva Convention; (d) provision for a system of effective remedies against violations of those rights and freedoms.

(European Commission 2015b, 2-3)

It is a list informed by consultation with multiple organizations and structures, among which the UNHCR, EASO, the European External Action Service, the Council of Europe and which defines Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey as safe countries of origin according to the criteria above (European Commission 2015b, 6). The Common list is not intended to be exclusive, as further countries may be added (or removed) especially on the basis of the amount of applicants for international protection received by the EU, which makes Pakistan, Bangladesh and Senegal likely candidates for the future (European Commission 2015b, 6). Yet, the concept reiterates the understanding that applications consideration should be individual and based on the single circumstances of every applicants (European Commission 2015b, 8).

The understanding of a Common list of safe countries of origin is intended to strongly relate and even overlap to the one of EU's Candidate States, which should already fulfil a series of requirements with respect to 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' (European Commission 2015b, 7).

In turn, a 'first country of asylum' has to be intended as a country where

(a) the applicant has enjoyed protection in accordance with the Geneva Convention in that country before travelling to the Union and he or she can still avail himself or herself of that protection; or (b) the applicant otherwise has enjoyed sufficient protection in that country before travelling to the Union and he or she can still avail himself or herself of that protection.

(European Commission 2016c, Art. 44)

Finally, and slightly different, a 'safe third-country' can be considered one where

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Regulation on Qualification; (c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; (e) the possibility exists to receive protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate.

(European Commission 2016c, Art. 45)

Indeed, all three terms open up many normative dilemmas, as for the effective impact on migrants. The choice of words does not help; what does 'sufficient protection' mean for example?

Delivered only three years after the recast 2013 Directive on procedures and right in the middle of the 'migration crisis', the 2016 proposal for Regulation is explicitly aimed at homogenizing procedures within the EU and avoiding *asylum shopping* and *secondary movements* (European Commission 2016c, 3-4). The basic idea supporting the entire Document is that the application process has to be as quick as possible: quick in rejecting unfounded applications and quick in returning non-eligible migrants. The main reasons, attaining to the credibility of the asylum system as evidenced before, are underlined by the need to face irregular immigration, dangerous movements and smuggling

phenomena (European Commission 2016c, 2). In turn, a quick procedure would be beneficial to those really in need of protection. Thus, the idea that efficient procedures for international protection have to envisage time constraints. This has led to the proposal of an '*accelerated examination procedure*' that would deal with cases of 'manifestly unfounded claims' such as 'when the applicant makes clearly inconsistent or false representations, misleads the authorities with false information' or when the application 'is clearly abusive', aimed at delaying or frustrating the enforcement of a return decision, or when it is not submitted in the first country of irregular entry or where the applicant is legally present or, of interest, 'when an applicant comes from a *safe country of origin*' (European Commission 2016c, 15). Given the 'urgency' attached to the whole process, doubts arise on the possible implications this may have for the effective and careful evaluation of single cases – an issue that becomes particularly visible in the analysis of these concepts in terms of justice claims, and especially through the concept of justice as mutual recognition (see chapter 3).

Following this same logic, duties on applicants are strengthened – such as those regarding mandatory fingerprints; presence and stay in the Member State of application, a duty that if contravened may have implications on the asylum request; respect for time constraints in the application phases – and sanctions for related 'abusive' behaviours are reinforced (European Commission 2016c, 4-5).

Qualification

A closer look to the content of the asylum domain of international protection and the nature of protection granted in the European Union (synthesized with the word 'Qualification') is even more telling. As in the case of all developments in the asylum system, the legislative path has followed the instruction provided by the Tampere Council (1999), envisaging a short-term timeline for the approximation of qualification standards and a long-term timeline for their harmonization. The analysis of the words and the concepts used reveals the existence of at least two distinct trends: on the one hand, we identify an attempt to improve the concept of protection provided in the EU after the poor results achieved with first streamlining attempts. This phase lasted until 2014. On the other hand, it suggests an apparent restrictive interpretation of the content of protection and the nature of protection granted, especially in the 2016 new proposal for Regulation on Qualification.

The protection system for persons in search for asylum in the European Union is based on two main conceptual grounds: 'persecution' and 'serious harm'. These terms have different legal bases, give birth to different statuses and entail different protection guarantees. The scope of protection has to a great extent been the object of revision.

The 2004 Directive on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons that otherwise need international protection and on the content of protection granted (European Council 2004a) made clear that the 1951 Geneva Convention and its 1967 Protocol was the legal provision supporting the protection system in the EU. It also stated that non-refoulement was its core principle (European Council 2004a). Respect for human dignity and the right to asylum were underscored as guiding values of EU's action, according to the Charter of Fundamental Rights of the European Union (Art. 1 and Art. 18 respectively).⁴ It also underlined that the refugee status was by no means the only form of protection granted by the EU but that subsidiary protection was complementary. At that time, a Directive on 'qualification' meant the approximation of the rules for the identification and the recognition and provision of a minimum level of benefits to persons in need of international protection. Providing common guidelines would limit 'secondary movements' by providing similar legal systems in Member States (Council 2004a). Yet, when looking at the legal systems in Member States, the vagueness of some concepts and the optional nature of some provisions in the Directive had not lead to similar identification, recognition and procedures. Moreover, incomplete or incorrect transposition was contributing to uneven standards in the Member States, towards, most of the time, lower protection levels than those expected by the European Commission (2013, 16). Hence, the 2004 Directive neither affected the direction of flows nor posed a limit to the problem of *secondary movements* (European Commission 2013, 16). More similar standards on protection would imply that there was no point for asylum seekers to choose either a specific country or to move within the Union to increase the chances for better protection.

⁴ At that time, the Charter did not have the same legal basis as it would assume after the Lisbon Treaty of 2009.

With this in mind, the recast 2011 Directive on qualifications aimed at better reducing discrepancies in Member States and improving standards of protection (European Parliament and Council 2011). The Directive specified the core definition of the protection system better than was the case in the previous Directive. 'International protection' meant both the refugee status and the subsidiary protection status, extending the opportunity to get protection in the EU. A 'Refugee' was defined as:

A third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

(European Parliament and Council 2011, Art. 2)

Instead, a 'person eligible for subsidiary protection' was defined as:

A third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm (...) and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

(European Parliament and Council 2011, Art. 2)

Details were provided of the definitions of 'persecution' and 'serious harm', which, respectively, substantiated the ground for the refugee status and the subsidiary protection status. Importantly, in both cases, the nature of the actors perpetrating the act spanned over the national state by encompassing 'parties or organisations controlling the State or a substantial part of the territory of the State' and 'non-State actors' (European Parliament and Council 2011, Art. 6).

In both the cases of refugee and subsidiary status, protection was enlarged to the 'family members' of the persons in need. This included

the spouse or his/her unmarried partner in a stable relationship (according to Member States' legislation on the matter); the minor children on condition that they are unmarried and regardless of whether they are adopted as defined under national law; and the father, mother or another adult responsible for the beneficiary of international protection when that beneficiary is a minor and unmarried (European Parliament and Council 2011, Art. 2). 'Minors' (under 18 years) and 'unaccompanied minors' (a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him/her) were devoted exceptional guarantees (European Parliament and Council 2011, Art. 2), recognizing their peculiar vulnerabilities. This is another aspect particularly relevant in terms of the tensions between different conceptions of justice, such as 'impartiality' and 'mutual recognition' (see chapter 3).

Being a refugee or entitled of subsidiary protection meant having specific rights. First and foremost, the right to *non-refoulement*, but also the right to information, to maintain family unity, to have residence permits, travel documents, access to employment, education, social welfare, and healthcare (European Parliament and Council 2011, Artt. 21-30). In most of the cases, persons entitled to international protection were granted the same rights as Member States' nationals (access to employment, education, recognition of qualifications, social welfare and healthcare). Differences in rights remained between refugees and persons entitled of subsidiary protection when it came to resident permits (3 years and 1 years at least renewable respectively) and social assistance, given that subsidiary protection was considered a more 'temporary' form of protection. Importantly, the 2011 Directive allowed persons entitled to international protection the possibility to obtain the long-term resident status in the EU to entice their social and economic integration (see below).

The refugee crisis and the need to make up for the loopholes of the European asylum system, speeded up regulation work. In 2016 a Commission proposal for a Regulation aimed at further harmonizing the common criteria for recognizing applicant of international protection. This was going to be accomplished by creating more detailed rules (directly applicable) and by removing most of 'optional' ones. Many aspects of interest in terms of definitions and concepts can be underlined.

First, common qualifications were part and parcel of the mechanism to avoid *asylum shopping* ('asylum should be granted according to Dublin

parameters') and *secondary movements* ('the state of residence is the state who grants protection') and hence avoid uneven protection distribution among Member States (European Commission 2016d, 2). Contributing to common protection could also mean the adoption of a common list of *safe countries of origin* (European Commission 2016d, 9).

Second, it was made clear that being entitled to international protection was both a duty and a right. Most importantly, the duty of the applicant to substantiate the application for international protection and the duty to remain in the Member States that granted that protection now seems to extend to refugees as much as to asylum seekers (European Commission 2016d, 6, 13-15).

Third, the concept of protection in the EU was somewhat 'limited'. The obligation to verify 'internal protection' options was phrased as 'the conditions that he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle in another part of the country of origin (...) to determine that the applicant is not in need of international protection' (European Commission 2016d, 13). Most importantly, in this understanding of protection as a 'limited' and 'limiting' concept was the clear affirmation of the 'non-permanent' nature of the protection status, for as long as it was needed.⁵ The Commission stated:

The absence of checks on the continued need for protection gives the protection a de facto permanent nature, thereby creating an additional incentive for those in need of international protection to come to the EU rather than to seek refuge in other places, including in countries closer to their countries-of-origin.
(European Commission 2016d, 4)

Indeed, this marks a deep watershed to previous understanding of asylum in the European Union, with possibly great implications for specific rights – and thus justice claims – as applied to this institution.

⁵ In the past the Court of Justice had been called to provide judgment on specific cases regarding the revocation of the refugee status and contributed to specify (in a 'positive' sense for the refugee) a provision whose interpretation was not unidirectional, see *Salahadin Abdulla and Others* (Court of Justice of the European Union 2008).

Table 2.1: Duration of residence permits for beneficiaries of international protection (AIDA 2016, 16)

Country	Legal basis	Duration of residence permit (in years)	
		Refugee status	Subsidiary protection
EU Minimum	Art. 24 Qualification Directive	●●●	●
Austria	Art. 8(4) Asylum Act	●●●	●
Belgium	Art. 49 Aliens Act	●●●●●	●
Bulgaria	Art. 6 Trans. Prov LAR	●●●●●	●●●
Cyprus	Arts. 18A(3 & 19(4) Refugee law	●●●	●
Czech Rep.	Sects. 50 & 53a Asylum Act	Permanent	●
Germany	Sect. 26 Residence Act	●●●	●
Denmark	Aliens Act as reformed	●●	●
Estonia	Art. 38 AGIPA	●●●	●
Spain	Art. 36(1)(c) Asylum Law	●●●●●	●●●●●
Finland	Sect. 57(7) Aliens Act	●●●●	●●●●
France	Arts. L313-13 & L314-11(8)-(10) Ceseda	●●●●●●●●●●	●●
Greece	Art. 21 Law 4375/2016	●●●	●●●
Croatia	Art. 75 LITP	●●●●●	●●●
Hungary	Sect. 23 Gov. Decree 251/2007	●●●●●●●●●●	●●●
Ireland		Permanent	●●●
Italy	Art. 23 LD 251/2007	●●●●●	●●●●●
Lithuania	Art. 89 Law on Status of Foreigners	Permanent	●
Latvia	Sect. 36 Asylum Act	Permanent	●
Luxembourg	Art. 57 LITP	●●●	●●●
Malta	Art. 20 Refugee Regulations	●●●	●●●
Netherlands	Art. 28 Aliens Act	●●●●●	●●●●●
Poland	Art. 89i Law on Protection	●●●	●●
Portugal	Art. 67 Law 26/2014	●●●●●	●●●
Romania	Art. 20(5) Asylum Act	●●●	●
Sweden ⁶	Aliens Act to be reformed	●●●	●
Slovenia	Sect. 91 International Protection Act	Permanent	●
Slovakia	Sect. 24 Asylum Act	Permanent	●
UK	Rule 339Q Immigration Rules	●●●●●	●●●●●
Norway	Sect. 60 Immigration Act	●●●	●●●
Switzerland ⁷	Arts. 58ff & 83ff Asylum Act	●	●
Serbia	Arts. 43 & 61 Asylum Act	Permanent	●
Turkey ⁸	Art. 83 LFIP	●	●

⁶ Permits issued to beneficiaries of subsidiary protection will be valid for 13 months under the proposed reform.

⁷ Switzerland has a 'temporary admission' regime, not subsidiary protection. The 'F-Permit' issues in cases of temporary admission does not amount to a residence permit, but rather as a confirmation that deportation is suspended.

⁸ Beneficiaries do not receive a residence permit, but rather an identification document. This refers to 'conditional refugees' i.e. persons originating from non-European countries. Refugees recognised under the Refugee Convention in Turkey are entitled to a 3-year identification document.

The Dublin System

The 'Dublin System' is the cornerstone of the CEAS. Its ancestor, the Dublin Convention, was already in place in 1990, well before any attempt to provide guidelines on a common asylum. Since 2003, it has had a bigger impact on Member States than any other provision on asylum. Its ultimate objective has not changed since: the determination of the state responsible for the examination of an application for international protection. The trajectories travelled to pursue this objective, instead, have changed since. 'Dublin' is certainly the most frequently used reference in EU's speeches, especially in last years, when its proper functioning was said to be crucial for the management of the 'refugee crisis' even though its weaknesses have become more apparent. The Dublin System is both regulative with respect to applicants for international protection in the EU, and relations among Member States. *Responsibility* and *solidarity* are the key terms in the Dublin system, and the aim of the Regulations produced through time was exactly to strike a balance between these two key concepts (Council 2003a). As such the normal functioning of the Dublin System has been affected by the 'internal crisis' of the European Union, which has revealed the deepest ontological fragilities of the common approach to asylum.

For the purpose of this work referring to Dublin as a regulation would be reductive.⁹ As a matter of fact, Dublin is a system: an ensemble of concepts which in themselves are highly relevant for the idea of a common European system (*responsibility, solidarity*); of devices considered key to the functioning of the system (EURODAC, Visa Information System (VIS), EASO and in the future the New European Agency for Asylum); and of terms that inform its logic (*secondary movements* and *family reunification* among others).

The Dublin System was little more than a bare sum of technicalities in 2003; a much more detailed framework for the definition of the 'responsible' state attentive to the basic and fundamental rights of the applicant in 2013; and finally, with the new proposal for Regulation, a central pillar of the Common European Asylum System, aimed at quickly providing protection and at curbing *secondary movements*

⁹ In the proposal for Regulation COM (2016) 272 final (p. 2), the Dublin System is defined as the joint work of the Dublin and the EURODAC Regulation, but for the purpose of this work this understanding is reductive.

within the European Union. We will now take a closer look at these phases.

The Charter of Fundamental Rights of the European Union and in particular its Article 18, the 'right to asylum', is the cornerstone supporting the principles and values enshrined in the Dublin Regulation (Council 2003a). In general terms, when reference is made to the Dublin system, it is article 10 of the Regulation that is quoted:

Where it is established, on the basis of proof or circumstantial evidence (...) that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third-country, the Member State thus entered shall be responsible for examining the application for asylum.

(Council 2003a, art 10)

For the finalities of the Regulation, any information that could prove the asylum seeker's transit through one of the frontier states of the EU, such as a residence document, or a registration in any of the database storing information on third-country citizens entering the EU space was key (EURODAC or the VIS).

Fact sheet 2.3: EURODAC

The system called EURODAC is one of the best examples of how concepts and terms can assume different meanings throughout time. Since it was created in 2000 by Regulation, it has then been significantly revised both in 2013 and in 2016. It now assumes a much broader meaning and absolves greater tasks than it was intended for. As a system aimed at collecting and sharing data among Member States, it fully adhered to the objective of developing a common approach to asylum.

EURODAC has been conceived as a system for the comparison of fingerprint data, 'consisting of a Central Unit, to be established within the Commission and which will operate a computerised central database of fingerprint data, as well as of the electronic means of transmission between the Member States and the central database' (Council 2000, Art. 2). It was created to help implement the Dublin Convention for the identification of the state responsible to examine an application for international protection. In order to meet that objective, a system had to be created both for the identification of applicants for asylum, and for discovering whether an application had already been submitted in another Member State (Council 2000). Germane here is the definition of 'hit', defined as 'the existence of a

match or matches established by the Central System by comparison between fingerprint data recorded in the computerised central database and those transmitted by a Member State with regard to a person' (Council 2000, Art. 2). The 2000 Regulation postulated a key obligation for the 'common European asylum': to take the fingerprints of all asylum applicants and of all aliens apprehended while irregularly crossing an external border of a Member State. Yet, at that time, two limitations were set: First, fingerprints of irregular crossing alien were taken only for the purpose of identifying the country responsible for the examination of an asylum application and were stored for a limited amount of time. Second, the fingerprints of minors under 14 were not taken (Council 2000, Art. 8).

Thirteen years later, after terrorist attacks, increasing inflows towards the European Union, increasing urgency to create a common and working asylum, and a Dublin Regulation modified accordingly, EURODAC assumed a broader meaning. The two main shapers of the new understanding of the system were the linkage established with law enforcement tools and the introduction of subsidiary protection to the understanding of international protection (European Parliament and Council 2013b). Particularly when it comes to law enforcement tools ('prevention, detection, investigation of terrorist offences and other serious criminal offences'), EURODAC could be of extreme relevance for specific authorities of the Member States or for the European Police Office (EUROPOL). This is because of the data stored in EURODAC that could be made available (under certain conditions though) (European Parliament and Council 2013b). Hence, a clear change in the purpose of the system can be observed.

The 2016 proposal for revision of the EURODAC Regulation has significantly modified the understanding and the purpose of the system in many ways. Most notably, it has been transformed from mainly an asylum tool to a device for broader migration purposes, for example the return of irregular immigrants found illegal in the Member States (European Commission 2016e). As a matter of fact, it has been proposed that EURODAC take the fingerprints not only of those persons illegally crossing an external border of a Member State for the identification of the responsible state, but also of those not fingerprinted irregular migrants already in the Member States who are not applying for asylum. The main idea was that 'thousands of migrants remain invisible in Europe, including thousands of unaccompanied minors, a situation that facilitates unauthorised secondary and subsequent movements and illegal stay within the EU' (European Commission 2016e, 2).

Hence, attention shifted from irregular immigration to the EU to irregular immigration in the EU (European Commission 2016e, 2). In addition to the original objective of EURODAC (linked to the realm of asylum), there was also a proposal to identify illegally staying third-country nationals to 'assist a Member State to re-document a third-country national for return purposes' by using improved biometrics for identification, such as facial recognition and digital photos (to be eventually be taken and transmitted also by the European Border and Coast Guard) (European Commission 2016e, 2-3). Accordingly, two main underpinnings of the EURODAC system changed: first, the idea that minors were not fingerprinted; second, that irregular immigrants' fingerprints could only be stored for a limited amount of time. As for minors' fingerprinting (proposed now at 6 years), the argument was that this could help both addressing smuggling phenomena, and identifying possible connections to family members (European Commission 2016e, 4). As for irregular immigrants apprehended at the external border or found in an illegal situation within the Member States, the broadened scope of the EURODAC Regulation to fight illegal immigration required the storing of data for a quite extended period (5 years), as for other databases in the Justice and Home Affairs domain (European Commission 2016e, 4).

Finally, the modified understanding of the system required that data were shared with third countries for the purpose of return, previously forbidden according to data protection criteria (European Commission 2016e, 4). Additionally, it allowed to share all data stored for law enforcement purposes (European Commission 2016e, 5).

As plainly stated in the proposal for the Regulation, EURODAC must be understood as strongly related to several key terms and concepts: the CEAS, the EU return policy, internal security and the European Border and Coast Guard (European Commission 2016e, 5-6). Hotspot will also be added as a term, in that 'urgency' has been attached to identify, register and fingerprinting all the persons arriving through them, both for relocation and return purposes (European Commission 2016e, 9). Indeed, the big modification EURODAC has gone through open many normative dilemmas that need careful investigation and assessment. However, the definition of responsibility in the Dublin system is essentially based on two other key elements: *minors* (and in particular *unaccompanied minors*) and *family unit*. The principles have almost always been that minors could not be separated from their parents or guardian; that unaccompanied minors have to join their family legally present in one of the Member States, provided that is in the

main interest of the minor (Council 2003a, Art. 6); and that this represents the views of the minor according to age and maturity (European Commission 2016a, Art. 8). From this point of view, vulnerable categories seem to be particularly protected with respect to others. Notably, Member States hosting family members already granted international protection or waiting for a decision on their asylum application should also take responsibility for asylum applicants (European Commission 2016a, Art. 12). Additionally, it is important to underline that the last Proposal for Regulation issued by the European Commission in 2016, has extended the understanding of *family members* to encompass the *sibling* or *siblings* of the applicant (European Commission 2016a, Art. 2).

As seen before, most of the Dublin system is about regulative aspects among Member States and their duties and responsibilities. It is especially here that most of the changes have been made through the different Regulations, and also where most of the controversies have arisen among Member States. The 2003 Dublin Regulation understanding of international protection did not encompass *subsidiary protection*, and this was somehow conflicting with other Directives (such as the Qualification Directive). This could represent a limitation to the right of *family unity* for certain categories of applicants (European Commission 2007b, 6). Moreover, the application of the Dublin Regulation raised the issue of internal solidarity. A reflection over the concept of solidarity was promoted in a complex situation: *asylum and mixed migratory flows* towards the European Union were putting extraordinary pressures on some countries; and in turn, it was exactly these countries that were particularly called to be *responsible* and observe EU's regulations, at the risk of endangering the EU asylum system (European Council 2012, 1). Responsibility and solidarity as the two faces of the same coin could be profitably handled through the help of FRONTEX and EASO, assisting Member States particularly affected by inflows. Furthermore, it was specified that solidarity could be assisted by *relocation*, defined as the voluntary acceptance of beneficiaries of international protection as attempted through Pilot Project for intra-EU Relocation from Malta (EUREMA) (European Council 2012, 5).

Fact sheet 2.4: Relocation

As seen above, relocation as a concept is not new to the European Union. Overall, it should be referred to the binary objective of solidarity and fair sharing of responsibilities mentioned in other parts of

this work. Hence, as in the case of other concepts, it is not only intended as a mechanism, but as a meaningful term that specifically plays out in relations among the Member States. In recent years, it has been employed in relation to the 'migration crisis' and it has been intended accordingly, as an exceptional, provisional measure to address an emergency situation (the one witnessed in the Mediterranean throughout 2015 and 2016). Nevertheless, a more elaborated concept of Crisis Relocation Mechanisms is being developed, which suggests a less 'extemporaneous' measure and instead provides the idea of a device to solve future structural crises affecting the EU.

As in the case of other concepts, relocation is better understood and assumes a more coherent story when its pattern of reference is made clear: EASO, solidarity, fair responsibility sharing, roadmap, hotspot, secondary movements, fingerprints, EURODAC and Dublin are the words which reiterate the most in the documents on the subject matter.

In its bare definition, relocation is defined as 'the transfer of an applicant from the territory of the Member State (...) responsible for examining his or her application for international protection to the territory of the Member State of relocation' and a member state of relocation as 'the Member State which becomes responsible for examining the application for international protection (...) of an applicant following his or her relocation in the territory of that Member State' (Council 2015b, Art. 2(e)). Nevertheless, and as argued above, in the last years, relocation has been particularly related to the concept of 'crisis', which is likely to affect the EU in many ways. Hence, it was intended as a device to address the considerable pressure to the migration and asylum systems of Italy and Greece (and Hungary) due to unprecedented flows of migrants. The geographical delimitation of the concept is worth noting. Relocation can be applicable in these countries and concerns persons having lodged their applications for international protection in these states (Council 2015b, Art. 3). Additionally, it is specified that the unprecedented arrivals of migrants include applicants for international protection who are 'in clear need of international protection' (Council 2015b), namely those extremely likely to be recognized as refugees in the EU: Syrians, Eritreans and Iraqis.

The idea of relocation as a tool to solidarity should be complemented by the idea that relocation is based on effective responsibilities falling on the states subject to relocation provisions. In other words, effective relocation presupposes that Italy and Greece bring forward structural adjustments to their asylum and migration systems, which should be listed in a roadmap. Migration and asylum systems are

intended in their capacity of 'asylum assessment', 'first reception' but also 'return' (Council 2015b). The relationship between relocation and the hotspot approach (see below) and between relocation and agencies such as EASO (see below) but also FRONTEX and EURODAC (see above) is apparent given that applicants for relocation have to be fingerprinted first (Council 2015b, Art. 5(5)).

A further idea subsumed in relocation is that 'an applicant does not have the right under EU law to choose the Member State responsible for his or her application' (Council 2015b, 5). Therefore, deciding the state of relocation is not a right of the persons that are relocated.¹⁰ Accordingly, avoiding secondary movements is important to the concept of relocation and to properly inform applicants of the possible constraints on their protection rights is reflected in the precept (in principle confined to the Member States providing them international protection) (Council 2015b).

Indeed, the idea of relocation is somewhat linked to the idea of a distribution key among Member States. Distribution formula have been particularly central to a specific reflection on relocation that has given a more structural dimension to the concept with the development of the idea of a Crisis Relocation Mechanism. This idea entails that 'a number of applications for international protection shall be examined by the Member State of relocation' in derogation from the principle set in the Dublin Regulation (European Commission 2015d, Art. 33(2)). The idea (proposed by the Commission in 2015) is that of an overall system and not only of a method; its underpinnings remains solidarity and fair responsibility sharing. This time, though, the relocation concept is especially related to the Dublin System given that the mechanism is triggered when the normal functioning of Dublin is put in question. The EU made a proposal for 'a permanent system of relocation to be triggered in crisis situation' and impinging on the determination of the responsible state for the examination of an application for international protection (European Commission 2015d, 2). The geographical specificities of the above concept is therefore lost. 'Selection' criteria are instead still based on nationality; explicit responsibility for states experiencing pressures remain and prevention of secondary movements is still one of the linchpins of the system (European Commission 2015d, 10). The crisis situation is defined as 'of such a magnitude as to place extreme pressure even on a well prepared and functioning asylum system, while also

¹⁰ While Member states may express a preference for applicants to be relocated on the basis of language, cultural and social ties or demonstrated family likely to positively contribute to integration.

taking into account the size of the Member State concerned' (European Commission 2015d, 7).

Fact sheet 2.5: Temporary protection

The definition of exceptional schemes to offer immediate protection to persons displaced and without the possibility to return to their country of origin was in place in 2001, through the so-called 'Temporary Protection Directive', created because of the massive inflows of persons in the aftermath of the Yugoslavia breakdown. Temporary protection was defined as:

A procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

(Council 2001, Art. 2(a))

Temporary protection would be offered to entitled migrants. The idea behind this Directive was to prevent secondary movements and to promote a balance of efforts between Member States 'in receiving and bearing the consequences of receiving displaced persons' (Council 2001). Yet, the Directive has never been employed.

Fact sheet 2.6: Hotspots

While not new in the EU jargon, the concept of 'hotspot' (as relocation) has been increasingly associated with the 'migration crisis'. It is not easy to provide a definition of what the hotspot is, as it has invariably been referred to physical 'areas' (European Commission 2015e) but also to a broader 'approach'.

The 'hotspot' approach is intended as the joint support of EU's agencies to frontline Member States experiencing disproportionate migratory pressures at the external borders. Two elements are implied: first, the hotspot can be conceived as a 'border control' device; second, by envisaging the joint work of many agencies, the approach absolves different functions. More precisely, FRONTEX deals with the screening, document check, fingerprinting and registration of persons in the hotspot; EASO helps with asylum applications and relocation and EUROPOL

assists frontline states on forged documents and, together with EUROJUST, smuggling and trafficking phenomena (European Commission 2015e, 5).

All these elements are of relevance to understand what the 'hotspot approach' is. Furthermore, this approach is strongly related to EURODAC and to its finalities as reframed in the 2016 Regulation seen above: registration of people for the twofold objective of channelling them into the international protection path (also through the relocation programme) or speeding up their return if not in need of protection.

The first seeds of the challenges to Dublin were already observed but became self-evident when a sentence of the Court of Justice of 2011 declared Greece as a *non-safe country*, de facto prohibiting the application of the Dublin Regulation. This and other events were brought to attention by many organizations, paved the way for a revision of the Dublin Regulation in 2013. The revision aimed particularly at extending the rights of applicants in every step of the responsibility determination process¹¹ (European Parliament and Council 2013b, Artt. 4-6). The idea of a 'fitness check' to assess the effects of the Dublin Regulation on fundamental rights (European parliament and Council 2013b) and the deficiencies testified by the Court of Justice in Greece (only implicitly mentioned), were aimed to protect the rights of applicants set out in the Union asylum *acquis* and the Charter of Fundamental Rights of the European Union, other international human rights, and refugee rights (European Parliament and Council 2013b). In the 2013 Dublin Regulation (recast), *subsidiary protection* entered the concept of international protection, and the European Union Asylum Support Office (EASO) entered into force to assist Member States in implementing the Dublin Regulation and to provide solidarity measures to particularly affected states (European Parliament and Council 2013b).

Fact sheet 2.7: The European Asylum Support Office (EASO) and the European Union Asylum Agency

The European Asylum Support Office (EASO) was established in 2010 after the new impetus on migration and asylum policy triggered

¹¹ Right to a personal interview, to get appropriate information, the possibility of effective remedy on a decision of transfer to a given Member States and to get a human transfer, to limit and provide appropriate conditions in detention, and especially of vulnerable categories such as minors and unaccompanied minors and giving priority to family unity

by the Lisbon Treaty (2009), the new Pact on Migration (2008) and similar documents. It was first intended as a 'support' Office, but has been gradually upgraded as one of the key tools at the EU's disposal, especially after the 'migration crisis'. Hence, the idea of an asylum Office has gradually changed into the idea of an effective Agency, more powerful and proactive in its tasks. It can be argued that this shifting 'nature' resonates the progressive modification of EURODAC but also that of FRONTEX, quickly modified into the European Border and Coast Guard.

If EASO is a 'practical' device, we should not miss the contribution this term brings to the CEAS. Indeed, it suggests that Member States should be assisted in their asylum practices, especially when facing severe pressure. The concepts and terms EASO is discussed in relation with help providing a coherent story about its relevance in the European asylum system. These concepts/terms are: external dimension, (safe) countries of origin, FRONTEX, reception, relocation, solidarity, resettlement, and capacity building. This list makes clear that if the primary task of the Office is assistance to Member States, a key external dimension is part of the definition, a dimension that was further extended with the proposal for an Agency drafted by the Commission in 2016.

EASO is primarily a Support Office enjoying independence in technical matters and legal, administrative and financial autonomy (European Parliament and Council 2010). Additionally, the Office is working in cooperation with EU agencies (FRONTEX and the FRA in particular) and other agencies (especially the UNHCR), drawing on their expertise (European Parliament and Council 2010). As reported in the Regulation that established it, EASO should be intended as 'a European centre of expertise on asylum', where its main tasks are 'contributing to the implementation of the CEAS, supporting practical cooperation among Member States on asylum and supporting Member States that are subject to particular pressure' (European Parliament and Council 2010). It was clearly specified that, considering the aim to improve the implementation of the CEAS, the Office had to be involved in the CEAS's external dimension (European Parliament and Council 2010, Art. 2(1)). With particular reference to this latter dimension, EASO was intended to help in the provision of information on countries of origin and on resettlement programmes (European Parliament and Council 2010, Art. 4). Additionally, given its 'support' nature and its technical skills, it could provide assistance to third countries on capacity building and reception systems, while also contributing to the implementation of Regional Protection Programmes and other actions related to 'durable solutions' (European Parliament and Council 2010, Art. 7). As for

Member States subject to severe pressure, EASO was intended to help with relocation efforts.

Since it was created, EASO came to embody new meanings corresponding to new tasks, especially triggered by the 'migration crisis'. Its 'implementation-check' function became even more needed as a complement to the CEAS, hence the proposal to enhance EASO and transform it into something partly new (European Commission 2016f, 2). Instead of a support office, it became more of an Agency, a centre of expertise in its own rights, not relying on information provided by Member States and able to provide operational and technical assistance to Member States (European Commission 2016f, 2). Inevitably, this required a new mandate, new resources in terms of staff and a new budget. The role of the Agency in promoting uniform application of asylum law and in promoting convergence in the assessment of applications for international protection among Member States has been particularly underlined (European Commission 2016f, Art. 1). Hence, EASO is no longer conceived as a pure assistance tool but as an active agent of harmonization of Member States' actions on asylum. The Agency has to assume also a central role in the assessment of safe countries of origin, safe third countries or first countries of asylum (European Commission 2016f, Art. 11).

As in the case of other proposals for Regulation put forward in 2016, the European Union has specified how the *new Dublin system* should look like. The new system aims to determine the state responsible for the examination of an asylum application while envisaging a) more efficient ways to show solidarity among Member States; b) clear provisions on applicants' obligations and the consequences of non-compliance so as to avoid possible abuses of the system; and c) quick procedures for the identification of the responsible state. As for point a), the proposal for an automatic *collective activation mechanism* was put forward, intended as the following:

[A] corrective mechanism in order to ensure a fair sharing of responsibility between Member States and a swift access of applicants to procedures for granting international protection, in situations when a Member State is confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under the Regulation'. Its aim was that to 'mitigate any significant disproportionality in the share of asylum applications between Member States resulting from the application of the responsibility criteria.

(European Commission 2016a, 18)

In this sense, the necessity for the creation of a new EU Agency for Asylum was underlined (European Commission 2016a, 17) (see fact sheet 2.7).

With respect to point b), the aim was to avoid applicants' *secondary movements*, underlining the obligation to apply in the first country of entrance and remain in the Member States assigned as responsible (European Commission 2016a, 4). As stated in the proposal, 'With this amendment it is clarified that an applicant neither has the right to choose the Member State of application nor the Member State responsible for examining the Application' (European Commission 2016a, 15). The purpose of the proposal put forward by this Regulation to expand the understanding of the *family members* to encompass *siblings* was exactly to avoid further secondary movements. As for point c), speeding up the determination process was in line with the new understanding of the CEAS. One of the most important proposals in this sense was the elimination of the 'cessation of responsibility clause', previously set at 12 months. Another one was the obligation for the Member State of application to first check the 'inadmissibility' of the asylum claim with respect to the *safe country of origin*, *first country of asylum* or the *safe third-country* concepts (European Commission 2016a, 15). Finally, other duties explicitly set time limits for different phases of the determination process both for Member States and for applicants. For example, a quick determination process encompassed applicants' obligation to provide the relevant elements and information regarding the determination process, respecting the time schedule set by the proposal, to the risk of no consideration of information unjustifiably provided afterwards (European Commission 2016a, 15).

Reception

The last building block of the CEAS are the reception conditions of asylum seekers into the territory of the European Union. As in the case of the other policies substantiating the CEAS, the ones on reception have been subject to modifications, and a proposal was issued in 2016 to revise the reception system. Overall, tensions have always accompanied the understanding of reception conditions in the European Union. On the one hand, there is a definition of minimum standard to respect *human dignity* (even though no clear definition is provided as for what this term stands for). On the other hand, there is a necessity of progressive harmonization to prevent *secondary movements*, determined by the different reception conditions in Member States (Council 2003b).

The Charter of Fundamental Rights of the European Union and the protection of *human dignity* ('dignified standard of living') were said to be at the basis of the 2003 Directive on reception, laying down minimum standards for the reception of asylum seekers (Council 2003b). The Directive specified two similar yet partly different definitions. First, *reception conditions* were intended as 'the full set of measures that Member States grant to asylum seekers/applicants'. Second, *material reception conditions* were the reception conditions that include housing, food (also non-food items with the 2016 Directive, a positive improvement this latter) and clothing, provided 'in kind', or as financial allowances or in vouchers, and a daily expenses allowance (Council 2003b). The difference is important in that material reception conditions, which specify the nature of reception conditions, also specify the restrictions applied to their provision. By specifically providing dispositions for the reception of 'applicant with special reception needs', the document scores positively on the protection of vulnerable categories of persons (European Parliament and Council 2013c).

The recast reception Directive laying down standard (and not 'minimum' standards) for the reception of applicants of international protection (European Parliament and Council 2013c) has brought about important changes to the understanding of reception conditions. First, the consideration that these applications were extended to applicants for *subsidiary protection*, thus expanding the category of persons affected by the Directive. Second, the idea that family unity and child rights were to be especially protected. Third, that *detention* had to be particularly detailed, especially as an answer to the many contestations regarding the effective implementation of the practice. Fourth, that reception conditions had to better ensure human dignity and hence had to be improved (European Parliament and Council 2013c).

The rights embodied in reception conditions encompass being timely informed about rights and duties and appeal possibilities. This meant timely release of a certificate proving the status of 'applicant' after lodging an application or certifying the right to stay in the territory throughout the examination of the asylum application; right to freely move in the territory of the host state or within the area assigned; to be kept with the own family (when possible); to have the same access to education as nationals; to have access to the labour market (after a certain period) and with the only limit of specific preferences for nationals

or Union citizens; and to get access to the healthcare or at least to emergency care and essential treatment of illness or mental disorders (Council 2003b, Artt. 5-15). When provided, housing is intended as:

Premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones; accommodation centres which guarantee an adequate standard of living; private houses, flats, hotels or other premises adapted for housing applicants.

(European Parliament and Council 2013c, Art. 18)

In these structures, the right of family unity should be supported, together with the right to communicate with and grant access to family members, the UNHCR, legal advisors and other organizations. On the other hand, applicants' residence always has to be communicated to the authorities of the host state and applicants' permanence in the assigned places may be condition for the effective provision of material reception conditions (Council 2009b, Art. 7(6)), hence reducing freedom of movement.

As argued, one of the most controversial terms provided in the Directive is *detention*, all the more relevant in the case of applicants for international protection. Detention is intended as the 'confinement of an asylum seeker/applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement' (Council 2009b, Art. 2(k)). The deprivation of the freedom of movement should differentiate between ordinary detention and reception in accommodation centres, intended as any place used for collective housing of asylum seekers/applicants (Council 2009b, Art. 2(l)). The recast Directive of 2013 provided the idea of *detention* as a last resort measure, and if no other less coercive measures could be applied (European Parliament and Council 2013c, Art. 8), with a specific emphasis on minors and unaccompanied minors. Its scope was limited to verify or determine an applicants' identity or nationality; to determine those elements on which the application for international protection was based, which could not be obtained in the absence of detention (in particular when there is a risk of absconding of the applicant); to decide on the applicant's right to enter the territory; to prepare the return and/or carry out the removal process when detention precedes a return procedure (and the Member State thinks that the application for international protection is made merely in order to delay or frustrate

the enforcement of the return decision); to protect national security or public order; and to determine the responsible state according to the Dublin criteria (European Parliament and Council 2013c, Art. 8). Eventually, with the 2016 proposal for Directive, detention may also be implemented in case an applicant has been assigned a specific place of residence but has not complied with this obligation (European Commission 2016g, Art. 8 (3) (c)).

However, applicants detained should benefit from specific rights, starting from the right to be detained for as short as the procedure require; to be duly informed of the reasons of detention and of the opportunities shared in this condition (even though free legal assistance and representation may depend on the national law); the right to access open-air spaces; to communicate with the UNHCR, family members, legal advisors and other organizations; and to be kept with the family or keep a gender-based partition if contingent situations do not oblige otherwise (European Parliament and Council 2013c, Artt. 9-10). Detention is thought to be implemented in specific detention facilities. If a prison is used for detention purposes, applicants have to be kept separate from prisoners (this possibility never applies for unaccompanied minors which should be lodged with adult relatives and with siblings when possible, in accommodation centres with special provisions for minors or in other suitable accommodations (European Parliament and Council, Art. 11.)

The 2016 proposal for a revised Directive on reception brings about important changes to the concept of reception (European Commission 2016g). The main idea is that important differences still persist on both the organization and the standard provided in the Member States. In particular, discrepancies among too generous and too restrictive reception conditions leave space to *secondary movements*. Contrasting this trend is utmost important for the EU, especially given the high migration pressure of recent years (European Commission 2016g, 3). Nevertheless, given social and economic conditions in each Member State, a thorough harmonization is neither possible nor advisable (European Commission 2016g, 6).

With this in mind, the provision of *standards on reception conditions* at the EU level is an attempt to further harmonization, reducing the distance among Member States' measures. This will be achieved through *operational standards and indicators* on reception conditions developed by the EASO and the future *European Union Agency for Asylum*, and through the set-up of contingency plans in case of massive arrivals (European Commission 2016g, 3). Additionally, the idea that reception

conditions at the EU level have to contribute to the *orderly* management of flows is included. The conditions should also contribute to the easy identification of the country responsible for the examination of an application for international protection according to the Dublin Regulation, and to the provision of timely and effective assessment of applicants' claims according to the Procedure Regulation. Hence, the possibility to restrict the freedom of movement of the applicants, the assignment of specific places, as well as the provision of material reception only 'in kind', is contemplated (European Commission 2016g, 3, 4, 5). In line with other proposal issued in 2016, this Directive more explicitly underlines duties for applicants and more clearly specifies the consequences of not abiding by these obligations in terms of material reception provisions. The definition of *absconding* provided in the Directive is interesting from this point of view. It means 'both a deliberate action to avoid the applicable asylum procedures and the factual circumstance of not remaining available to the relevant authorities, including by leaving the territory where the applicant is required to be present' (European Commission 2016g, Art. 2(10)), which is open to many interpretative possibilities (among others, how to assess a deliberate action?). Finally, access to the labour market in the Member States is made swifter.¹² This represents indeed a positive provision, contributing to the idea of *social integration*. Yet, this measure together with the request for further harmonization was both intended to promote applicants' 'self-reliance' and to reducing *asylum shopping* for employment purposes and related *secondary movements* (European Commission 2016g, 4).

In summary, it can be said that the EU has undertaken important steps forward in extending the content and domain of protection. Yet, important limitations remain, which somehow hamper a full-enjoyment of rights within the European space as for EU citizens and that seems to mainly leave out other specific claims of protection that deviate from EU's criteria. The *trait-d'union* linking the developments undergone in all asylum phases is that to avoid 'secondary movement' within the Union, an objective whose priority is all internal to the EU, while putting on the back burner the migrants with his/her own need of protection. This objective has also informed the last proposal for revision of the asylum system, putting emphasis on 'urgency' and 'duties' of ap-

¹² Access is reduced from no later than nine months to no later than 6 months and in the cases of well-founded applications to three months.

plicants and persons already entitled of protection; in both cases a 'pejorative' protection stance can be already inferred and more speculations about that will follow in the third part of this work.

Irregular Immigration

Return

Since the EU got competences on migration, tackling irregular immigration has been a key aim. In the first documents on the matter the term 'illegal immigration' was used, even if it was explained that the term 'illegal' was used following EU legal terminology and was not intended to label the person as being illegal but rather her 'status' as not in compliance with the law on entry or residence (European Commission 2002, 7). Nevertheless, the use of the term has been subject to many criticisms, and has mostly been substituted by irregular immigration in EU's documents, although not always consistently in the last years. It was specified that addressing irregular immigration was indivisible from the creation of a common migration and asylum policy (European Commission 2001a, 5). It was mainly interpreted as a threat or a severe challenge given that the jargon used spoke about 'combating or fighting' illegal immigration (European Commission 2001a, 5, 7).

It was recognized that the phenomenon was variegated as for the 'individuals concerned and the patterns of their illegal entry and residence' (European Commission 2001a, 7). In fact, different 'illegalities' could characterize the term: an illegal border crossing, or the use of false or forged documents for 'illegal entry' which in turn could occur individually or by mean of smugglers or facilitators. 'Overstayers' was the term used to describe people who entered in a legal way, by means of a valid VISA or residence permit but stayed longer than what their permits allowed. Seemingly, illegal stay may characterize the situation whereby persons do not need a VISA for short-stay terms (3 months) but which embark on unauthorized employment activities or whereby persons violate residence regulations (European Commission 2001a, 7). According to the 2008 Directive on Return, 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State (European Parliament and Council 2008, Art. 3(2)). Hence, both illegal entry and illegal residence account for illegal/irregular immigration.

The *return* of irregular immigrants, illegally entered or staying in the Union, has from the very beginning constituted the key recipe to properly address irregular immigration. While return as a practice was already implemented at the Member States' level, a 'common' policy on return had to envisage common principles, standards and measures (European Commission 2001a, 24). Basic principles supporting return were, on the one hand, priority of voluntary return over forced return, and on the other hand, the obligations under international law to readmit own nationals.

As for other terms/concepts analysed in this work, *return* does not simply reflect a practice, but it entails specific understandings related to the regulation of migration, specific responsibilities, rights and obligations. It acquires meaning if also taking into account relations with third countries; and informs and moulds the work of agencies and instruments disposable at the EU level (see the case of hotspots and EURODAC above). As such, the pattern of terms/concepts somehow related to return and relevant for this work encompasses: *readmission, transit and origin countries, detention, Global Approach to Migration and Mobility (GAMM), reintegration, VIS, SIS, FRONTEX, EURODAC* (from 2015) and *hotspot*. These concepts help draw the contour of the EU idea of return, which does not necessarily overlap with that of its Member States or of other international actors. Above all, two terms have always characterized the jargon used on return: *integrity* and *credibility*. More precisely, the EU has always conceived the development of an effective *return policy* key both in the fight against illegal immigration and inescapable for the integrity and the credibility of the EU migration and asylum system (European Commission 2002, 4; European Commission 2003c, 9; European Parliament and Council 2007; European Commission 2015f, 2). Further, the possibility to force return was central to ensure the integrity of the common migration and asylum policy (575/2007/EC). It was maintained that an effective return policy allows more support by the public opinion in favour of legal immigrants' admission and of persons in real need of protection (European Commission 2002, 8). Through time, this basic understanding of return has not changed; it has 'crystallized' through the development of an effective Return Policy in 2008 and it has 'adjusted' with respect to the contingencies of different moments, either emphasizing respect for human rights or the necessity to be as effective and immediate as possible.

According to the 2008 Return Directive (on common standards and procedures in Member States for returning illegally staying third-country nationals), *return* means:

The process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to: his or her country of origin; or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements; or another third-country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

(European Parliament and Council 2008, Art. 3(3))

The best interest of the child and respect for family life, the state of health of the person to be returned and the principle of ‘non-refoulement’ were said to be primary concerns in the application of the Directive. A ‘third-country national’, instead, is defined as ‘any person who is not a citizen of the Union (...) and who is not a person enjoying the Community right of free movement (...)’ (European Parliament and Council 2008, Art. 3(1)). Two key elements in the definition comes to mind: first the possibility for return to be voluntary or forced. Only the effective implementation of the latter, could open the way to the former and could convey a clear message to both illegal immigrants within the EU and outside (European Commission 2002, 8). Additionally, forced return was intended as fundamental for the admission policy and for enforcing the rule of law (European Commission 2002, 8). Second, return referring to the readmission of ‘third-country nationals’. This element is key, as international obligations only exist for return of own citizens.

Readmission agreements are therefore especially relevant for transit countries. *Readmission* is intended as an act by a state accepting the re-entry of an individual (own nationals, third-country nationals or stateless persons), who has been found illegally entering to, being present in or residing in another state’ while a *Readmission agreement* is:

An agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not, or no longer fulfil the conditions of entry, presence or residence in the requesting state.

(European Commission 2002, 24-25)

Thus, the Readmission agreement facilitates the return of irregular migrants.

Given these definitions, a series of other terms and concepts revealed key for the understanding of common standards on return. In particular, an *entry ban* was intended as 'an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision' (European Parliament and Council 2008, Art. 3(6)). Additionally, the concept of *detention* assumed great relevance when applied to return, 'in order to prepare and/or to carry out the removal process' (European Parliament and Council 2008, Art. 15(1)). Intended as an 'Act of enforcement, deprivation of personal liberty for return enforcement purposes within a closed facility' (European Commission 2002, 25) the concept struggled with a 'human rights' perspective. Detention had to take place in a specialized detention facility; if occurring in prisons, migrants to be return had to be kept separate from other detainees. Rights and duties of detained migrants were to be reiterated along with rules regarding facilities' working modalities (European Parliament and Council 2008, Art. 16). Unaccompanied minors and family with minors should only be detained as last resort for the shortest period possible. Unaccompanied minors should benefit of appropriate accommodations; family should be given separate accommodation, while minors should be provided leisure activities, and depending on the duration of their stay, education (European Parliament and Council 2008, Art. 17). In this sense, separate treatment is provided to 'vulnerable' categories.

The concept of detention as adopted in the 2008 Directive on Return was especially vague with respect to: the duration of detention (no more than six months extendable under exceptional circumstances to no more than 18 months); 'reasonable intervals' at which detention should be reviewed (European Commission 2014a, 14); and the motivations of detention (such as the risk of 'absconding'). These loopholes

gave way to many pronouncements by the Court of Justice of the European Union (i.e. *Kadzoev*) (Court of Justice of the European Union 2009) in favour a 'protective' (for migrants) interpretation of detention (European Commission 2014a, 27). The *Arslan* ruling (Court of Justice of the European Union 2013a) effectively underlined the different concepts and safeguards of detention for return and detention under asylum (European Commission 2014a, 28), insisting on a certain 'categorization' of migrants with different rights. In general, there were several protests regarding Member States' discretionary interpretation of these concepts. These contestations also asked for more attention to the fundamental rights of migrants to be returned. Among others, FRONTEX was forced to embody fundamental rights and respect for dignity considerations within its working modalities on return (European Commission 2014a, 6).

Fact sheet 2.8: FRONTEX and its development into the European Border and Coast Guard

The European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union was established in 2004 (Council 2004b) and became operational in October 2005. The Agency was created as autonomous in terms of legal, administrative and financial capabilities (Council 2004b). It was intended to improve the 'integrated management' of the external borders of EU's Member States (Council 2004b, Art. 2). As such, it was thought to improve and facilitate coordination among Member States on the control and surveillance of the external border. At the basis of FRONTEX stood two main ideas. First, 'the responsibility for the control and the surveillance of external borders lies with the Member States' (Council 2004b, Art. 1(2)). Second, that the EU had a role in implementing the 'integrated management' of its external borders to ensure uniform and effective control and surveillance, given that this played as a pre-requisite for the free movement of persons in the EU and for the area of freedom, security and justice (Council 2004b).

There was indeed an element of solidarity in the idea behind FRONTEX, substantiated by the argument that control of the external border was a matter of utmost relevance to the Member States regardless of their geographical position (Council 2004b). Accordingly, FRONTEX was created both for times of 'normality' and of 'emergency', that is, situations of high migratory pressures. This is also observable in the hotspot approach, which FRONTEX contributes to. The concepts of 'border control', 'risk analysis and assessment', 'border guards' training' and 'technological research' were central in the understanding of FRONTEX. The concept of return is also key,

according to which the Agency is called to assist Member States by organizing joint return operations and identifying best practices on the acquisition of travel documents and the removal of irregular immigrants (while observing the non-refoulement principle). As such, FRONTEX also fit into the meaning of the EU's external dimension.

With the creation of an independent FRONTEX Fundamental Rights Officer in 2012, monitoring the Agency's operations and the adoption of a FRONTEX Code of Conduct for joint return operations, the Agency, fallen prey of many criticisms, underlined respect for dignity and human rights as own key pillars (European Commission 2014a, 6). In parallel, though, the Agency understood more as a return tool. Specifically on this dimension, a proposal was made for the Agency to act not only as 'facilitating cooperation between' or 'assisting' Member States but also with an autonomous role on the return of irregular immigrants (thus far a prerogative of Member States), a shift that would have significantly impacted its concept and definition (European Commission 2015f, 8). Along this line, the meaning of 'risk analysis' was to be extended to 'collect and analyse data on irregular secondary movements' of third-country nationals within the EU', to help enforce the return of irregularly staying migrants (European Commission 2015f, 8). Again, this was intended to far extend the meaning of FRONTEX as an Agency devoted to operations 'at the border'.

FRONTEX has been the launching pad of what is today the European Border and Coast Guard, replacing FRONTEX. The idea was not new. In the 2001 Commission Communication on a Common Policy on Illegal Immigration, the proposal for the creation of a European Border Guard was already made clear, as it was bluntly explained that border management encompassed a variegated set of tasks, illegal immigration being only one of many (traffic security, customs, security threats, dangerous or illegal goods control) (European Commission 2001a). Indeed, the 'refugee crisis' has given great impetus to the effective creation of the Agency and to its working modalities. For example, the hotspot system concept has been fully ingrained. Being also an instrument pursuing the aim to 'Securing borders', the definition of the neonate agency spans over that of FRONTEX. Interestingly, the European Parliament speaks of a European Border and Coast Guard 'system' (European Parliament 2016). While a formal definition is not provided, the main idea conveyed is that of an Agency with a 'shared responsibility' for the management of the external borders (strongly criticized by some Member States as an intrusion towards sovereign prerogatives), both in normal and emergency time, representing a 'deepening' with respect

to FRONTEX (European Parliament 2016), due to increased resources in terms of staff and funds. The Agency works with national authorities responsible for border management (including coast guards) and together they form the European Border and Coast Guard, performing 'integrated border management'. This complex and multifaceted concept is intended for the purpose of border control; search and rescue operations; analysis of the risk for internal security of affecting the functioning of the external border; cooperation between Member States; inter-agency cooperation at the national and EU level; cooperation with third countries (neighbouring countries, countries of origin and transit of illegal immigration); technical and operational measures within Schengen related to border control; return of third-country nationals; use of up-to-date technology and information systems; quality control mechanisms and solidarity (European Parliament 2016, Art. 4).

While not lingering on the details of the new Agency, which largely draws on FRONTEX, it is here relevant to emphasize the words that more than others provide an understanding of the logic informing it: mixed migratory flows, improved return, hotspots, search and rescue, fight against cross-border crime, Schengen, internal border controls, EASO, EUROPOL, EUROJUST and European Agency of Fundamental Rights (European Parliament 2016). The objectives of the Agency do not only rest with the management of irregular immigration, but also with internal security (from possible threats linked to smuggling, trafficking or terrorism) and the safeguard of freedom of movements within the Union (preservation of the Schengen system). Hence, the priority given to 'security' concerns may be likely to overshadow concerns more related to migrants' right in general and rights of specific categories of migrants in particular.

The concept of *reintegration* was also considered as part and parcel of the understanding of effective return. As a matter of fact, the act of returning migrants well encompassed the entire migration journey and had to ensure to be sustainable (durable) so as to not open up new opportunities for new emigration (European Commission 2003c, 9). Return assistance would increase the opportunities for voluntary returns, constituting a good solution both for migrants and for the EU, ensuring a cost-effective measure (European Parliament and Council 2007). Thus, relations with third countries were not only necessary for *readmission* but also for *reintegration*, key concepts for the understanding of return and to be included in the *Global Approach to Migration and Mobility* (GAMM), 'the overarching framework for external migration and asylum policy' (European Commission 2014a, 2).

As for other concepts discussed in this report, also 'return' has been re-interpreted through the lenses of the 'refugee crisis' of the last few years. It has not assumed other meanings, but its urgency has been underlined, and this has side-lined concerns over human rights. In particular, two main imperatives have reinterpreted the concept. First, return has to be incremented and second, it must be done quicker (see also the use of the 'hotspot' as presented before under this logic). Increasing the rate of return was given a geographical priority, emphasizing the urgency to conclude return and readmission agreements with African countries (European Commission 2015f, 10). Inevitably, the refugee crisis further emphasized the link between return and asylum putting a strong importance on returning rejected asylum seekers. The idea that the return of irregular immigrants (included rejected asylum seekers) could maintain public trust in the EU asylum policy, could support and free resources for persons in real need of international protection was brought to the table again (European Commission 2015f, 2; European Commission 2015g, 2). Additionally, the idea that an effective and swift return policy would discourage those persons not in need of international protection to risk their lives and spend much money to reach the EU was put forward (European Commission 2015f, 2).

Hence, swift return procedures had to be applied also in cases of *unfounded asylum claims*, reiterating the connection between return and a functioning asylum system (European Commission 2015f, 5). The emphasis on forced return was underlined. 'Flexibility' was underlined regarding the conditions of closed detention for migrants under the 'emergency clause' of the Return Directive for situation of migratory pressures. Simplified and swift return procedures for migrants apprehended or intercepted in irregular border crossing were encouraged. Finally, detention for the purpose to avoid *secondary movements* was advanced in the Commission Action Plan on Return (European Commission 2015f, 4). As seen before, many agencies have been related to the concept of a Common EU Return policy, among others FRONTEX, facilitating the organization of joint return operations and individuating best practices on return matters (acquisition of travel documents and removal practices) (European Parliament and Council 2007). Other 'flanking measures' proved increasingly relevant throughout time in the field of return, such as the VIS for the identification and documentation of persons to be returned, or the SIS for the issuing of EU-wide entry ban (European Commission 2014a, 4). In the last documents

drafted by the Commission, the role and mandate of the different agencies with respect to return was extended. In particular, this applied to FRONTEX (see table on FRONTEX), while EURODAC was proposed for the first time as a potentially useful instrument not only on asylum, but also on return (see Fact sheet 2.3).

Legal migration

Unlike the cases of asylum and irregular immigration, ‘legal migration’ does not play an extended role in the EU. Nevertheless, some concepts and terms are equally interesting as they say something about the scope of rights conferred to migrants and the domains where these rights seem more likely to be achieved.

Undoubtedly one of the key terms in the legislation on migration is ‘family reunification’. On the one hand this stands as one of the key ways to legally enter the European Union. On the other hand, it refers to a fundamental right, embodied in the European Charter of Fundamental Rights, putting family unity at centre stage of EU’s normative façade. Yet, it must be said that the Right to family reunification, enshrined and regulated by the 2003 dedicated Directive, has often been interpreted in a restrictive way by Member States, creating a variegated governance on the matter. This is also related to the vagueness of some provisions of the text and to omissions in the same, which have conceded a large degree of discretion when it comes to the interpretation and implementation of the right. However, no new document has been produced thus far and partial modifications have mainly been embodied in the new Directives on asylum as discussed above. This essentially means that the governance of family reunification remains largely fragmented and allows for different interpretations of the right of family reunification (with all the implications this entails for migrants).

The right to family reunification codified by Directive 2003/86/EC of 2003 (European Commission 2008a) draws on the Convention for the Protection of Human Rights and Fundamental Freedoms and on the Charter of Fundamental Rights of the European Union (which in turn derives from the Convention above). Family reunification as discussed at Tampere (1999) was aimed at providing third-country nationals *legally* residing in the territory of the European Union with comparable rights and obligations as those of EU citizens, also with a view to better integration (European Commission 2008a). Family reunification was considered as a step toward promoting family life, which had to be

provided in an equal way throughout the EU, hence, the necessity for the harmonization of national legislations on the matter. Family reunification was defined as:

The entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.

(European Commission 2008a, Art. 2(d))

The 'sponsor' was 'a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her' (European Commission 2008a, Art. 2(c)).

As explained by an EU document, the original proposal of the Commission for a Directive on the right to family reunification was more 'open', while the final text mirrored a more restrictive understanding, much in line with the legislation of Member States (European Commission 2008a). A restrictive interpretation of the Directive was motivated by Member States' argument that family reunification represented an overused tool to get legal access to the EU (European Commission 2008a; European Commission 2011a).

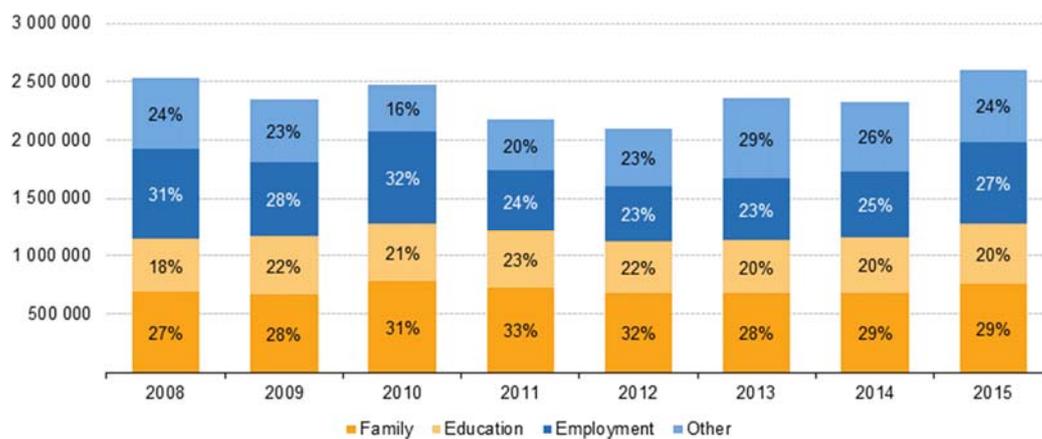


Figure 2.1: First Residence Permits issued by reason, EU-28, 2008-2015 (EUROSTAT 2016)

The Directive clearly explains that family reunification applies in any case to members of the nuclear family, that is, to the *spouse* and the *minor unmarried children* (European Commission 2008a, 1). There were however some restrictions to these categories: in the case of polygamy, no more than one spouse was allowed and the reunification of further

children could be restricted (European Commission 2008a, 6). Indeed this was inevitably likely to impact certain categories of migrants more than others. A minimum age for the sponsor and the spouse (21) could also be introduced, with the objective to prevent forced marriages (European Commission 2008a, 6). With respect to 'protected' migrants, such as 'minors', some restrictions were imposed. In their assessment of entry and residence of minors above 12 years arriving independently from their families, national authorities could evaluate whether they fulfilled integration conditions required in the Member States (European Commission 2008a, Art. 4 (1) (d)). Furthermore, for minors of more than 15 years, entry on grounds other than family reunification could be required (European Commission 2008a, 5). Aside from that, it was up to Member States to allow entry and residence and hence to consider 'dependent parents and unmarried adult children of the sponsor or his/her spouse, and an unmarried partner (duly attested long-term relationship or registered partnership) of the sponsor' as family members (European Commission 2008a, 6). A renewable residence permit of at least one year (but no longer than that of the sponsor) was a specific right of family members. Also, family members were entitled to the same rights as the sponsor in terms of access to education, access to employment and self-employment activities (pending possible conditions set by Member States), access to vocational guidance, training and retraining (European Commission 2008a, Art. 14).

It was made clear that refugees should be conceded more favourable conditions for the exercise of family reunification, recognizing hence their peculiar condition. Other family members could join the refugee if dependent on him. Additionally, in the case of unaccompanied minors 'the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line' was mandatory for Member States. Refugees were not required to provide accommodation and other resource evidence as in the case of other sponsors, nor were they required to have resided for a certain period after being joined by their family (see below) (European Commission 2008a, Art. 12). Other than that, though some possible limitations remain even for refugees (European Commission 2011a, 6). However, if a sponsor whose status of refugees was recognized could apply for family reunification, no such possibility was initially envisaged for persons entitled of '*subsidiary protection*' (European Commission 2008a, Art. 3 (2)(c)), a measure corrected by the recast Qualification Directive of 2013, scoring hence a positive point on the extension of rights.

There was also left a large space to interpretation with regard to the 'requirements' necessary to exert the right of family reunification. In particular, it was explained that Member States 'may' require the provision of evidence as for accommodation, sickness insurance, stable and regular resources sufficient to also maintain the reunified family without recourse to the social assistance system of the Member States (European Commission 2008a, Art. 7). This vagueness has led Member States to impose many different requirements, as well as recourse to the Court of Justice on interpretative grounds has been wide.

One of the most debated and criticized issues is that a sponsor can exert the right to family reunification when holding a residence permit valid for at least one year provided he/she has 'a reasonable prospects of obtaining the right of permanent residence' (European Commission 2008a, Art. 3(1)). This provision has raised many interpretative dilemmas (European Commission 2011a, 2). The possibility for Member States to require compliance with 'integration measures' for members of the family has also been widely debated (European Commission 2008a, Art. 7(2)). These 'integration measures' have given birth to a plethora of measures, some of which examined also by the Court of Justice, which has concluded that these measures should have the facilitation of the integration of family members as its ultimate objective (European Commission 2011a, 4). A further 'possible' requirement that Member States could introduce was to request the sponsor to have stayed *lawfully* in the hosting territory for a period of no more than two years before finally reunite with his family (European Commission 2008a, Art. 8). As a derogation, 'a three year' period was introduced (at the request of Austria), for countries having to match family reunification with a quota system. Because of this feature, peculiar to the Austrian case, issues regarding the appropriateness of such a provision on the EU Directive were raised (European Commission 2008a, 8). Omission, as much as vagueness, was hence blameworthy. No reference was made to the likelihood of 'fees' to be applied in different phases of the family reunification process (for application, VISA fees, residence permits, pre-entry language texts). Consequently, many Member States have applied different fees (some of which quite high) and no harmonization currently exists on the matter (European Commission 2011a, 8).

Integration

The integration of foreign nationals has always been one of the key objectives of the European Union. An objective that can only partly be

discussed at the European level, given that, it only acquires a full meaning when dealt at the Member States' level, matching with different historical, cultural and administrative background (European Commission 2008b). Here again, the patchy governance of migration is all the more relevant. In fact, no *binding* legislation exists on the matter. Nevertheless, integration has a European dimension as it conflates with some fundamental principles of the Charter of the Fundamental Rights of the European Union and as it is essential to meeting other key tasks of the EU in other domains. It is reasonable to suppose that integration acquires a specific meaning in the EU, linked to the values it supports and to the objectives it aims to achieve. Hence, defining what the EU means with integration and what it expects Member States to endorse in their national legislation is of the utmost relevant and deserves scrutiny.

Before delving into the concept, it is appropriate to underline that integration as intended by the EU is better understood in its broader pattern of reference, which encompasses words and concepts such as competitiveness, demographic change, ageing, legal and illegal migration, entry and residence, family reunification, third countries, return, refugees, non-discrimination, long-term residents and resettlement. Each of these words help define the meaning and purpose of integration in the EU.

'Integration' is defined by the EU as a 'two-way process based on mutual rights and corresponding obligations of legally resident third-country nationals and the *host society* which provides for full participation of the immigrant' (European Commission 2003d, 17-18). There are three immediate aspects of this definition. First, that integration is a process and therefore needs the active participation of immigrants and host societies. Second, that integration is about the definition of rights as well as obligations. Third, that integration applies to *legal* migrants. 'Illegal immigrants' (this is the term used in 2003, when the first relevant document was issued) are covered by basic human rights, which encompass emergency healthcare and primary school education for children. However, the best approach with illegal immigrants is reportedly to return them, as they do not benefit from integration measures (with connected rights), and would be further marginalized (European Commission 2003d, 25).

Since its first treatments, integration has been emphasized with a view to the possible contribution of legal migrants to the competitiveness of

the EU, given also the economic and social challenges of demographic ageing (European Commission 2003d, 3). 'The successful integration of immigrants is both a matter of social cohesion and a prerequisite for economic efficiency', reported a Commission document (European Commission 2003d, 17). Also because of that, integration has aimed to provide legal migrants with rights and obligations comparable to those of EU citizens (European Commission 2003d, 4), scoring positive result on non-discrimination. Even though the EU does not have a specific mandate on integration, it has intervened in other legislative domains underlining the importance of integration. For instance, this has been done in the case of *family reunification* (see above), considered as a key tool for integration, of *long-term residents*, of the conditions of entry and residence for paid employment or self-employment activities, of *non-discrimination* (European Commission 2003d, 5).

Fact sheet 2.9: Long-term residents

Long-term residents have taken on a specific importance in the debate on integration and are one of the few categories where the EU has delivered a Directive, in an attempt to harmonize Member States' practices. Given the fact that the EU and Member States endorse the principle that 'the length of residence has an influence on the level of rights of the person concerned', third-country nationals meeting the requirement for long-term resident status are those mostly benefitting of integration provisions and hence of rights in the EU (European Commission 2003d, 5). Since 2010, long-term status has been extended to beneficiaries of international protection, although it cannot be given to asylum seekers, persons residing temporarily, having a temporary protection, residing for the purpose of study or vocational training, hence discriminating according to the 'time-length' of permanence in the EU. Legal and continuous residence for at least five years are preconditions for the long-term status. Additionally, eligible persons need to provide evidence of having enough resources for them and their family not to have recourse to the social assistance system and to have sickness insurance (Council 2003c, Art. 5).

The status is permanent and long-term residents should be given a residence permit of at least five years. Most importantly, they enjoy equal treatment with nationals when it comes to access to employment and self-employed activity, education and vocational training, including study grants in accordance with national law; recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; social security, social assistance and social protection as defined by national law; tax

benefits; access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; freedom of association and affiliation and membership organizations representing workers or employers or similar organizations; and freedom of access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security. Some limitations 'may' exist on employment (prioritizing EU, EEA or nationals citizens), education (language proficiency) or social assistance and social protection. Finally, they also have the possibility to reside in a second Member States (Council 2003c, Artt. 14-23). Indeed, with respect to other categories of migrants, persons eligible for long-residence status enjoy much higher rights, leading to easier integration prospect.

Fact box 2.10: The EU Blue Card

The term 'Blue Card' immediately recalls the European Union's effort to attract highly qualified immigrants to the overall benefit of her competitiveness and economic growth.

The EU Blue Card entitles its holder to reside and work in the territory of a Member State (Council 2009, Art. 2(c)). The main idea behind the Blue Card is that, to attract highly qualified workers, it is necessary to facilitate their admission as well as that of their families and to provide them with equal social and economic rights as of EU's citizens in a number of areas. In the Directive that first tried to harmonize criteria at the EU level, a series of persons were excluded from the possibility to apply for a EU Blue Card, among those, beneficiaries of international protection (Council 2009, Art. 3(2)(b)). In the Proposal for a revised Directive in 2016 this exclusive measure has been relaxed and beneficiaries of international protection (but not of temporary protection) and resettled persons are envisaged as potentially falling within the Blue Card if highly skilled (European Commission 2016h). This is a positive shift with respect to rights extension. The rights enjoyed by persons having the EU Blue Card are quite extensive: labour market access; temporary unemployment safeguard; equal treatment with respect to working conditions; freedom of association; affiliation and membership in organizations representing workers or similar; recognition of education and professional qualifications; provisions for social security; access to good and services for the public; free access to the entire national territory (Council 2009, Artt. 12-17).

Of utmost importance are the extended rights for family reunification envisaged for this category of legal migrants (which starkly contrast 'ordinary' migrants). The 2016 proposal for Directive hopes to extend

these rights even further by reducing time limits for family reunification, removing the need for prospect for permanent residence, removing the time limit for access to the labour market and removing impediments conditions (Council 2009, Art. 15). In a similar way, the path towards the application for the 'long term residence status' in the EU is easier, by cumulating periods of residence in different EU Member States (Council 2009, Art. 16) (a provision not envisaged for non-skilled migrants). Intra-EU mobility of the Blue Card holder and of his/her family is also eased and plans have been made to make it even easier in the 2016 proposal for Directive (Council 2009; European Commission 2016h).

However, as one of the few instruments of the EU realm of legal migration, the EU Blue Card has not had the success hoped for. Minimum standards (inevitable before the Lisbon Treaty when unanimity was required) have provided a large margin of manoeuvre in Member States (European Commission 2014b). Sometimes the 'Blue Card' has been synonymous of intricate admission and intra-mobility conditions. Hence, the new proposal for Directive issued by the Commission hopes to upgrade the relevance of the instrument by addressing these shortcomings. Most importantly, if adopted, the new Directive would change the understanding of the EU Blue Card, by making it the only available avenue to the admission of highly qualified third-country nationals in the EU, something that would bypass Member States' prerogatives thus far. In fact, 'only action at EU level can offer highly skilled workers the possibility to easily move, work and reside in several EU Member States', the Commission makes clear (European Commission 2016h, 6).

Two basic features that have informed the EU's and Member States' understanding of integration are the 'incremental approach' and the 'holistic approach'. According to the first, certain categories of immigrants can benefit from integration measures. These are labour migrants, family members admitted under family reunion agreements, refugees and persons enjoying international protection. For these persons integration entails 'a balance of rights and obligations over time', which essentially means that 'the longer a third-country national resides legally in a Member State, the more rights and obligations such a person should acquire' (European Commission 2003d, 18). Hence, immediate integration (which translates into specific rights and obligations) should apply to immigrants with a prospect for a more permanent or stable residence in the EU. Refugees, resettled refugees and

persons entitled to subsidiary protection should also benefit of integration measures. Length of stay and specific needs therefore affect integration and accordingly, asylum seekers are not included in the category of persons above. According to the 'holistic' approach, integration should not only take into account economic and social aspects, but also cultural and religious diversity, citizenship, participation and political rights as well as integration into the labour market, education and language skills, housing and urban issues, health and social services, the social and cultural environment, nationality, civic citizenship and respect for diversity (European Commission 2003d, 19). Interestingly, some integration measures have a specific impact on the possibility of *return*. As in the case of measures on education, these would contribute to acquire qualifications that can be used in the origin country (European Commission 2003d, 19).

Additionally, two other specific peculiarities inform integration as intended by the EU. First, the idea that a holistic approach should not only cross different sectors but also encompass a variety of actors at the local, national, regional, European level as well as countries of origin, and be the most inclusive possible, working with social partners, the research community, NGOs and the migrants self (European Commission 2003d, 24), emphasizing the multi-faceted governance of the phenomenon. Third countries of origin, for example, could work at three levels: preparing the arrival of immigrants with measures related to integration; support migrants in the EU, through embassies for example; and profiting of migrant's acquired competence when these return to their residence countries (European Commission 2011b, 10). Second, integration includes the idea that some persons may have specific needs, such as refugees and persons entitled of international protection, immigrant women (because of both their sex and ethnic origin) and second and third generation immigrants (European Commission 2003d, 25). In this sense, migrants' subjectivity is particularly taken care of.

Fact box 2.11: the Common Agenda for Integration

The 'Common Agenda for Integration' tried to provide further guidelines to Member States' on the principles upon which integration should be promoted in the EU. These are the principles that still today inform the debate on integration and provide meaning to the concept as intended in the EU. Some of them seem to reflect efforts at involving migrants and their exigencies in the process:

1. Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States
2. Integration implies respect for the basic values of the European Union
3. Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible
4. Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration
5. Efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society
6. Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration
7. Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, intercultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member State citizens
8. The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law
9. The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.

(European Commission 2005a, 5-10)

Recently, the debate has resented the echoes of the 'refugee crisis' and the European Commission has delivered an Action Plan emphasizing the need to immediately provide integration measures, with an insistence on pre-departure venues. This is an argument in line with the increasing focus on orderly arrivals, making resettlement a privileged channel of entry (European Commission 2016i). There has also been put emphasis on the early and full integration of all third-country nationals, including refugees. Refugees' integration in the labour market

is considered as paramount and is in line with what envisaged in the Qualification Directive. It has also been specified that support to the integration of third-country nationals should not come at the expenses of other vulnerable, disadvantaged group or minority in the Member States (European Commission 2016i).

The external dimension to migration and asylum

The idea that migration necessitates of an 'external dimension' did not only come about from the perception of a blurred divide between internal and external affairs. Rather, it was somehow intrinsic in the same definition of migration as a movement across a national border recognizing the existence of a place from where migrants originate and transit before arriving. It became clear that to try to govern the phenomenon and to regulate it, third countries had to be engaged somehow. Together with migration other home affairs issues, such as 'terrorism' and 'organized crime' shared the fact of necessitating a vigorous external action able to dilute their capabilities to exploit transnational nets, and that acquired even more urgency given the security dimension. Hence, the first reference to the external dimension of the area of freedom, security and justice (European Commission 2005b).

As specifically for migration, the idea was not only to better manage the movement of persons through the engagement of third countries; it was also about addressing the root causes of such movements. Hence the idea was that of a 'comprehensive approach' with respect to issues such as admission and reception in the EU to encompass phenomena and development in third countries (European Commission 2005b, 4). Through time, the external dimension of migration has acquired its own relevance, detached or not always overlapping with border management efforts more in general. An increasing set of words have been associated with this specific facet of migration: irregular immigration, return, readmission, asylum, refugees, Regional Protection Programmes (later Regional Development and Protection Programmes), durable solutions, capacity building, Mobility Partnership, Circular migration, VISA facilitation, Partnership Frameworks (Compacts) and Trust Funds. Indeed, this is not an exhaustive list and many more words testify to the 'external dimension'. However, these provide a glimpse of what 'externally' entails in this EUs effort. Going through the concept delves into EU's interpretation of how relations with third countries have to be framed, into supporting principles and values,

into specific aims and into what is required to maintain an internal area of freedom, security and justice.

As a starting point, it is relevant to underline how the concept of ‘resilience’, which now seems to be the linchpin of EU’s external action in a variegated set of domain, was already well ingrained to migration in the idea of an ‘external dimension’. More specifically, it was ingrained in the form of ‘respect for the rule of law’ and ‘capacity building’ of third states (those from where migrants originated or transited). Through time, this understanding enriched to encompass an even more comprehensive approach, pulling together actions and aims in different domains. To a certain extent it is possible to affirm that the understanding behind the external dimension to migration has always overlapped with ‘resilience’:

Societies based on common values such as good governance, democracy, the rule of law and respect for human rights will be more effective in preventing domestic threats to their own security as well as more able and willing to cooperate against common international threats.

(European Commission 2005b, 4)

Different principles have informed the understanding of ‘the external dimension of migration’, among others, geographic prioritization (some countries are prioritised in their relations with the EU); differentiation (idea of tailor-made approaches); flexibility (to timely respond to new circumstances); cross-pillar coordination (pulling together of different external actions); partnership (idea of joint approaches with third countries) (European Commission 2005b, 6-7).

Two instruments that have been informing the understanding of the external dimension are, for example, Mobility Partnership and Circular Migration. The main idea behind Mobility Partnerships was to frame relations with third countries on the basis of increased opportunities for legal migration and corresponding duties to fight irregular migration. In particular, the idea was set forward that more cooperation on the fight against irregular migration and on readmission would ensure increased opportunities for legal migration (European Commission 2007a, 2, 4). Mobility Partnership contemplated also the idea of possible countermeasures against *brain drain* phenomena, that is, the deprivation of important resources for the development of a third-

country as a result of the partnership. Yet, these were not firmly part of the arrangement with third countries, but could be added, to the request of the third-country (European Commission 2007a, 7). The concept of *circular migration*, instead, was put forward to intend 'a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries' (European Commission 2007a, 8). Of particular relevance is the possibility for third-country nationals to have temporary access to the EU for work, study, research and training. Nevertheless, the concept of circular migration presupposes as fundamental condition the return and the reestablishment in the country of origin. Hence, both concepts seem to be largely based on 'conditionality' imposed upon third countries. Brain drain of possible skills with a particular attention to specific sectors is given more attention by Circular Migration. However, circular migration was also intended as a possible contribution to 'brain gain' given by temporary emigration experiences, opportunities that may be profitably exploited through adequate reintegration programmes and the creation of local professional opportunities (European Commission 2007a, 12).

With the Arab Spring and the increasing arrivals of migrants on European shores the need to deepen relations with third countries turned more urgent and the external dimension was enriched by a new key concept, the *Global approach to migration and mobility* (GAMM) (European Commission 2001b). Presented in 2011, GAMM was intended 'in the widest possible context as the overarching framework of EU external migration policy, complementary to other, broader, objectives that are served by EU foreign policy and development cooperation' (European Commission 2001b, 4). This attempt at providing a new impetus and a new specification of the external dimension of migration was aimed at pursuing even more coherent external actions, at defining geographic priorities and at more thoroughly pursuing EU strategic objectives (European Commission 2001b, 3). Again, elements recalling the 'resilience' approach of the EU are to be underlined: 'The GAMM should respond to the opportunities and challenges that the EU migration policy faces, while at the same time supporting partners to address their own migration and mobility priorities, within their appropriate regional context and framework' (European Commission 2001b, 5). Hence, the emphasis was on fruitful cooperation and capacity building, not only on migration (managing migration and reducing irregular migration) and security (fight against smuggling and trafficking),

but also on asylum (not a new approach if one considers for example the *Regional Protection Programmes* already encountered in this work).

Accordingly, the main idea was that an effective cooperation with (selected) third countries had to be framed around 4 main pillars: legal migration and mobility; irregular migration and trafficking in human beings; international protection and asylum policy; maximizing the development impact of migration and mobility (European Commission 2001b, 6). Again, the principle of differentiation was at the basis of the GAMM, 'the EU will seek closer cooperation with those partners that share interests and are ready to make mutual commitments with the EU and its Member States (European Commission 2001b, 7). Mobility Partnership was individuated as the key instrument to fulfil the aims of the GAMM, revised to offer 'visa facilitation based on a simultaneously negotiated readmission agreement', though a 'more for more' logic (read as conditionality) (European Commission 2001b, 11).

The massive inflows characterizing the last years have brought further emphasis on the external dimension of migration. More than previously, the external dimension has been conceived as inextricable with respect to other external actions and geographical prioritization has been emphasized. In this sense goes, for example the set-up of *Trust Funds*, intended as 'an innovative mechanism under the EU's Financial Regulation used in the field of development cooperation to pool large resources from different donors to enable a swift, common, complementary and flexible response to the different dimensions of an emergency situation', directed specifically at the Sahel and Lake Chad regions, the Horn of Africa and North Africa (European Commission, 2015h). A similar geographical prioritization is envisaged in the new framework for relations with third countries, the *Partnership Framework (Compacts)*, seemingly intended to foster resilience. The main tenets of this concept are: the development of safe and sustainable reception capacities and the provision of lasting prospects close to home for refugees; the creation of effective resettlement prospects in the EU to discourage irregular migration and dangerous journeys and effective policies for the return and readmission of third-country nationals (European Commission 2016l, 2). Again, 'standing ready to provide greater support to those partner countries which make the greatest efforts' was behind the concept of compacts (European Commission 2016l, 2). As framed, the 'Compact' approach was aimed both to face short-term crises as well as to

address the root causes of migration. The idea was a package encompassing different policy elements within EU competence (neighbourhood policy, development aid, trade, mobility, energy, security, digital policy, etc.).

Chapter 3

EU migration terms, definitions and concepts: Perspectives of justice

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This chapter draws together the results of the preliminary analysis in chapter 2 on terms, concepts and definitions in EU migration documents, and examine them through the lens of the three conceptions of justice developed by GLOBUS: Justice as non-domination, justice as impartiality, and justice as mutual recognition. In view of these perspectives of justice, the EU migration concepts and definitions seen so far already reveal the tensions and potential contradictions existing both between different demands of justice and within different components of the EU Migration System of Governance (EUMSG).

Justice as non-domination

Non-domination refers to a condition in which one is not subjected to (i.e. is free of) any kind of arbitrary interference or control on the part of political and legal institutions (or powerful private actors). Mainstream literature relates the concept to that of freedom, especially in its negative form (Pettit 1997, 2001), and the classic 'republican tradition', which entails a crucial role of the state serves as the primary guarantor of freedom, and hence justice (see section on Hungary and migration, Chapter 4).

On an international level, a context characterized by a non-domination stance is one where the integrity and sovereignty of states are respected together with their systems for protecting rights (Eriksen 2016, 11). The transposition of these normative concepts from the domestic to the international realm is quite complicated, given the different political rationale underpinning the latter. In general, when applied to international relations, this notion of justice is premised by the Westphalian assumption that states are uniform, sovereign actors that set and enforce migration policies – and, in doing so, conceivably abuse their power to the detriment of either individuals (migrants) or other polities (states and/or the European Union) (see section on Hungary and migration, Chapter 4). This seems particularly true of the migration policy area, as our analysis confirms that, as argued by Eriksen (2016, 5), the absence of powerful supranational institutions with regulative power is a potential source of ‘domination’ in a Westphalian system (i.e. the lack of freedom determined by arbitrary interferences with the country’s choices) (Eriksen 2016, 8).

In line with the relation between non-domination and negative freedom, the only acceptable interference is one where troubled states (or their populations) are helped based on a duty of beneficence (informing humanitarian intervention) and not for the sake of any overarching ‘right’, or ‘substantive’ notion of justice (Eriksen 2016, 11). In this regard, it is quite interesting that the EU’s legitimising discourse about ‘resettlement’, has been aimed at defining the practice as a way to alleviate the pressure experienced by third countries of first asylum. The European Union’s extended use of the concept of ‘safe country of origin’ in the recent years, may equally be intended as a way to confirm states’ sovereignty and respect for their respective systems of protection of rights. Moreover, the specific way in which ‘integration’ has been prescribed to be in the EU – that is, ‘fair terms of cooperation with states external to the EU’ advantageous for both parties (Eriksen 2016, 11) – may represent ‘non-domination’ attitudes.

On the other hand, it can be affirmed that even in some of the definitions above, instances of domination persist. In general, we can identify instances of failed uphold of non-domination justice in the EU’s response to migration, both towards its Member States and third countries. As for third countries, several examples can be made:

The concept of 'safe third-country' respects the system of protecting rights in place in the country, but also conceals a clear domination trait by presupposing the return of 'third' citizens. The definition of some countries as 'safe' may in turn open broader justice assessment between these states and those that are considered to be 'not' safe.

The concept of 'return' and, in particular, of 'readmission' reiterates a Westphalian concept, that is the international obligation to accept own citizens that are returned; however, similarly to the concept of 'safe third-country', it falls into domination when, as intended by the EU, it also contemplates the possibility of returning to 'transit countries'. As bluntly stated by the EU, a readmission agreement 'works mainly in the interest of the EU' (European Commission 2002, 24). In this sense, the failure to sign readmission agreements with North African countries is to be interpreted as an act of 'resistance' to such domination.

The concepts of 'Mobility Partnerships' and 'Circular Migration', that have progressively been developed as facets of the 'external dimension' to migration of the European Union and that represent specific ways of regulating migration with third countries, link cooperation perspectives to corresponding duties. In the case of Mobility Partnership, to increase opportunities for legal avenues into the EU, corresponding duties are envisaged to fight irregular migration and to return own immigrants (and possibly 'third citizens'). Hence, legal migration is defined as an 'opportunity with conditions'. In the case of Circular migration, whereby some degree of legal mobility is allowed 'back and forth between two countries' (European Commission 2007a, 8), the return of migrants to their own residence and to their activities in the country of origin after the mobility experience, is required. Also in this case, possibilities for legal migration are conditioned and specifically dependent upon the final return to the country of origin. A by-product of these two concepts is the possible 'brain drain' that this would cause to third countries, which is in itself an act of domination since depriving the country of resources may *de facto* worsen their situation. As a palliative, the EU, which has not been blind to this eventuality, has linked the concept of Circular Migration to possible 'reintegration measures' to be promoted with origin countries (the concept of Mobility Partnership has not been so explicit on measures to redress possible 'brain drain' phenomena).

Domination traits are clearly present also in the understanding behind the 'Global Approach to migration and mobility', 'the overarching framework of EU external migration policy' (European Commission 2011c, 4) launched in 2011. This attempt was aimed at providing a new impetus, and a new specification of the external dimension of migration was aimed at pursuing even more coherent external actions, as well as at defining geographic priorities and at more thoroughly pursuing EU strategic objectives (European Commission 2011c, 3). In the logic of the Global Approach, the 'issues' for cooperation (legal migration and mobility; irregular migration and trafficking in human beings; international protection and asylum policy) are decided by the EU. The EU also decides the countries with whom to engage in cooperative efforts according to a 'differentiation principle', whereby 'the EU will seek closer cooperation with those partners that share interests with and are ready to make mutual commitments with the EU and its Member States' (European Commission 2011c, 7). The 'more for more' logic subsumed in the Global Approach to Mobility Partnership found concrete application through 'visa facilitation based on a simultaneously negotiated readmission agreement' (European Commission 2011c, 11).

Moreover, the recent 'migration crisis' has brought attention to the external dimension, which continues to be imbued with geographical prioritization, that inevitably makes some countries of EU's selection 'more relevant' than others. In this direction goes, for example, the definition of *Framework Partnership* (Compacts) – the new framework for relations with third countries. The main objectives of this concept are: the development of safe and sustainable reception capacities and the provision of lasting prospects close to home for refugees; the creation of effective resettlement prospects in the EU in order to discourage irregular migration and dangerous journeys; and effective policies for the return and readmission of third-country nationals (European Commission 2016l, 2). Conditionality, though, is still largely present, as the EU stands 'ready to provide greater support to those partner countries which make the greatest efforts' (European Commission 2016l, 2).

The revised external dimension relies to a great extent on the necessity to make third-states 'resilient': from the point of view of justice as treated in the GLOBUS project, upholding the respect of international law (a facet of the concept of resilience) in relations with third-countries does not represent an act of domination as would probably be in-

terpreted as strengthening sovereign prerogatives. However, for example, insisting that third-states improve their asylum system, may sound as an unduly interference and would conform more to a definition of justice as 'impartiality', where the duty with respect to third countries is one of 'rights and justice' (Eriksen 2016, 11) and has the protection of human rights as ultimate objective, and interference may be a way to limit the State's power on its own citizens.

Traits of domination are also encompassed in some of the concepts and definitions the EU has proposed for the 'internal' management of migration.

The 'safe country of origin' concept assumes a relevance at the EU level when intended as a 'Common list of safe countries of origin' decided at the EU level, based on specific criteria and aimed at avoiding discrepancies in national legislations. It is hence directed to uniform the list of countries considered as 'safe' for Member States which have already their own lists, while forcing the adoption of a list decided at the EU level for those countries lacking one.

An analogous path has been followed in the proposal for revision of the 'Blue Card' Directive. Mirroring the European Union's effort to establish common guidelines to attract highly qualified immigrants to the overall benefit of its competitiveness and economic growth, the new Blue Card framework would become the only available avenue for the admission of highly qualified third-country nationals in the EU.

Discomfort has also been expressed with the recently established European Border and Coast Guard, for the 'shared responsibility' for the management of the external borders it implies, both in normal and emergency time, perceived as a violation of sovereign prerogatives.

'Integration' as a domain, instead, is specifically recognized as peculiar to Member States, to their different historical, cultural and administrative background, hence possibly qualifying as a self-affirmed non-domination attitude by the EU.

The 'Dublin system' (establishing the responsible state for the examination of an asylum application), the 'relocation system' (envisaging the redistribution of persons 'in clear need of international protection' among Member States) and the 'hotspot system' (setting joint support of EU's agencies to frontline Member States experiencing disproport-

tionate migratory pressures at the external borders and practically organized as to select irregular migrants to be returned, asylum seekers to be relocated and other asylum seekers), have all been accused of being acts of domination of the EU with respect to some Member States particularly affected by these provisions (mostly frontline states). With respect to, for example, the hotspot approach, Morgese (2015) wonders whether this can be interpreted as the internal translation of the 'more for more' approach applied with third countries, making the relocation mechanism and the provision of financial resources contingent to the strict application of the hotspot approach and of the EURODAC Regulation. This is clearly explicable, according to Morgese, by the fact that while not having a legal nature, it is in fact binding for Italy and Greece.

Justice as impartiality

According to justice as *impartiality*, individual human beings are the ultimate units of moral concern (Eriksen 2016, 14) and their full legal standing requires 'equal basic rights and liberties'. Consequently, a policy intended to promote this notion of justice would have to uphold human rights and grant them pre-eminence over sovereignty rights (Eriksen 2016, 16-17). The protection of individuals *as* human beings has to be unencumbered by bias related to any allegiance, sense of belonging or identity features. In safeguarding natural rights, national and supranational institutions are called to be informed by universal values and objectives, acting at 'local enforcers' of a cosmopolitan order.

The entire legislation of the EU, starting with the Amsterdam Treaty up to the recent revision proposals, traces a parabola with respect to the definition of justice as impartiality, and this holds true for almost all migration policy domains. While making reference to relevant Conventions on Human Rights, to the Geneva Convention of 1951 and the 1967 Protocol, and to the Charter of the Fundamental Rights of the European Union, the first legislative phase (2003-2005) can be considered quite restrictive in terms of human rights protection. This is so either because the standardization effort has been minimal and transposition poor, leaving room to manoeuvre for the Member States, or because the Member States have deliberately steered away from harmonization so that the measures actually implemented would be more restrictive compared to

the Commission’s proposals. In general terms, regardless of the time-period, ‘Europeanization’ has led to divergent national provisions and lower standards (Menéndez 2016). An example is provided in table 3.1.¹³

The second big phase of legislation (2011-2013) seems instead to be characterized by a far greater attention to the protection of human rights, partly due to the entry into force of the Lisbon Treaty, the legal relevance of the Charter of Fundamental Rights and the EU’s attempt at responding to harsh external criticism on its first phase of migration management. Accordingly, it is in this period that the EU came up with new human rights monitoring devices, such as the EU Agency for Fundamental Rights (2007), the Fundamental Rights Officer for FRONTEX (2012), or the FRONTEX Code of Conduct for joint return operations.

Table 3.1: Pejorative changes in residence permits for international protection status after the Recast Qualification Directive (2013) (AIDA 2016, 5).

Country	Refugee status (in years)		Subsidiary protection (in years)	
	Before	After	Before	After
Austria	Permanent	3	1	1
Belgium	Permanent	5	1	1
Denmark	5	2	5	1
Hungary	10	10	5	3
Sweden ¹⁴	Permanent	3	Permanent	1

Yet, over the last two years, the EU legislation seems to have been at odds with the protection of human rights under three main aspects: the increased obligations that both migrants and asylum seekers have to comply with; the overall idea to ‘accelerate’ the procedures relative to the management of migration and asylum; and the transformation of EU’s Agencies into tools to deal with different facets of the migration process (dealing both with irregular immigration and asylum).¹⁵ Moreover, EU documents have shown an increasing use of the term ‘illegal’ – instead of ‘irregular’

¹³ It is important to notice, however, that some Member States have maintained their standards of protection, often higher than those of the EU. For instance, France has recently increased the resident permit for subsidiary protection from one year to two.

¹⁴ Under the proposed reform, residence permits for refugees will be valid from 3 years and 13 months for beneficiaries of subsidiary protection, from 20 July 2016 to 19 July 2019.

¹⁵ ‘EURODAC’, for example, – originally a tool for the collection and comparison of applicants’ fingerprints – is likely to be transformed into a device for broader migration purposes, among which, the return of irregular immigrants found illegal in Member States.

– with reference to migrants, to the detriment of textual coherence, and marking a U turn compared to the EU’s increasing use of the term ‘irregular’ in previous policy and legislative documents (ECRE 2016b).

A final general observation is that, while in the asylum domain justice as impartiality tends to be pursued more consistently – because of the EU’s more active engagement and higher level of authority in this field, and, most importantly, thanks to the many legal and binding documents and institutions on the protection of the rights of the refugees – the results are mixed in the realm of irregular immigration, legal migration, integration and external relations. It is significant, for example, that as of yet no Member State has signed the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. This makes an attentive reflection on these topics even more urgent.

A more detailed assessment of how terms and definitions stand with respect to *impartiality* reveals many interesting insights for further research. The aim to hamper ‘secondary movements’ is one of the key finalities of the EU – a reference that runs throughout all its legislation. Indeed this refers not only to irregular immigrants, but also, and increasingly so, to asylum seekers and persons entitled of international protection, resettled persons included.¹⁶ The message conveyed and its implications in terms of rights are twofold: first, these people (refugees included) are not free to circulate in the EU as citizens of the EU are, and second, they cannot decide where to ask and receive protection in the EU. The negative connotation imbued in the term ‘asylum shopping’ (the practice by asylum seekers of applying for asylum in several countries), which is widely used by the EU, goes in the same direction. The frequent reference to ‘orderly and managed arrivals’ in the EU opens more avenues for evaluation: the concept has been linked to the necessity to ensure ‘safe arrivals’, and in this sense it cares for the loss of lives that many migrants experience in their migratory journey. However, the term only refers to asylum seekers, and even for them it poses ‘conditions’ on the modalities of entry into the EU. Indeed this

¹⁶ This has been also visible in the 2016 proposal for the revision of the Directive on reception, where the provision of material reception is proposed (European Commission 2016g, 3, 4, 5), and not for asylum seekers in another Member State than that assigned under Dublin. This would contradict, according to ECRE, ‘the principle of entitlement to reception conditions as a corollary of asylum seeker status, elaborated in the Cimade and Gisti ruling of the CJEU’ (ECRE 20116d, 7).

clearly stands in contrast with the disorder and chaos often characterizing dire situations that persons escape from. The preference for 'ordered and managed arrivals' has made 'resettlement' the preferred tool to let people in need enter the EU. And yet, resettlement opportunities are limited in number by definition, and seem to be subject to 'geographical prioritization' from where most flows arrive, i.e. North Africa, Middle East, and the Horn of Africa, (Council 2015a, 4).¹⁷ Also, resettlement presupposes an already recognized 'refugee' status. Hence, in these cases, the possibility for asylum seekers to reach the European Union and ask for protection seems to be reduced, something which undoubtedly contravenes some basic rights, such as the Right to Asylum as established in the Charter of the Fundamental Rights of the European Union.

The concept of 'safe country of origin' has increasingly gained attention and has in parallel been subject to much criticism. Two controversial points are worth noticing here: first, the criteria that the EU adopts for this assessment, and second, the real finality of a list of 'safe countries of origin'. As for the first point, the fulfilment of the Copenhagen criteria (strongly based on democracy and the promotion of human rights) has automatically elected some of the 'safe countries' of the list. However, the latest reports on these countries seem to question the EU's choice, and perhaps reduce the validity of such an automatic approach (this is visible, for example, in the case of Turkey), which seems to be 'stereotyping applications on the basis of their nationality' (ECRE 2015, 2). As for the second, it is not entirely clear whether 'human rights' stand fully at the basis of EU's considerations in drafting the list, since the same EU reports state that 'further countries may be added (or removed) especially on the basis of the amount of applicants for international protection received by the EU' (which makes Pakistan, Bangladesh and Senegal likely candidates for the future) (European Commission 2015b, 6). The concept also opens the possibility that applications from 'safe countries of origin' could be considered as 'unfounded' before prior examination (ECRE 2015, 3). The legal basis of the 'safe third-country', 'first country of asylum' and 'safe third-country' concepts is not clear, and the 'safe country of origin' concept

¹⁷ In the 2016 proposal for a Union Resettlement Framework, it was specified that persons who had irregularly entered, irregularly stayed in, or attempted to irregularly enter the territory of the Member States during the last five years prior to resettlement had to be excluded from resettlement schemes (European Commission 2016b, 11). This has further reduced the opportunities for resettlement for certain categories.

bluntly violates, according to ECRE (2016c) the principle of non-discrimination according to race, religion, country of origin as stated under Art. 3 of the Geneva Refugee Convention of 1951.

Resting with asylum, it cannot be neglected that the EU has tried to enlarge the scale of protection conferred to persons in need. This has been particularly so by encompassing 'subsidiary protection' within the concept of international protection, hence going beyond the Geneva Convention and contemplating both persecution and serious harm as grounds for asking and receiving protection (included the possibility for family reunification). Since 2010, the possibility to apply for the EU 'long term status' resident (a particularly advantageous recognition in terms of rights in the EU) has been extended.¹⁸ In 2016, a proposal was made by the European Commission to extend the possibility to apply for the EU Blue Card to the beneficiaries of international protection, in order to attract highly qualified workers. The 2013 Recast Directives especially paid more attention to rights, in the sense of providing, for example, more rights in terms of legal assistance in appeals (European Parliament and Council 2013a, 4); of proper information on the possibility to apply for asylum (ASGI 2013, 2); and of conceding similar access for persons entitled of international protection to employment, education, recognition of qualifications, social welfare, and healthcare as for the citizens of the Member States. Furthermore, proposals in the sense of extended recognition of family members and swift access to the labour market for applicants (and hence more rights) of international protection have been made. (European Commission 2016a).

Notwithstanding the extension of rights, though, impartiality has not always been fulfilled: many persons in need remained out of the 'labels' codified by the EU (although the possibility existed for Member States to provide for other forms of protection). Also, differences persisted in the scope of rights provided to these two categories, even

¹⁸ However, as reported by the Asylum Information Database (2016, 2), eligibility for long-term residence status only applies after 5 years. 'By design, the EU asylum acquis therefore contrasts with asylum systems in other regions of the world, where granting asylum opens up avenues for permanent residence'. This is for example the case in the United States and in Canada. Also, further limitations have been proposed under the 2016 Regulation proposal on Qualification for obtaining the long-term resident status in case of presence in a Member States other than the one that granted protection. If adopted, this sanction would discriminate beneficiaries of international protection with respect to other third-country citizens in the Union, which are not subject to sanctions for irregular movements in the Union (ECRE 2016, 21).

though the EU in principle aims at 'aligning rights', with persons entitled of subsidiary protection being penalized. Differences remain in the duration of resident permits, respectively to last at least three years for refugees, and one year for subsidiary protection, which is renewable – an 'unjustifiable distinction between the two statuses' according to ECRE based on the assumption that subsidiary protection is more 'permanent' (ECRE 2016a, 16). Differences also persist in the provision of social assistance, seemingly based in the more 'temporary' form of protection attached to the subsidiary status. The tendency to 'categorize' migrants and asylum seekers – and hence underline their different treatment – is visible also in the concepts of 'relocation' and 'hotspot'¹⁹, where specific reference is made to persons 'in clear need of international protection', a label that underlines, for example, that some applicants (of specific nationalities) deserve more and immediate protection than other applicants. Both concepts remind a threefold system of rights: one for irregular immigrants to be returned; one for asylum seekers to be relocated; and one for asylum seekers of different nationalities of those eligible for relocation (see table 2.1).

Even in the case of persons already granted protection, the scenario looks bleak. The 2016 proposal for Regulation on qualification seems to generally restrict the rights of persons entitled of international protection envisaging, the obligation to remain in the Member State that granted that protection (a restriction of movement applied before only to asylum seekers) (European Commission 2016d, 6, 13, 4, 15). The failure to achieve 'mutual recognition of positive asylum decisions' that would allow the movement of beneficiaries of international protection, ECRE (2016a, 21) explains, contravenes the EU's commitment to 'a uniform asylum status, valid throughout the Union'. A more worrying proposal is the one that underlines the 'temporal' nature of protection in the EU, for as long as it is needed.²⁰ As reported by the Commission, 'the absence of checks on the continued need for protection gives the protection a de facto permanent nature, thereby creating an additional incentive for those in need of international protection to come to the EU rather than to seek refuge in other places, including in countries

¹⁹ As for the hotspot, the absence of a clear legal nature may weaken the protection of migrants' rights (Morgese 2015).

²⁰ In the past the Court of Justice had been called to provide judgment on specific cases regarding the revocation of the refugee status and contributed to specify (in a 'positive' sense for the refugee) a provision whose interpretation was not unidirectional, see *Salahadin Abdulla and Others* (Court of Justice of the European Union 2008).

closer to their countries-of-origin' (European Commission 2016d, 13). The configuration of protection, and even of the 'refugee status' as non-permanent, poses multiple concerns with respect to the possible limitations to the right of asylum in the EU and indeed to possible integration perspectives (ECRE 2016, 2), and raises the doubt that the principle of protection is somehow subordinated to EU's internal interests. In fact, it seems not to take into account the 'protracted' nature of most of the situations characterizing displacement and forced migration (AIDA 2016).

As explained above, the blurred nature that some of EU's instruments are assuming, aimed at pursuing irregular migration and asylum finalities, seems also to have specific impact rather than generalized discomfort. In fact, according to the 2016 proposal for revision of EURO-DAC, the principle upon which minors cannot be fingerprinted seems to be overcome (fingerprints have been proposed from up to 6 years) (European Commission 2016e, 4). The proposal also opens up for storing collected data for 5 years; to share some of the data with third countries for the purpose of return (European Commission 2016e, 4), which were strongly forbidden before according to data protection criteria and opening the possibility that sensible data can be given to alleged actors of persecution and serious harm (ECRE 2016c); and to share all data stored for law enforcement purposes (European Commission 2016e, 5).

An evaluation of how 'return' has been understood and defined by the European Union also opens space for evaluation from the point of view of impartiality. Within the 2008 Directive on Return, the vagueness with which 'detention' has been defined has left ample space of manoeuvre to Member States, but has also given way to many pronouncements of the EU Court of Justice. In general, there have been many contestations to Member States' practices associated with a discretionary interpretation of the terms and definitions present in the Directive, especially related to the fundamental rights of migrants to be returned. Moreover, as a consequence of the 'refugee crisis', urgency measures have partially side-lined fundamental rights. In the 2015 Action Plan on Return, the idea has been put forward that the return rate should be incremented (with an increased accent on forced return) and return procedures simplified and swiftly implemented (European Commission 2015f, 5), with inevitable implications on the careful assessment of individual rights.

Family unity is a right embodied in the Charter of the Fundamental Rights of the European Union. However, family reunification is not an international right and not a fundamental right for the EU, although in many Constitutions of the Member States it is expressly cited as a fundamental right (Balboni 2015, 185). The EU has been both vague (the statement 'Member States may' was reiterated continuously in the 2003 Directive on family reunification) and restrictive (setting many limitations)²¹ with respect to family reunification of third-country citizens. Much space has been left to Member States' interpretation with regard to the 'requirements' necessary to exert the right in terms of accommodation, sickness insurance and stable and regular resources (Council 2003, 4). Requirements in this sense, such as accommodation, look extremely demanding; in particular given the fact that they are not similarly imposed on nationals or other EU citizens working and residing in the national territory (Morozzo della Rocca 2004). The European Parliament brought an action to the ECJ against the Council, claiming that some provisions of the Directive went against the right to family life and the non-discrimination principle as codified in the Convention on the Protection of Human Rights and Fundamental Freedoms (European Commission 2008a, 4). The sentence of the Court (C-540/03) has been relevant in many aspects, emphasizing (as the C-578/08 Case) that, notwithstanding possible restrictions and derogations, the provisions should not undermine or run counter to the promotion of family reunification (European Commission 2014c). In an evaluation on justice as 'impartiality,' a consideration of 'integration' as intended by the EU cannot be avoided. The EU has considered integration as a process through which rights and obligations are conferred to third citizens as they belong and apply to EU citizens. While this is remarkable, it also takes into account that the EU endorses the principle that 'the length of residence has an influence on the level of rights of the person concerned' (European Commission 2003d, 5). Hence, it can be inferred that not only different statuses enjoy different rights, but also that different integration perspectives exist for third-country citizens. For example, 'EU long-term residents' are those mostly benefitting of rights and,

²¹ Among limitations, the Directive made clear that a sponsor can exert the right to family reunification when holding a residence permit valid for at least one year, and provided he/she has 'a reasonable prospects of obtaining the right of permanent residence' (European Commission 2014c, 3). This provision has raised many interpretative dilemmas (European Commission 2011a, 2).

hence, of integration provisions in the EU.²² In a similar way, integration opportunities for Blue Card holders (and general admission conditions) seem to be quite simplified and extended with respect to other categories of migrants.

Indeed, a thorough assessment of justice as ‘impartiality’ would be made better once an effective analysis of arrangements with third countries (such as that with Turkey of March 2016) is undertaken. From now it suffices to say that some of the concepts analysed in this report are at the basis of these agreements (i.e. safe third-country, re-admission, hotspot, ordered arrival), with all the problems they already entail in terms of human rights observance.

Justice as mutual recognition

Dialogue and reciprocity are the basic features of a policy aimed at mutual recognition, that is, one that rules out the possibility to determine a priori what is normatively right and fair. According to this notion, each relevant subject (individual, group, polity) has the right to be recognised in their unique identity, and particular groups are entitled to special rights due to their collective identity – to the point the these ‘concrete others’ may prevail over the ‘generalized other’ (Eriksen 2016). Justice as impartiality and justice as mutual recognition may well be at variance, given that even when a formally just order upholding human rights exists, people may still be treated unfairly (Eriksen 2016, 19). Consequently, ‘having a say in a reason-given process’ becomes crucial as far as justice is understood as mutual recognition, which contemplates due hearing and recognition, respect for individual identities and the practices and activities that are valued, belonging and difference (Eriksen 2016, 19-20). More than in the other two conceptions, justice as recognition is concerned with the status of one subject being recognised by others, rather than being about claims on resources.

Looking specifically at the legal context, it is possible to say that mutual recognition is key to achieve impartiality. In the realm of law, in fact, two degrees of impartiality exist: the impartiality of the legislator, which translates into a general and an abstract norm; and the impar-

²² To be noticed, the ‘long term status’ cannot be given to persons residing temporarily, having a temporary protection, residing for the purpose of study, or vocational training.

tiality of the executor, which contemplates the norm as inevitably applied to the single case. Hence, notwithstanding the presence of the abstract law, the evaluation has to be individual in order to be impartial (Balboni 2016). This specification finds confirmation in every legal act of the EU on migration, where, together with the general law, prescription is made for individual evaluations of migrants and of the different circumstances they are in. This does not imply that mutual recognition is always satisfied in practice. More importantly, and of interest for this work, this does not even imply that the same terms and definitions present in the legislation inevitably conform to this criterion of justice. To the contrary, this brief reflection shows that this sometimes has been contradicted in the same content of legislation.

The principal way through which the EU has satisfied a mutual recognition definition of justice has been through the increasing attention paid to 'vulnerable categories' which have been given rights that were not envisaged before or which have been attached peculiar rights, by virtue of their specific exigencies.²³ Accordingly, for example, as soon as in 2000 the EU has recognized that protection could no longer be granted only on the basis of the Geneva Convention, given the increasing mismatch between 'the nature of the demand and the criteria of the Geneva Convention' (European Commission 2000, 5). Hence, subsidiary protection has been inserted as a specific form of protection for persons having experienced or likely to experience serious harm. On the negative side, though, it can equally be said that some vulnerable person fail to be recognized as in need of protection, independently from their self-perception.

Some categories of persons have been generally recognized as especially vulnerable, in particular minors and unaccompanied minors: for both of them, specific rights are contemplated which derogate from general rights and obligations.²⁴ A similar attention has been sometimes applied to women with respect to, for example, female asylum applications

²³ For example, for the decision over the responsible state (Dublin), minors cannot be separated from their parents or guardian; unaccompanied minors have to join their family legally present in one of the Member States, provided this is in the interest of the minor (Council 2003a, 4) and that represents the views of the minor according to age and maturity (European Commission 2016a, 44).

²⁴ It is to be noticed that EU law does not prohibit the detention of minors, while the same is prohibited in many Member States.

through a 'gender perspective' (European Parliament and Council 2013a).

A peculiar attention has also been reserved to the family and to its unity: a fundamental right, but also a crucial self-identification tool. Recognizing their vulnerability, refugees have been conceded more favourable conditions for the exercise of family reunification, by encompassing for instance other dependent members, by not being required to have resided for a certain period after being joined by their family and to possess accommodation and other resource for the exercise of that right (Council 2003, 5-6). Persons entitled of subsidiary protection rights have been equally considered eligible for family reunification. However, some restrictions imposed seem not to take into due account the peculiarities of some migrants: in the case of polygamy, for example, no more than one spouse is allowed and the reunification of further children could be restricted (European Commission 2008a, 6). Furthermore, even 'protected' categories have been subject to restrictions: in their assessment of entry and residence of minors above 12 years arriving independently from their families, national authorities may evaluate whether they fulfil integration conditions required in the Member States (Council 2003, 3). Also, for minors of more than 15 years, entry on grounds other than family reunification could be required (European Commission 2008a, 5). Indeed this is disputable given that art 24 of the Charter of the Fundamental Rights of the European Union establishes the principle of the 'superior interest' of the minor, which applies in all circumstances, even in decisions regarding family relations (Balboni 2015).

As for integration, it is defined by the EU as a 'two-way process based on mutual rights and corresponding obligations of legally resident third-country nationals and the host society which provides for full participation of the immigrant' (European Commission 2003d, 17-18). The entire definition scores positively in terms of 'mutual recognition', in particular when it is underlined that the host society should create an environment conducive to third-citizens' integration. Also, it is clearly affirmed that specific persons may have specific requirements and priorities (European Commission 2003d, 25). Against this backdrop, the possibility allowed to Member States to introduce 'integration measures' - that is, measures whose mandatory compliance by migrants is a sign of effective integration into the country - contrasts with the understanding of integration provided, as it leaves space to the possible introduction of measures that may fail to recognize and

protect migrants' specificities.²⁵ Also, given the fact that integration is about the provision of more rights and given the fact that (as observed above) these are linked to the permanence in the territory of the EU, asylum seekers and other vulnerable but 'temporary' categories (such as persons having received temporary protection) may remain deprived of such rights.

Other terms are subject to non-definitive evaluations. 'Resettlement', for example, presupposes the recognition of the needs of protection of some persons residing out of the EU – that is, needs of protection that, according to the EU, range far beyond a traditional understanding of refugees according to UNHCR practices by encompassing, for example, socio-economic vulnerabilities, displaced persons, and those with family links (European Commission 2016b, 10-11). Yet, as seen before, resettlement opportunities are selective by nature and hence limited and confined to some states, risking to leave out other vulnerable persons perceiving themselves as in need. In a similar way, the concept of 'safe country of origin', and, more specifically, that of a 'Common list of safe countries of origin' is controversial. The 'safety' of the origin country does not leave out the possibility that some persons within that country may be in need of special attention and recognition. While the EU ensures that examination is individual, the reiterated presence of the term in Documents regarding procedures for asylum application, for example, and the Dublin Regulation, and the 'accelerated' provisions envisaged in these cases, seem to convey the idea of a 'preliminary' assessment firstly based on nationality, so that protection becomes more a question of 'where' rather than 'who' gets protection (AIDA 2016b, 6). As ECRE (2016b) explains, the 'first country of asylum' and 'safe third-country' concepts are based on a misinterpretation of the Refugee Convention, which does not envisage the obligation to apply in the first country refugees reach after fleeing their country of origin. Also, it is far from given that protection ensured in first countries of asylum and in safe third countries equals the one ensured in the EU. The 'safe third-country' concept, moreover, is to be applied to persons not already given protection (as in the first country of asylum), but that could 'potentially' receive such protection (ECRE 2016b, 56). The existence of different

²⁵ This has been the case of the 'agreements' or 'contracts' introduced to stress the need of migrants to conform to the values and fundamental laws of the hosting country which de facto look as binding unilateral impositions on migrants, as we will show later discussing Member States' positions.

lists of 'safe third-country' in the Member States opens further questions regarding mutual recognition and impartiality.

Table 3.2: 'Safe countries' according to different EU Member States (European Commission 2015c).²⁶

Member State	Country considered as safe
Austria	Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro, Serbia, EEA Countries/Switzerland, Canada, Australia, New Zealand
Belgium	Albania, Bosnia and Herzegovina, FYR Macedonia, Montenegro, Serbia, India
Bulgaria	Albania, Bosnia and Herzegovina, FYR Macedonia, Montenegro, Serbia, Ukraine, Algeria, Ethiopia, Ghana, Nigeria, Tanzania, Armenia, Bangladesh, China, Georgia, India, Turkey
Czech Rep	Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro, Serbia, EEA Countries/Switzerland, Liechtenstein, Canada, USA, Mongolia, Australia, New Zealand
Denmark	Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro, Serbia, EFTA Countries, Moldova, Russian Federation, Canada, USA, Mongolia, Australia, Japan, New Zealand
France	Albania, Bosnia and Herzegovina, FYR Macedonia, Montenegro, Moldova, Benin, Cape Verde, Ghana, Mauritius, Senegal, Tanzania, Armenia, Georgia, India, Mongolia
Germany	Bosnia and Herzegovina, FYR Macedonia, Serbia, Ghana, Senegal
Ireland	South Africa
Luxembourg	Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro, Serbia, Ukraine, Benin*, Cape Verde, Ghana*, Senegal
Malta	EFTA Countries/Switzerland, Benin, Botswana, Cape Verde, Gabon, Ghana, Senegal, Brazil, Canada, Chile, Costa Rica, Jamaica, Uruguay, USA, India, Australia, Japan, New Zealand
Slovakia	Montenegro, EEA Countries/Switzerland, Ghana, Kenya, Mauritius, Seychelles, South Africa, Canada, USA, Australia, Japan, New Zealand
UK	Albania, Bosnia and Herzegovina, FYR Macedonia, Kosovo, Montenegro, Serbia, Moldova, Ukraine, Gambia*, Ghana*, Kenya*, Liberia*, Malawi*, Mali, Mauritius*, Nigeria, South Africa, Sierra Leone*, Bolivia, Brazil, Ecuador*, Jamaica, Peru, India, Mongolia, South Korea
*Safe only for males	

A close look at how relocation has been conceived recently by the European Union leaves with two equally valid arguments: it rightly points at some of the most vulnerable persons in recent years, but it

²⁶ Of interest is that some of these countries are considered 'safe' only for males, contributing in this sense to the concept of justice as 'mutual recognition'.

does so in terms of nationalities. Nationalities eligible for relocation are considered on the basis of previous recognition rates, which may in them be biased by the reality of the time. Also, such selection upon nationality concretely eliminates the possibility for persons of the 'wrong' nationalities to be considered in 'clear need of international protection'. A further idea subsumed in relocation is that 'an applicant does not have the right under EU law to choose the Member State responsible for his or her application' and that it is not the right of persons to be relocated to decide their state of relocation (while Member States may express a preference for applicants to be relocated on the basis of language, cultural and social ties or demonstrated family likely to positively contribute to integration) (Council 2015b, 5). This raises a paradox: while EU citizens become more 'European', persons in need of protection become more 'nationalized' (Menéndez 2016). A similar assessment can be made for the 'hotspot', where the mixed purposes of the approach creates a threefold partition whereby vulnerabilities are differently assessed and where rights are automatically reduced for those persons ticking the wrong box. Again, while the system reiterates 'individual examination', the pre-selection operated fails to conform to a definition of mutual recognition.

A final consideration on return and on the external dimension is in order. The recent urgency attached to increase the rate of returns and to make them quicker does not score positively on 'mutual recognition': both criteria may underestimate exigencies especially of those persons residing in the states with whom the EU has recently urged to create return and readmission agreements (African countries) (European Commission 2015f, 10). However, it is fair to point out that the EU has always given precedence to the concept of 'voluntary' return, which indeed recognizes the role of migrants as active actors in the process. Besides, while self-interested, the idea of 'reintegration' is also an effort at recognizing the specific exigencies of migrants that, when returned, need an environment which provides for their exigencies in a sustainable way. In a similar way, the 'brain drain' phenomena considered in Mobility Partnership and Circular Migration underlines the necessity of the proper reintegration of migrants, that is, the full exploitation of migrants' acquired competences and of an environment which duly answered the migrants' exigencies.

Chapter 4

National case studies: Terms, definitions and concepts on migration

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Italy and migration

Italy's approach to migration is again under the spotlight as it has been in past times. It was then confronted with massive amounts of people fleeing their countries and aiming at the EU. Migration is part of Italy's history, though not in the same vein as for other European countries. When countries such as Germany, UK or France were engaged with 'Gastarbeiter' and naturalizing former colonies' citizens, Italy was still largely an emigration country. The progressive shift into an immigration country has been recent. The *Testo Unico*, the key document on migration, was issued in 1998 at the end of a decade when Italy experienced massive inflows of asylum seekers (richiedenti asilo/'profughi') from the former Yugoslavia Republic. Surprisingly, the document only scarcely addressed asylum matters, which instead found

²⁷ This chapter directly draws from longer papers elaborated by researchers working on national case studies: Melegh, Vancsó, Mendly, Hunyadi and Vadasi (Hungary), Corvinus University of Budapest; Karimanidou (Greece), Glasgow Caledonian University; Olsen (Norway), ARENA, University of Oslo; Ceccorulli (Italy) and Grappi (France), University of Bologna; Zotti (United Kingdom and Germany), University of Bologna and Catholic University of Milan.

proper treatment more recently with the transposition of European Regulations and Directives. This legislative void is all the more puzzling if one considers that the right of asylum has been fully ingrained in the Italian Constitution as follow:

The Italian juridical system conforms to the norms generally recognized by the international law; The juridical situation of the foreigner is regulated by the law in conformity with norms and international treaties; The foreigner to whom the effective exercise of the democratic freedoms granted by the Italian Constitution is impeded in his country, has the right of asylum in the Republic, according to the conditions established by the law; Extradition of the foreigner for political crimes is not permitted.

(Costituzione della Repubblica Italiana 1947, art. 10)

The timid approach toward asylum has sometimes been accompanied by an assertive approach in the realm of migration, especially as a consequence of more or less artificial 'emergencies' that, albeit not reported in the legislation, have informed important approaches to migration. The 'Bossi-Fini' law of 2002, as maintained by some of its critics, followed a specific philosophy, strongly characterized by the restriction of many rights, from entrance to defence against expulsion, and decisions on asylum matters, running contrary to Article 13 of the Constitution (Zorzella 2002). Similarly, Law Decree 160/2008 has tried to redirect migration policy in unquestionable restrictive terms, by restricting, for example, family reunification opportunities, both with reference to family members and to the economic capacity needed to exercise such right (Pastore 2008). Hence, in the period 2008-2011, the general approach was to associate migration to the preservation of 'public security' (Renoldi e Savio 2008; Zorzella 2011), with a strongly controversial legislative output, (Law n°94 of 2009), establishing the crime of illegal entrance and permanence in the territory of the Republic (Savio 2009). Hence, 'Irregularity', became a crime (Peprino 2009).

Terms, definitions and concepts: the peculiarities of the Italian case

Even though aimed at regulating migration, the term 'migrant', appears very infrequently in the *Testo Unico*: the most used word is in fact 'foreign/alien' (*straniero*). When the term 'migration' is employed, it is done so in order to assume a specific connotation, such as in the case of 'clandestine immigration' and 'extra-communitarian immigration'.

These are terms which progressively became part of the national jargon on migration to describe respectively irregular immigration and the inflow of persons from outside the then European Community, even though in the public debate, this term often overlaps with an understanding of the EU that predates the 2004 enlargement. While deeply employed in the law and by commentators, the term 'clandestine immigration' has increasingly taken on a negative connotation to refer in particular to the 'illegality' surrounding undocumented migrants entering Italy. Today, the term is scantily used, and essentially only by anti-immigration positions.

In the same vein as the EU's legislation and the legislation of EU's Member States, the term 'asylum seeker' is generally not used, opting for a more neutral 'applicant'. 'International protection' has substituted the restricted reference to 'asylum' to encompass different categories of protection defined by the EU, but also specific to the Italian case (humanitarian protection).

Other terms employed (often for the first time) by the Italian legislation have raised great debate and criticisms by commentators, while allowing an increasingly frequent recourse to the different Courts of the Italian system, both for interpretative and legitimacy purposes. That was the case, for example, with the introduction of Temporary Permanence Centers (Centri di Permanenza Temporanea) for the first time in 1998. The introduction of the centres was motivated by the necessity to better manage expulsions and to conform with other European states, where these centres were already operative (Nascimbene 2001; Einaudi 2007; Di Martino 2014). The centres raised a major debate on the logic and legitimacy of 'administrative detention' (detenzione amministrativa). It is worth to remember that the European Convention on Human Rights envisages the possibility to deprive the liberty of the individual in case of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition' (Art. 5, C.1,f).

The main controversy over the concept was that it allowed for the detention ('trattenimento') of persons even in the absence of a penal crime. The concept implied the restriction of the personal liberty of migrants, and it assumed a peculiar emphasis in Italy as it was in clear contrast with the Constitution (Art.13) (Savio 2015; Caputo 2000), which recites that 'no form of detention, inspection, search nor other

restriction to personal freedom is allowed if not as a consequence of an act motivated by the judiciary authority and only in the cases and the modalities foreseen by the law'. Throughout time, though, these restrictions have been intended as key tools of the migration policy both by their supporters and promoters, as well as by their critics. This has been heightened when even more restrictive understandings of the term have been adopted by centre-right coalitions in 2002 and 2009, and when the possibility of 'holding' persons in open (but also closed) centres has been contemplated for asylum seekers. At the time of writing, and as a result of the increasing security threats to the EU, the Centres for identification and Expulsion have been upgraded anew as key instruments; something which inevitably puts the emphasis on other terms, such as 'detention', 'expulsion', and 'irregular immigration', and seems to re-propose a 'migration-security' nexus.

The word 'centres' is extremely controversial in Italy, as it recalls the idea of people to be kept in specific places and separated from the rest of the community. Along the same lines, it is to be noticed that there is a tension between the concepts of 'trattenimento' and 'accoglienza' as referred to asylum seekers: the Italian legislator has marked a difference between persons in CIE (close structures) and persons in other centres (CARA). As a matter of fact, 'accoglienza' has a slightly less aseptic and more positive flavour than 'reception', the English word used with respect to asylum seekers.

Another concept particularly debated has been that of expulsion, which in the Italian legislation has been articulated in three different terms: push-back ('respingimento'); expulsion with accompaniment to the frontier ('espulsione con accompagnamento alla frontiera'); and administrative expulsion ('espulsione amministrativa'), causing interpretative and practical confusion. The use of these specific terms by the legislator, and the emphasis on coercion, run contrary to a European approach who has firstly prioritized the 'voluntary' character of return. Also, commentators have underlined that insistence on these concepts has been mainly an attempt at emphasizing a specific approach to the handling of migration: a punitive one rather than a regulative one (Casadonte and Di Bari 2002).

The concepts of 'residence contract', 'integration agreement', 'humanitarian protection', and 'humanitarian corridors' are also peculiar to the Italian case, and are discussed below. In fact, the section rests on a

preliminary evaluation of possible dimensions of justice. The term 'compact' ('migration compact') is also worth mentioning, proposed by Italy as a 'new approach' to handle relations with third countries on migration, – a concept that has been endorsed by the European Union discussing the New 'Partnership Frameworks' with third countries as 'Compacts'.

Observations on the three understandings of justice from the Italian case

Justice as non-domination

While it is difficult at this stage to envisage acts of 'domination' embodied in the terms and concepts of the Italian legislation, some elements are worth considering.

For example, by linking the amount of quotas for workers to cooperation on the fight against 'clandestine immigration' and on the effective readmission of irregular nationals, Italy has somehow exerted its influence on relations with specific countries through the concept of 'decreto flussi' ('flow decree'). Thus, Italy has discriminated between countries by privileging those with whom effective cooperation on migration management was at play.

While the concept of domination (non-domination) is likely to apply mostly in relations with third countries (of origin and transit), it is worth noticing how the concept of 'hotspot' has been perceived as 'imposed' in the Italian landscape as a measure to ensure the proper fingerprinting of all migrants, while not taking in due account the fact that most of the migrants arriving in Italy were not eligible for relocation. Furthermore, the strict number of nationalities intrinsic to 'relocation' will mean that these migrants will leave Italy, even though these are the most complex cases (Di Filippo 2015, 40). Hence, the introduction of the concept of 'hotspot' in the Italian jargon may suggest a case of 'domination' from other Member States.

Justice as impartiality

In principle, the law should presuppose 'impartiality' (non-discrimination, also with reference to third citizens) as its *raison d'être*. However, traces of 'discrimination' are present in the Italian case. Mainly, these traces are embedded in the rights and obligations attached to specific categories of migrants. The same categorization effort does not only serve regulative purposes: additionally, it marks differences be-

tween individuals in terms of their status as rightful claimants of justice. Thus, while respect for fundamental human rights cannot be questioned and should apply to all migrants (*non-refoulement*, right of asylum, right of family life for example), these rights may sometimes be restricted for certain categories of migrants.

A first observation regarding the Italian case is that, in a similar way as in the case of the EU's legislation, permanence and the prospect for a stable or permanent residence in the territory of the Republic allows the granting of more rights. Also, the 'regular' residence of migrants is the precondition for sharing the same civil rights as Italian citizens. This is not to say that regular migrants' rights perfectly match those of Italians, rather that irregularity is a rightless condition (aside from basic human rights such as emergency medical treatment), and that a rightless condition in no way can lead to the prospect of integration into the Italian society and system.

That said, the 'decreto flussi' – the only regular access into the Republic – is in itself discriminatory as it provides the idea that only a certain number of persons is allowed entrance, and that these persons are 'selected' among others. Indeed, there is only limited space left in this concept for an assertive role of migrants as bearer of specific claims (see below on mutual recognition). While it is assessed that regular migrants enjoy more rights than irregular ones, some specifications are worth mentioning as they also are subject to discrimination. First, in the case of specific jobs, preference is given to Italian citizens and those of the European Union. Second, 'the residence contract' introduced by the Bossi-Fini law for dependent workers (but not for EU long-term residents) is a precondition for the issuing of the residence permit, and puts workers in a subjugated position with respect to their employer. Contrary to what the meaning of the word may suggest, 'contract' in fact denotes a term devoid of reciprocity, assuming domination traits (see mutual recognition below) (Zorzella 2011).

While providing a minimum and basic understanding of family members eligible for family reunification, the EU leaves space to Member States for optional positive interpretations. Many commentators have noticed that in Italy, family reunification has been progressively restricted from its initial provision in 1998. In particular due to the Bossi-Fini law and the Law decree 166/2008 leading to a pejorative situation

with respect to other Member States and the *de facto* closure of possible regular access into the Italian territory (Zorzella 2002; Pastore 2008).

Beyond creating confusion, the proliferation in Italy of 'labels' for different centres (CDA, CARA, CIE, hotspot) has opened up space for 'discriminatory' attitudes, as the creation of these centres leads to the establishment of 'a special right for foreigners' (Caputo 2000, 52). As evidenced by Marchetti, asylum seekers collected in different centres 'are divided in groups with different rights and opportunities' (2015, 167), even when the asylum seekers had the same juridical status. The lack of a clear juridical nature for the hotspots seems also to have an impact for rights claim.

On the positive, with respect to the legislation of other Member States, the Italian Republic has tried to approximate the rights shared by persons entitled to refugee status and those entitled of the status of subsidiary protection (5 years is the duration of the residence permit in both cases, topping the rank set by the EU). However, subsidiary protection is still characterized by some restrictions. Also, while humanitarian protection is specific to Italy and is substantiated by the same Italian Constitution, the related residence permit only lasts two years and rights cannot be compared to the other forms of protection (for example, family reunification is not a possibility). As observable from statistics, amid a high degree of rejection of applications for the refugee and subsidiary protection status, the trend has brought with it a greater release of humanitarian protection residence permits.

Finally, the 'right of information' has been particularly underlined in the Italian legislation (also for migrants in CIE), something which complies both with an understanding of justice as 'impartiality' and 'mutual recognition', given that rights as well as obligations deriving from their specific status should be known by every migrant, and given that in principle all migrants (even those in CIE) are informed of their right to apply for international protection, something which may satisfy self-perception criteria. The hotspot approach, though, has been accused of denying migrants this fundamental right by not properly informing them on the possibility to apply for international protection (Zorzella 2015; Morandi and Schiavone 2015).

Justice as mutual recognition

The hotspot 'system', 'area', and 'approach' as it has been invariably labelled (suggesting possible interpretations this term may assume), opens more avenues for evaluation with respect to this third concept of justice. On the one hand, by automatically selecting people in clear need of international protection, it seems to recognize the particularly vulnerable situation of some migrants (Syrians, Eritreans and Iraqis) arrived in the last years in Italy, fleeing from wars and conflicts. On the other hand, this approach based on 'nationality', may side-line or postpone the concerns of other possible groups which equally perceive themselves as in need of protection. This consideration, indeed, is extendible to the EU more at large.

Certainly, the Italian legislation is not devoid of terms which entail 'mutual recognition' of migrants. Vulnerable persons are particularly given attention to (important is the recent introduction of victims of trafficking, genital mutilation, persons affected by serious illness, or mental disorders among the list of vulnerable persons (AIDA 2015)). According to the EU legislation, minors and unaccompanied minors (whose detention is prohibited in Italy) are particularly protected categories and their voices have to be taken into account (although in the case of unaccompanied minors Italy still lacks an organic law, which is currently under discussion). Reference to gender has also increased. The concept of 'corridoi umanitari' ('human corridors') is seemingly implying a peculiar attention to the needs of specific vulnerable persons. Humanitarian residence permits refer to specific categories of persons not included in the EU 'international protection' understanding. They are a further attempt to recognize the needs of these migrants, and are released without proper identification documents, documents ascertaining sustenance capabilities, accommodation or sufficient means to return to the origin country (Bonetti 2008) and can be conceded in the absence of a formal request for international protection. Seemingly, the SPRAR system for asylum seekers (the 'second reception tier') has been believed to offer specific attention to the different needs of its hosts (even though, the refugee crisis has seen a large recourse to emergency structures (CAS), that by definition entail emergency measures which cannot take into account the singular exigencies of the persons present in the structures) (see Morandi and Schiavone 2015). Moreover, social protection and emersion programmes are peculiar measures of the Italian case, recognizing the specific needs of

certain migrants, such as victims of trafficking and violence. In particular, a victim does not only obtain a special residence permit, but has also access to emersion programmes (Giammarino 2000, 54).

Finally, the concept of 'integration' is conceived to specifically take into account individuals' peculiarities and identities – in particular to be cherished and promoted in the education system. However, this latter impression seems to be contradicted by another concept, namely that of 'integration agreement'. If in principle the words 'agreement' and 'integration' denote mutual reciprocity and consent (Zorzella 2011), they may in reality, as drafted by the Legislator, look like as an act of 'domination' (or not recognition) of the migrants' identity and peculiarities alongside an act of 'discrimination' (see the second concept of justice above) if one considers that the same agreement is not requested for the Italian citizens (Cuttitta 2016).

France and migration

As Gérard Noiriel explains, the 'immigrant' is in France a 'republican invention'. It was not until the Third Republic that the concept started to circulate as part of the effort to govern a mobile working population (Noiriel 1988). After the end of the colonial empire, and most remarkably after the independence of Algeria, France had to face the presence of millions of foreigners from the former colonies. The high mobility with these countries gradually introduced a separation between workers, students and trainees, and then linked family reunification to housing and other requirements (Sayad and Gilette 1984). Even after the independence of former colonies, the condition of particular national groups with historical links to France continued to be regulated with specific provisions, which partially waive from the general rule. This experience worked as a precedent for the future laws dealing with migration.

The colonial past resulted also in a geographical stratification between 'metropolitan France' (part of the Schengen space) and the five 'overseas departments' part of the European Union (Guadelupe, Martinique, Guyane, La Réunion and Mayotte), plus other territories included in the Republic. The law on immigration currently in force (CESEDA) considers France as the ensemble of 'metropolitan France', Saint-Pierre-et-Miquelon, Saint-Barthélemy and Saint-Martin (Art. L111-3).

The crisis of the early 1970s marked the beginning of an approach where the release of a permit to stay is strictly related to a labour contract, and the process of regularisation becomes more difficult. By the end of the decade immigration became a major political issue for social and political reasons and the period marked the rise of a new discourse and legislative activism based on the need to control ('maitriser') the fluxes of migrants. During the 1980s, more than 15 laws, dozens of decrees, and more than 200 circulars were emitted – a trend that continued in the 1990s with annual interventions that increased the normative cacophony on immigration. In the same period, the debate polarized around the support for migrants' rights and their right to stay through the regularisation of the 'undocumented' ('sans-papier'), and the effort to fight 'clandestine immigration'. The alternation in government marked several shifts towards the first or the second position until the introduction of more draconian conditions that made it harsher to be a regular migrant in France and acquire nationality through the so-called *loi Pasqua-Debré* (1986, 1993 and 1997).

The general attitude towards migrants shifted between 'integration' and 'assimilation', reflected in the restriction of the *jus soli* from a semi-automatic procedure to something that must be activated and requires formal obligations, floating between the call for more strictness and more humanity. But it is only behind this opposition that we can see an emerging rationality, linking migration to the economic and demographic needs of the country: an utilitarian vision that in the following years would produce a tension between the search of a comprehensive framework to regulate migration, and the adoption of a 'case by case' approach. This tension cuts across the distinction between regular and irregular migration, leading to a growing precarisation of the regular stay. Even when it came to asylum policy, the increase in the number of demands has been coupled with a decrease in the rate of admissions during the period 1970-2000, from 90 per cent to less than 20 per cent (Cornuau and Duzenat, 2008). Behind the declarations, the practical orientation of the state has been a restraint of the conditions for the admissibility and the acceptance of the demand – including the use of subsidiary protection, introduced in 2003 – as a way to recognize the menace to individual freedom, while at the same time recognising lower rights than the refugee status.

The rise of Nicholas Sarkozy as the Minister of the Interior in 2002 and then as President of the Republic in 2007, can be seen both as a turning

point and as a formalization of a tendency already in place. The discourse on the 'chosen immigration' ('immigration choisie') openly affirmed the right of France to decide whom to accept inside its territory, and the goal of increasing a qualified economic migration over familial migration, representing the vast majority of new permits. More recently, a number of reforms have been introduced, following what the Ministry of the Interior defines as 'clear, republican and consensual' principles: namely the improvement of reception of the regular immigrants; the attraction of talents and high qualified foreigners; and the strengthening of the contrast to irregular migration. On the other hand, new incriminations have been introduced for the foreigner who refuses the collection of fingerprints or escapes from a detention centre. In 2004 the adoption of the Code of entry and residence of foreigners and the right to asylum - or CESEDA (Code de l'entrée et du séjour des étrangers et du droit d'asile) - systematized the different laws and provisions in the field into a single text. The CESEDA was lastly reformed in the sections regarding asylum on 23 July 2015, and in the sections relating to the entry and rights of foreigners on 7 March, 2016. Even if the reforms were partly intended to contrast the precarisation of the stay through the generalization of the multiannual permit (*carte pluriannuelle*), this is not likely to happen due to harsher conditions and a stricter control (Gisti et. Al. 2017).

Terms, definitions and concepts: peculiarities of the French case

Recent statistics set the number of foreigners in France up to 4 million and the number of immigrants up to 7.5 million (Bouvier and Coirier 2016). This distinction between the immigrant ('immigré') and the foreigner ('étranger') largely depends on the historic mobility of the people from the former colonies. 'Immigrant' is a concept primarily related to the country of origin of the person and not their actual legal status in France, and is defined as 'a person born foreigner abroad and resident in France'. The concept of 'foreigner' ('étranger') is, on the contrary, referred to the present nationality and legal status of a person. As defined by CESEDA, art. L111-1, the foreigners are 'the people without French nationality, either if they have a foreign nationality or if they don't have a nationality'. Following the law, if a person has multiple nationalities, including the French nationality, he/she is considered as French in France.

Consequently, the CESEDA never refers to 'immigrant', but only to 'foreigners' and widely uses the word 'ressortissant', literally describing a foreign citizen out of his or her own country. The distinction between 'étranger' and 'ressortissant' is relevant as not all foreigners are 'ressortissant', as in the case of the stateless people. The same law refers to 'immigration' in two ways: (i) when it mentions the name of the institutions dealing with the process, and (ii) when mentioning the 'irregular immigration' ('immigration irrégulière'). When dealing with the people without papers, the concept of 'irregularity' is used in reference to a 'situation' ('situation'), such as 'the foreigners in irregular situation' (art. L111-10). The law never uses the word 'clandestine', which is by the way used by branches of the state to describe actions against 'clandestine immigration'. The law uses instead the word 'migrant' when referring to the activity of facilitating the irregular entry and stay in the country: such as the 'illicit traffic of migrants' ('trafic illicite de migrants'); the projects of co-development ('codéveloppement des migrants'); or the help to migrants ('aide aux migrants') (arts. L622-1, L900-1 and L316-1).

The rationale behind the use of 'irregular migration' was explained in 1998 by the commission of enquiry of the French Senate, Masson Balarello, on the issue of regularisation. The commission pointed out that the use of the term 'irregular migration' contradicted the idea – implicit in the term 'sans-papiers' (without papers) used by the growing movement pushing for a mass regularisation of migrants – 'that the concerned persons are 'victims', somehow deprived of a right from the administration, while it concerns foreigners staying irregularly in France' (Masson and Balarello 1998).

Generally speaking, a 'foreigner' is a person who lacks a basic right recognised to French citizens: the right to enter and stay without conditions in France. A foreigner regularly staying in France has the same rights as a French citizen with some exceptions: only the citizens of a EU Member State have the political rights, and only in the local and European elections; only the citizens of a European Union Member State, Norway, Iceland, Lichtenstein, Andorra, Monaco, and Switzerland have access to job positions in the public administration (excluded the so called 'sovereign positions' such as diplomacy, defence etc.); the non EU citizens can access the public administration only for jobs in the field of research and education; social benefits such as health insurance, maternity leave and the likes are recognised depending on the

working position. A foreigner can participate in the social life, including being elected as union representative, but they cannot be elected as members of the 'conseils des prud'hommes', a form of arbitration.

On the side of international protection, two main categories exist in France: the status of refugee and the status of subsidiary protection. The sources of the definition of refugees and recipients of protection are basically three: the French Constitution; the Geneva Convention of 1951; and the UNHCR, while the normative framework is included in the book VII of the CESEDA. The term 'subsidiary' means that this form of protection is recognised only after the evaluation of the criteria, in order to be acknowledged as a refugee. A third category, that does not directly imply a form of protection, but must be included in the picture, is that of 'stateless person'.

The Art. L711-1 of CESEDA states that the quality of refugee 'is recognised to all persons prosecuted in reason of their action in favour of liberty', following the definition of the French constitution, as well as to 'all persons under the mandate of the High Commission of the United Nations for the refugees, art. 6 and 7 of his statute as adopted by the General Assembly of the United Nations the 14 of December 1950', and the persons 'who correspond to the definitions included in the first article of the Geneva convention on the status of refugees of 28 July, 1951'. All these three categories are recipients of the dispositions 'applicable to refugees as for the Geneva convention'. The article L711-2 specifies that the 'reasons of prosecution' are evaluated following the conditions included in the directive 2011/95/UE 13 December 2011, concerning the conditions under which a foreign citizen or a stateless person can be a recipient of international protection. It also specifies that the aspects in relation to gender and sexual orientation are taken into account for definition of social groups; that there must be a direct link between the reasons of persecution and specific acts or the lack of protection; and that it makes no difference if the subjects own the characteristics that motivate the acts of persecution, or these are an assumption of the perpetrator.

The CESEDA describes the conditions to obtain a permit for 'vie privée et familiale' in different articles (see sub-section 6, Arts. L313-11 et seq), considering the family as the nuclear family: namely the couple - including both marriage, cohabiting and the union through PACS (*Pact*

civil de solidarité, a civil union which provides also for the same sex unions) – a relation between a parent and their sons.

Observations on the three understandings of justice from the French case

Justice as non-domination

France is a powerful funding member of the EU and it is safe to say that its relation with the communitarian decision is performed in full autonomy. The compliance of France with the EU regulation comes together with the process of joint elaboration of these rules. The fact that France's borders are mainly internal to the Schengen space keeps the state relatively distant from the main point of crisis of the last years. Nevertheless, the situation in Calais, where a bottleneck is created to stop migrants who wants to reach UK, and in Ventimiglia, where a similar bottleneck is created on the Italian side of the border to stop migrants who want to reach France, reveal how the distinction between external and internal borders in the EU is somehow misleading. If we consider the relocation system developed by the EU, France formally committed itself to receiving its quota, but the slow implementation of the whole project is making this commitment too difficult to assess.

On the other hand, France has historical and more recent bilateral relations with many third countries. An overview of the agreements signed with these countries reveals a more complex situation. Here we can note that the rise of a discourse based on co-development has produced a situation where the political and the economic advantage of France towards the concerned third countries is used as a leverage to impose France's own priorities. In particular, France has used this advantage to control irregular migration and govern mobility in a more efficient manner for its economic system. This point is particularly evident in the way bilateral agreements make development aids and the possibility to include avenues for workers of a specific country contingent upon the commitment to readmit expelled migrants and to strengthen the control over irregular migration (Panizzon 2013).

This sheds light on the fact that the relation of domination or no-domination between countries is grounded in a mutual relation of domination between these countries and the mobile population.

Justice as impartiality

France has strong commitments to international law, affirmed in the CESEDA and in all the procedures regarding migration and asylum. The observations and limits concerning the international regime of protection of migrants and asylum seekers can thus be applied to France. Nevertheless, at least two dimensions point out a relevant specific position by France; namely, the definition of the list of labour shortages, and the list of 'safe countries' compiled by OFPRA (Office for the Protection of Refugees and Stateless Persons). The definition of labour shortages responds to the priorities adopted by the EU's strategy to promote growth and employment within the context of the Europe 2020 strategy. The very reforms towards the 'chosen immigration' can be considered as part of the effort by France as a Member State to attract talent and skills 'with a sectorial approach to legal migration and flexible admission mechanisms which respond to each State's priorities' (EMN 2015: 8). Following these needs, the possibility for a foreigner to get a work permit in France depends upon two conditions: first, the definition of the specific occupations open depending on his nationality and, second, the employment situation criterion. In terms of justice, it is difficult to connect this kind of procedure with a cosmopolitan idea and even less with 'impartiality', unless we define 'impartiality' as a technical parameter for the efficiency of the labour market.

The definition of 'safe countries' opens up a different set of problems. In fact, it opposes the principle of 'impartiality' as it imposes the national identity before any other consideration of the individual condition or danger of the concerned foreigner, allowing for speed rejection of the demand of asylum. The national list of 'safe countries', first introduced with the reform of 2003, first released in 2005 and lastly amended in 2015, has been criticised for accumulating on the EU lists following considerations that are difficult to discern. It is possible to note a certain correspondence between the list of 'safe countries' and some of the major sources of application in recent years, such as Kosovo and Albania. The number of included countries - 16 - may seem both too low and too high. In any case, it is difficult to relate this list with some form of generally applicable impartiality.

Justice as mutual recognition

The French state has progressively introduced normative instruments to insure the integration of foreign nationals into the value system of

the 'République'. The 'Contract d'intégration républicaine' (CIR, introduced with the reform of CESEDA of 24 July 2006, in substitution of the 'Contract d'accueil et intégration') includes the obligation for the applicant not only to comply with the French law, but also 'to respect the key values of French society and Republic'. In order to explain this passage of CIR, the French ministry of the Interior has drafted a document titled 'Living in France'. The document starts with the explanation of the 'key values of French Society and Republic' and states that 'France is synonymous with fundamental values to which the French are very attached' and that 'living in France means having rights as well as obligations' (General Directorate for Foreign Nationals in France 2016, 5). Independently from the values enlisted in this document, the mere existence of CIR should be understood as a lack of mutual recognition as it reflects a solution to the long debate over multiculturalism in the name of the supremacy of the 'République'.

A second and more general tension regarding mutual recognition is present concerning the fact that migrants are always considered as subject of a state. As the discourse on the 'chosen immigration' clearly shows, the main focus of the French policy on migration is to affirm this field as a state prerogative and interest. Even the compliance with international obligations comes as an indirect consequence of the French state engagement with the international community and its membership in the European Union. What is clear is that the French state, as a sovereign state, recognises the claim by foreign individuals of moving and living in its own territory only as a specific segment of labour force or a specific class of vulnerable people. This implies strong consequences for the European migration system, as it rests in a middle ground between being rooted in nation states and a supranational political formation. While the European Union seems to replicate the logic of nation states when it comes to migration at a different scale, critics such as the French philosopher Etienne Balibar suggested that Europe, as a hybrid entity, should open new paths for justice that are not rooted in the political logic of sovereignty (Balibar 2001; 2016).

Germany and migration

For decades, German policymakers and public dialogue perpetuated the perception that Germany was not a country of immigration, even as it was becoming one of the world's top destinations (second only to the United States in recent years). Since the early 2000s, Germany has undergone a profound policy shift toward recognizing its status and

becoming a country that emphasizes the integration of newcomers and the recruitment of skilled labour migrants. This approach to immigration and immigrants has been tested, however, amid the massive humanitarian inflows that began in 2015, which have stoked heated debate.

The current conceptual paradigm underlying the legal and institutional framework of the national migration system is the one that emerged in the early 2000s, when Germany suited up to embrace – despite reluctances, enduring inconsistencies and ongoing debates – its new identity as a country of immigration and integration. The country's previous self-depiction was one that denied immigration and integration as part of its identity, despite the millions of *Gastarbeiter*, mostly unskilled labourers from Italy, Turkey, Spain, and Greece, that arrived in the economic boom years between 1955 and 1973. The 1970s economic slowdown as well as the partially unexpected inflow of asylum seekers in the 80s and ethnic Germans in the 90s are the main reasons of this stance.

Terms, definitions and concepts: the peculiarities of the German case

The complexity of German authorities' approach to migration is reflected in the diverse range of only partially overlapping, if not potentially contrasting, concepts to be found in official sources – a complexity that is only enhanced by a public debate not always able or willing to keep up with subtleties. For instance, *Migration* and *Migranten* are essentially socio-scientific notions rather than technical terms pertaining to the German *Aufenthaltsrecht* (residence law), yet they occur in legal sources quite frequently, also as an effect of German policymakers' participation in wider debates aimed at defining notions and targeting vested biases recurring in common and specialist parlance (Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration 2014; Senge 2015; European Commission 2012). More relevant, although not specifically defined in legal terms, is the concept of *Zuwanderung* – translated in the EMN-glossary as migration – which refers to the actual flow of people entering the country from abroad. The legal use of the term – after which the immigration law currently in force (*Zuwanderungsgesetz*) is named – is relevant because it implies

the legal distinction between regular and irregular entry in the country.²⁸ More specifically, *Zuwanderung* entails the authoritative regulation of the movement of people leaving their homeland (*Heimat*) through the enforcement of entry requirements – that is, the active governmental management of a policy issue. This notion therefore differs from the ostensibly ‘neutral’ notion of migration – although even the scientific term *Migranten* can come to unwarrantedly singling out ‘special groups’, such as poor families with non-German backgrounds in need of social assistance. The use of the concept of *Einwanderung* – the willing relocation of people moving to a foreign country in need of additional population for demographic, economic, cultural or any other kind of reasons (Germany as *Einwanderungsland*) is highly indicative of the underlying political conflict over the Germany’s general stance toward migration.

Though virtually irrelevant in lexical terms, the linguistic difference between *Zuwanderung* – implicitly referring to unwanted and uncontrolled entry and the governance thereof – and *Einwanderung* – which entails permanent establishment and social integration – has been a crucial point of the debate over a new immigration act in Germany since the choice of either term would elicit a completely different perspective on the matter at issue. Oddly enough, the EMN translates *Einwanderung* as irregular immigration (European Commission 2012). However, the very difference between insiders/citizens and outsiders/aliens is to some extent strained by categories like that of *Spätaussiedler* (repatriated ethnic Germans) – German nationals (*Volkszugehörige*) from the successor states of the former Soviet Union and other Eastern European states, who have established their stay permanently in Germany by means of a special admission procedure. *Spätaussiedler*’s special entitlement to naturalization (*Einbürgerung*) emphasizes even more Germany’s conditional and differentiated approach to citizenship as a means to integration. The meaning of *Volkszugehörige* has been adapted several times, especially with regard to the importance of German linguistic proficiency. The language tests carried out since 1996 required the acquisition of German language skills through family mediation. Since 2013, knowledge acquired elsewhere has also been allowed, which has led to a growth in the circle of poten-

²⁸ The term *erlaubt* (allowed) is also used. Referring to resolution 1509 (2006) of the Parliamentary Assembly of the Council of Europe, the term ‘illegal’ is preferred when referring to a status or process, whereas the term ‘irregular’ is preferred when referring to a person (Council 2006)

tial returnees. The German Constitution, Art. 116, also refer to *Statusdeutscher* (As-if-German) or German without German citizenship, i.e. refugees or expellees of German nationality or as their spouse or descendant in the territory of the German Reich according to the situation of 31 December 1937. Moreover, the *Bundesvertriebenengesetzes* granted special rights to the exiled and refugees in order to favour the naturalization of Jews who had to flee during the Third Reich's rule or had been left outside of the post-WWII German national borders.

Unsurprisingly, over the last few years, asylum policy and legislation have also been at the centre of intense public debates, often fuelled by more or less genuine conceptual misunderstandings. To this regard, the notion of *Wirtschaftsflüchtlinge* (economic refugee) is notable. This category includes anybody who enters the country irregularly and then applies as asylum seekers, although their motivation is to improve their living conditions, and not to escape persecution in their country of origin. The concept's negative connotation, as well as the openly unwarranted bridging of the distinction between migration and asylum, express quite effectively the tensions agitating the German society and a certain intolerance of nuances. Among the sources of disagreement and misperceptions is the variance of the legal grounds for the status of refugee (*Flüchtlinge*) can be granted to asylum seekers (*Asylbewerber*, *Asylsuchende*, the term *Asylant* is also in use, mostly with a derogatory connotation). Apart from the international instruments the country is signatory to, protection of the right to asylum in Germany is also guaranteed by the Constitution (Deutsche Bundestag 1949, 16a), although concretely the latter plays a subordinate role compared to the safeguard granted through the Geneva Convention (every year, only one to two per cent of asylum seekers receive protection based on the Constitution).

Moreover, the Federal Office for Migration and Refugees (BAMF), the Ministry of the Interior's agency in charge of asylum procedures, also

assesses whether applicants meet the requirements for subsidiary protection²⁹ and temporary suspensions of deportations³⁰, or because their repatriation is technically impossible, but are eventually going to have to leave the country. Failed asylum seekers (*abgelehnte Asylbewerber*) – with no claim to any form of protection and no pending appeal – are requested to leave Germany within a week if the application is rejected because manifestly unfounded or immaterial, 30 day in all other cases. A failure to comply normally results in deportation (*Abschiebung*). This is therefore legally different from the notion of *Zurückweisung* (rejection at the border) – which correspond to border control practices executed in places (basically airports) that are conceived as lying virtually outside of the German territory – since, in this case, the incoming alien does not even come to the asylum application. This is also part of the crackdown on asylum seekers and migration launched by the government in 2016, at least in part as an effect of the widespread reprisal against the alleged ‘loss of control’ of the country’s borders. If a deportation order is not immediately enforceable, detention pending deportation (*Abschiebungsgewahrsam*) of asylum seekers is legally possible. *Land*-level authorities – the states foreigners’ registration offices (*Ausländerbehörden*) and administrative courts are in charge of deportations and actual repatriations (as well as the issuing or withholding of residence permits and inspections enforcement).

Observations on the three understandings of justice from the German case

Justice as non-domination

As it can be argued, the compliance of migration-related concepts and norms with a notion of justice as ‘inter-governmental fairness’ is troubled by Germany’s somewhat ambivalent foreign policy identity. The foreign policy identity has been wavering more and more conspicuously between a post-World World II repute as a non-threatening, highly reliable partner on the one hand and the (domestic as well as

²⁹ The protection afforded to a third-country national or to a stateless person who does not fulfil the conditions for recognition as a refugee but who has provided sound grounds for the assumption that returning to her/his country of origin or, in the case of a stateless person, to the country of her/his previous habitual residence would in fact be liable to cause serious harm according to Article 15, and that Articles 17(1) and (2) is not applicable and that s(he) cannot benefit from the protection of that country.

³⁰ *Duldung*, literally ‘toleration’, is not a residence title; those who are granted one (*Geduldete*) are tolerated for international or humanitarian reasons or for the protection of the interests of the Federal Republic of Germany (§ 60a (1) Aufenthaltsgesetz).

international) expectations of a more assertive role, better suited to the country's interests, capabilities and status on the other. This inherent tension manifests itself most clearly within the European Union, where a balance between formal equality with fellow Member States and the country's *de facto* leading role seems increasingly hard to strike.

As far as formal definitions and policy instruments are concerned, the very preference for the *Zuvanderung* concept can be regarded as conducive to domination outcomes, inasmuch as it involves the supremacy of domestic public authorities managing immigrants through more or less strict governmental strategies, while also indirectly – but deliberately – influencing their relative home countries. What seems to be implied here is a unilateral exertion of pressure at the expenses of the mutual relationship inherent in a notion that emphasizes long-term integration rather than an effective response to an emergency. As for intra-EU relations, possible evidence of dominance may be found in the German government's inherently unfair demand that the countries lying along the Union's external borders act strictly in accordance with the terms of the Dublin III System – that is, that they bear the brunt of the migration wave, with virtually no extra support from other Member States. On the other hand, the unilateral suspension of the Dublin III System in September 2015, which triggered Central Europe governments' allegations of 'moral imperialism' is worth a mention. Apart from any considerations about the EU asylum policy's structural flaws and the poor performance of national reception systems, what matters here is that the German government's request appears untenable in terms of a genuinely 'Westphalian' notion of justice, as it wittingly overlooks the concrete conditions faced by Southern Europe countries. In this sense, the opportunity to resort to effective means like the quasi-extraterritorial fast-track asylum procedure carried out in the transit areas of major German airports creates an objective normative advantage for countries with no (sensitive) external border. In this sense, the respect of justice as non-domination requires more than the mere compliance with the principle of formal equality and mutual recognitions among nation-states, but also presupposes the 'diplomatic' ability to manage the inevitable differences in power and material conditions.

Justice as impartiality

While Germany's conceptual and legal frameworks tend to comply to a considerable extent with universal criteria of justice focused solely on the claims of individuals *as such*, they also continue to be bounded

by nation-specific considerations, for reasons that largely complement those discussed with reference to justice as non-domination. The very existence of forms of 'quasi-citizenships' based on ethnic identities and/or historical backgrounds (ethnic German repatriates, Jewish immigrants) generates a discriminatory effect in terms of access to international protection and naturalization on migrants. As far as economic migration is concerned, compliance with the universalistic *jus soli* principle coexists with rules that request relinquishing the applicant's original citizenship in order to access the naturalization process. Moreover, specific measures have been taken to select labour force with the purpose of addressing skills gaps (*Fachkräftemangel*) – see the implementation of the EU Blue Card system for highly qualified persons, which ensures a faster access to permanent residence. Significantly, the same rationale has been successfully applied to free movement of labour within the EU, creating an advantageous transfer of skilled workers from Southern Europe. Even when it comes to asylum, the application of universal rules has a number of conditions attached. Though they conform quite effectively to the rule of law and are relatively safe from the executive's exclusive control, Germany's criteria and procedures to grant protection to asylum seekers prove to be no less sensitive to contingent concerns than cosmopolitan inspiration. Notably, Germany's current asylum system was made possible by the so-called 1993 *Asylkompromiss* – a constitutional change to tighten the hitherto generous condition to access to the status of refugees in the wake of the 1980s increase in the inflows of asylum seekers, mainly from Yugoslavia, Romania and Bulgaria.

Significantly, the concept of 'safe country' is not only at variance, as a criterion by which to assess asylum applications, with the pre-eminence of individual over nationality-related concerns maintained by a notion of justice as impartiality, but it also periodically updated based on contingent considerations about the economic and political feasibility of Germany's asylum policy. Another aspect that makes the German asylum legislation less consistent with cosmopolitan values are the distinctive sets of safeguards granted by different forms of international protection. Far from being a merely technical issue, the differences between the possible grounds based on which protection is actually granted have become a political case since the executive's attempt in 2016 to curtail the number of incoming *Ausländer* (foreigners) granting a larger share of asylum seekers subsidiary protection instead of the 'full' status of refugee. The measure was expected to discourage new arrivals, as subsidiary protection, while excluding deportation,

also comes with a two-year ban on the refugee's family reunification and a speed up deportation process for those not provided with a permanent right to remain. The government's crackdown on migration has resulted in a string of successful appeals before Germany's administrative courts, which have ruled full protection for 90 percent of the claimants. Accordingly, national courts can be regarded as effective subsidiary enforcers of impartiality principles, attesting to the idea that the 'checks and balances' at work within Germany's institutional setting is functional to the advancement of justice as impartiality. But it also relates in a problematic way to the goal of promoting collective (supranational) institutions as default modes to pursue this notion of justice.

Justice as mutual recognition

Few aspects of Germany's migration-related conceptual and legal frameworks seem to fulfil the criterion according to which specific individual and collective identities are to be addressed *per se* and not in relation to concerns about resources – which instead emerge as a relatively high, albeit variable, priority of the country's migration policies, as seen above. Admittedly, Germany's migration system includes well-structured, nationally standardised integration courses (which may become mandatory under certain circumstances) primarily destined for migrants with long-term residence plans in order to support them in integrating into the economic, cultural and social life. Significantly, specific integration courses have been designed for special target groups: immigrants with additional advancement needs (e.g. parents, women, and youths). The federal government's commitment toward this goal is confirmed by the 'Integration bill' submitted a few months ago, aimed at launching a 'two-way process that would foster integration while expecting incomers to do their bit' (The Federal Government 2016). One particular aspect consistent with the notion of justice as mutual recognition is the role assigned to state-level entities, such as local Foreigners Authorities, which are responsible for issuing residence titles and are the primary location for questions regarding residency and taking up employment, creating more favourable condition to a genuine dialogue. The role of the *Länder's* registration offices, responsible for administering deportations, and state courts, usually in charge of asylum seekers' appeals is also significant. It was these authorities that ruled out deportations to Afghanistan, pending new security reports, despite the agreement signed by the EU and strongly advocated for by the federal government.

United Kingdom and migration

The legislation regulating immigration and asylum in the UK is a relatively complicated patchwork of Acts of Parliament and statutory instruments – executive orders of subordinate legislations (e.g. the Immigration Rules) expanding on and clarifying the framework of immigration law. These have been emended at a very high rate over the past decades, in order to keep abreast with the massive changes occurred in this policy area. Although the United Kingdom has received immigrants for centuries, the country has traditionally been a net exporter of people; only from the mid-1980s did the United Kingdom become a country of immigration. The 1990s differs markedly because of high levels of net immigration, a surge generated in large part by sustained economic growth. Since 2004, immigration levels have been boosted by an extraordinary wave of mobility from Eastern European countries, particularly Poland, whose citizens have free movement and labour rights following the European Union enlargement. The recent refugee crisis only added to an already very high level of public anxiety about immigration, fuelled by media attention. This has ultimately led to significant changes not only in the political agenda of traditional and new parties, but also in the very conceptual framework underlying the common notions of what is right and what is wrong regarding a forceful phenomenon as migration.

Terms, definitions and concepts: peculiarities of the UK case

The United Kingdom's law offers no unambiguous and practicable definition of 'migrant' or 'immigrant' ('Foreign', for the purposes of the Control of Immigration means 'non-Commonwealth' to 1998 and 'non-Commonwealth' and 'non-EEA' from 1999). The distinction between those who have the 'right to abode' in the UK and those who have not is crucial. The stock of migrants who are not entitled to reside in the UK, either because they have never had a legal residence permit or because they have overstayed their time-limited permit or who are legally resident but breaching the conditions attached to their immigration status, are often referred to as 'illegal immigrants'. The terminology 'irregular (im)migrant'/'migrant in an irregular situation' has come into use because it better covers the diversity of deviations from the law whilst avoiding any problematic moral statement (Düvell 2014). The Immigration Act 1971 Section 24(1)(a) defines 'illegal entry' as the offence of knowingly entering the United Kingdom in breach of

a deportation order or without leave. For the offence to be committed, a person must *knowingly* enter in breach of a deportation order or without leave (UK Legislation 1971). Labour migration involves people coming to the UK for the purpose of paid work – i.e. whose primary reason for migrating or legal permission to enter the UK is for employment.

An ‘economic migrant’ is not a legal classification, but rather an umbrella term for a wide array of people that move from one country to another to advance their economic and professional prospects. In the UK’s public discourse, what is meant by ‘economic migrant’ – often with a derogatory connotation if not a xenophobic twist – is a person who has left his/her own country and seeks by lawful or unlawful means to find employment – i.e. for ‘personal convenience’ possibly at the expenses of local workers – in another country (Althaus 2016). Consider for example how the purportedly right-wing British think-tank Migration Watch states that ‘[i]n the majority of cases the unsuccessful asylum seeker is, in fact, an economic migrant who has tried to take advantage of the asylum system in the absence of any other available means of obtaining lawful entry into the United Kingdom. This conclusion is reinforced when one considers that most asylum seekers are young men. Furthermore, many of them have paid huge sums of money to people traffickers to bring them to the UK’ (Migration Watch UK 2006). The British Government also makes use of the term ‘migrant worker’ as formulated in the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Family to designate a person engaged in a remunerated activity in a state of which he or she is not a national (Office of the High Commissioner for Human Rights 1990; Department for Business Innovation & Skills, 2015). The UK, like most countries with advanced economies, has specific policies in place to facilitate the mobility of highly skilled professionals and investors into its respective national economy. The most desirable migrants are identified as expatriates (‘expats’). Restriction and selection of labour, education and investment immigration is pursued through the implementation of the 5 Tier Points Based System (which implicitly differentiates the concept of labour immigrant).

Someone who has received a positive decision on his or her asylum claim from the Home Office, or has had a successful appeal, is issued documents confirming his/her status as a refugee (UK Government 2012, art. 334). Successful applicants gain support not only for themselves but also for their ‘dependents’ regardless of their immigration

status (who can be a husband/wife/civil partner, an unmarried couple (if living together for more than 2 of the last 3 years), a child under 18, or a member of the household who is over 18 and is in need of care and attention due to disability). If the Home Office considers that a person does not qualify for asylum, but is still in need of international protection, he/she may be granted Humanitarian Protection.

The Home Office has the power to hold individuals in detention when exercising immigration control. Asylum seekers and other migrants can be detained for administrative purposes – typically to establish their identities, or to facilitate their immigration claims resolution and/or their removals. Although detention is not a criminal procedure, observers frequently point to the prison-like features of immigration detention in the UK, including both architectural similarities and ‘conceptual parities,’ which make it arguably a form of punishment even if officially it is not recognized as such. Decisions on asylum and human rights claims made in the UK are made by the UK Border Agency, which is an agency of the Home Office. In order to become an asylum applicant and be recognised as a refugee in Britain, migrants need to be on UK territory (so, strictly speaking the migrants in Calais are neither refugees or asylum seekers from a UK legal perspective – at least as long as they remain in French territory). The safe country of origin concept is provided by British legislation (Nationality Immigration and Asylum Act (UK Government 2002, 94)). States are designated safe by order of the Secretary of State for the Home Office. The Secretary of State may make such an order where they are satisfied that ‘there is in general in that State or part no serious risk of persecution of persons entitled to reside’ there, and that removal there ‘will not in general contravene’ the ECHR. The UK participates in EU and bilateral readmissions agreements, and has memoranda of understanding for the return of nationals found illegally in the UK.

The term ‘deportation’ applies to people and their children whose removal from the country is deemed ‘conducive to the public good’ by the Secretary of State. Deportation can also be recommended by a court in connection with a conviction of a criminal offence that carries a prison term. Administrative removals (or just ‘removals’) refers to a larger set of cases involving the enforced removal of non-citizens who have either entered the country illegally or deceptively, stayed in the country longer than their visa permitted, or otherwise violated the con-

ditions of their leave to remain in the UK. Voluntary departures involve people against whom enforced removal has been initiated. (The term 'voluntary' describes the method of departure rather than the choice of whether or not to depart).

Observations on the three understandings of justice from the UK case

Justice as non-domination

Arguably, the basic 'negative' conception informed by the idea of justice as non-domination is the most discernible in the definitions and sets of relevant norms underlying the UK's migration policy. British norms and operationalized concepts seem to be directed to large extent against arbitrary interference and the subordination to others, favouring the rule of law and counter-majoritarian institutions – as the judiciary's power to assess the liability of every public authority (political and administrative) established through the Human Rights Act 1998. The purpose of holding in check the power of individuals and non-state groups is at least in principle pursued through the protection of the right of irregular immigrants, especially when employed not *qua* immigrants but as part of the country's population. On the other hand, this purpose inherently at variance with that of preventing and eradicating irregular ('illegal') situations – see the new 2015 measures against landlords renting to irregular migrants – which can still be associated with non-domination through the role of the government as gatekeeper on the membership to the 'body politic', watching over a plain field where all insiders enjoy the same 'right to have right' that comes with citizenship (or, at least, border clearance).

As for non-domination within the international context, the British government's conceptual framework appears quite consistent with a Westphalian notion of justice – that is, a procedural rather than a substantial idea of justice, one in which the role of global institutions is to foster deliberation and promote common practical reasons rather than sanction non-compliance in a legal fashion. In this perspective, the way migration is defined and regulated is contingent on national interests – first of all security interests. Accordingly, freedom of movement and hospitality duties could be rightly constrained or conditioned based on the primary goal of national security. The decision not to be automatically bound by measures taken under the Schengen acquis (but to retain a right to opt-in) can be regarded as being in line with this practical

conception of justice – although it put a strain on the on the strong principle of equality that ‘qualifies’ strict non-domination among the EU Member States. As long as the natural configuration of the country offered a better and less intrusive way to prevent illegal immigration than other measures, such as Schengen’s, it was reasonable – therefore right – to stick to national norms and the respective concepts. Migration laws and, even more so, border control rules have rested on an ever-stronger notion of ‘territoriality’, which in turn hinges on the UK being an island (UK Government 2014). Arguably, this seems to have relieved the UK’s public authorities, compared to continental Europe’s, from conceptualising immigration an inherently global issue, to be reckoned with through novel mind-sets and institutional tools.

Potential and actual infringements of the principle of non-domination are to be found in the EU readmission agreements and the bilateral memoranda of understanding for irregular migrants the UK partakes to, owing to asymmetries in the parties’ bargaining power. However, any specific measure aimed at curtailing migration can end up being perceived by other countries’ government as unfair treatment of their national abroad (as in the case with India and the British government’s and the scrapping of post-study work visa). The post-Brexit UK’s goal of retaining access to the EU internal market while dismissing the freedom of movement (and of migration) of EU citizens can also be regarded as an attempt to dominate relationships with former EU fellow members.

Justice as impartiality

Looking at the UK’s regulatory approach of migration and asylum, a major source of potential and actual infringements of the principle of impartiality – hinging on the idea of general/universal rights of individuals and collective entities – is the role assigned to Immigration Rules as a source of law, which attest to the post-statutory phase of the UK’s immigration policy (Cerna and Wietholtz 2011, 204). While a part of the British legal order – being *de jure* statutory instruments and having been able to curb the Parliament’s sway – Immigration Rules are in fact non-legislated ‘rules of practice’, not bound to be abstract or general, as required instead of statutory law. This has allowed the Home Office to regulate a great many aspects of the British immigration policy at its complete discretion. Being extremely flexible tools for the ‘loophole-closing’ and ‘fine-tuning’ that has characterised the British legislative approach, Immigration Rules have been very much at odds

with the principles of justice as impartiality. Moreover, unlike in other countries, the latter have been put under considerable strain by policy instruments designed to select immigrants based on their professional qualification in order to fill gaps in the national labour market such as the 5 Tier Point System, which provides for 'fast track' procedures for highly qualified migrants, sponsorship systems, et cetera.

Also the concept of 'safe countries of origin' (defined in Nationality Immigration and Asylum Act (UK Government 2002, 94)) may be inconsistent with the principles underlying impartiality, at least to the extent that its use is prompted by the desire to speed up the processing of asylum seekers' applications, rather than ascertaining – in a virtually unbiased and selfless manner – that 'there is in general in that State (*of origin*) or part no serious risk of persecution of persons entitled to reside' there, and that removal there 'will not in general contravene' the European Convention on Human Rights (in this case there also seems to be a merely instrumental implementation of the ECHR). On the other hand, regardless of a tendency to criminalize irregular immigration, a series of measures – i.e. the direct enforceability of the ECHR via the Human Rights Act 1998 – have also provided for an effective protection in the UK of the universal rights of immigrants despite their irregular status. The UK ensures quite effectively that the basic rights of irregular immigrants cannot be violated in the enforcement of immigration laws and the implementation of measures to control migration, also when it comes to the delicate issue of deportation.

Justice as mutual recognition

The declared goal of the Immigration Act 2014's – as stated by the then home secretary May – to 'create a really hostile environment for illegal immigrants' may well be regarded as a token of the UK's conceptual and legislative attitude toward mutual recognition concerning migration (Travis 2013). Another publicized goal of recent years' migration laws and policy measures is quite revealing: the so-called 'net migration-target', i.e. the intent to reduce net migration to the UK from EU and non-EU countries from hundreds to tens of thousands per year (Sims 2016). Both purposes reveal a marked 'managerial' underlying stance according to which migrants (as well as asylum seekers) seem to be primarily conceived of as a policy issue, to be managed with governmental tools as effectively and in line with overarching national in-

terests as possible. As one can see, such an approach is only marginally based on aspects like 'dialogue' and 'reciprocity', as it rather assumes the policy object to be essentially passive.

This is confirmed, among others, by the rationale of the UK's naturalization's rule. Not unlike in other countries, foreigners that wish to become British citizens have to demonstrate to know and be able to join values and principles, history and culture as well as the law of the UK, besides mastering the English language and being willing to get involved in the community life. The process, however, is not designed as a voluntary adhesion to fundamental features of the British citizenship premised on the mutual recognition of the recipient political community (represented by the public authority) on the one hand and the citizen-to-be on the other. Instead, the process resembles much more a bureaucratic scrutiny of requirements by the UK Visa Bureau – and basically the same goes for the ascertainment of the commitment to the country preliminary to the grant or refusal of Indefinite Leave to Remain or temporary visa. In this sense, the different requirements applied to people from inside the European Economic Area appear just the entailment of specific bureaucratic conditions rather than the acknowledgment of actual identifying aspects.

This is also in line with the process of 'normalisation' undergone by the UK's national identity, which over the last three decades has been progressively rationalised through the removal of special rights and conditions to abode formerly assigned to specific categories of people based on their ties to the British Empire and then the Commonwealth, and a widespread negative evaluation of the multicultural integration strategy's results (Platt and Platt 2013). A certain UK disinclination to justice as mutual recognition can also be detected, as regarding asylum, in the British legal system of the third-country system, which further exempts the Home Office from the obligation of dealing with a number of asylum requests, shifting the burden on the countries of 'safe arrival' unilaterally designed by the Home Office. Moreover, unlike with repatriations to the country of origin, the return to third safe countries cannot be appealed to by asylum seekers. Although the same 'buck-passing' is to be found within Dublin III System too, at least in principle this can be thought of as the undesired outcome of a structurally flawed (but still value-laden) common policy, whereas the functional equivalent implemented by the UK government permits to

avoid any 'significant' encounter with the asylum applicant without so much as the admittedly faulty 'peer pressure' operating within the EU.

Greece and migration

Greece is a relatively 'new' country of immigration since it was transformed into a country of transit and settlement in the 1990s (Gropas and Triandafyllidou 2007; Kasimis 2012). Until then it was predominantly a country of emigration. Although small numbers of immigrants arrived in Greece in the 1970s and 1980s, significant numbers of migrants from the former Soviet Union republics and Balkan countries settled in Greece following political and economic unrest after the collapse of communist regimes. These flows also included ethnically Greek returning migrants, such as members of the Greek minority in Albania and Greek post-civil war refugees in Eastern European communist states (Gropas and Triandafyllidou 2007). In addition, because of its geographical position, Greece is a main point of entry to the European Union for migrants from Asian, Middle Eastern and African countries fleeing armed conflict and political and economic instability (Triandafyllidou and Maroukis 2012), recently including Syrian refugees displaced by the Syrian conflict (UNHCR 2016a).

Several legislative instruments were introduced to address the new dynamics of migration. Law 1975 of 1991 was a first attempt to regulate the entry and residence and was followed by law 2910 in 2001. Both laws were predominantly focused on controlling entry and considered economic migration as temporary. These tendencies are also evident in Law 3386 of 2005 which, however, attempted to provide for long-term residence and integration (Baldwin-Edwards 2009; Triandafyllidou 2009). Nevertheless, migrants faced significant difficulties in maintaining legal status because of strict provisions on entry and residence and work permits and administrative inadequacies (Triandafyllidou 2009; Maroukis 2013). As a result, four regularisation programs took place between 1997 and 2007 (Baldwin-Edwards 2009). The provisions of Law 3386/2005, subsequent amendments and other laws transposing EU directives – for instance on family reunification and long term residence status – were codified in Law 4251/2014 (Government Gazette 2005; 2014).

The first law specifically on refugee protection was introduced in 1996. It established normal and accelerated procedures and introduced the concepts of manifestly unfounded applications and safe third-country

in line with developments in EU soft law. The Europeanisation of refugee and asylum law accelerated in the late 2000s with the transposition of the Dublin Regulation (2003) and the Reception (2007), Procedures (2008) and Qualifications (2008) directives. Following widespread criticisms on the country's asylum and reception systems, Law 3907/2011 introduced significant reforms – establishing the Asylum and First Reception Services – and transposed the Returns Directive (Government Gazette 2011). In 2016, Law 4375/2016 introduced amendments to the asylum and reception systems aimed at facilitating the implementation of the EU-Turkey agreement (Government Gazette 2016).

Greece has also ratified key international and regional human rights instruments – including the Geneva Convention, the Universal Declaration of Human Rights, International Covenant of Social, Economic and Cultural Rights, International Covenant on Civil and Political Rights – which safeguard the human rights of migrants. In addition, the Greek Constitution prohibits the 'extradition of aliens prosecuted for their action as freedom-fighters' and guarantees the 'protection of their life, honour and liberty' of every person in Greek territory 'irrespective of nationality, race or language and of religious or political beliefs' (Hellenic Parliament 2001, Art 5, para. 2). It also guarantees equal access to social security for all persons working in Greece. Overall, the Greek legal framework largely conforms to international and regional legal standards, although specific definitions and categories diverge on occasion.

Terms, definitions and concepts: the peculiarities of the Greek case

The term 'migrant' is not used in Greek law. Current law uses the terms: 'foreign national' ('allodapos'), defined as 'natural person who does not have Greek nationality or is stateless'; 'third-country national', defined as 'any natural person who is not a Greek national or the national of any other EU Member State'; and 'EU national', defined as 'any person who is a national of an EU Member State' (Government Gazette 2005; 2014). Similarly, while the term 'illegal immigrant' – 'lathrometanasths' or 'paranomos metanastis' – is not used in Greek law, the term 'illegal immigration' ('paranomi metanastefsi') occasionally is (EMN 2014). With reference to illegality, the law distinguishes between third-country nationals who 'reside legally' on the one hand and those who or 'reside illegally' or have 'entered illegally'. However, the terms 'migrant', 'economic migrant', 'economic migration' and 'illegal immigration' has been used in official documents such as reports

submitted to UN or EU bodies, press releases by the government and ministries and parliamentary debates.

The definitions of 'refugee' 'refugee status' and 'subsidiary protection' are identical to those in the Geneva Convention and EU directives on qualification and procedures (Government Gazette 2013; 2016). The terms 'applicant for international protection' or 'applicant for asylum' – are used in law to signify asylum seekers (Government Gazette 2016, Art. 34; 2014, Art. 2; 2010, Art. 2). Other legal definitions and categories in domestic law – such as 'safe third-country' 'return' 'family reunification' 'unaccompanied minors' – generally transpose their equivalents from EU legal instruments. There are, however, occasional differences between domestic and EU legal norms. For instance, when Law 3907/2011 transposed the Returns directive, migrants 'apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border' (European Parliament and Council 2008, Art. 2, par. 2a; Government Gazette 2011, Art. 17 par 2a) were excluded from its remit. The text of the directive leaves the choice to include migrants apprehended at the border to the discretion of member states (European Parliament and Council 2008, Art 2). Similarly, there is no list of designated safe third countries in Greek law.

Migration has generally been a controversial issue in Greece. The use of the terms 'illegal immigrant' and 'illegal immigration' is particularly significant in the Greek context since it has framed media and public debates on migration since the 1990s (Karamanidou 2016; Pavlou 2009). Their widespread use constructed migration as a predominantly negative phenomenon, associated with criminality and social threat. The significance of 'illegality' is also evident in legislation which prioritises control and deterrence over refugee protection or long-term integration. For instance, migrants entering the country in an unauthorised manner are labelled as 'illegal' upon entry to Greek territory in accordance to the provisions of Law 3386/2005, even if they intent to apply for asylum. As will be discussed further on, this has significant consequences for migrants' rights.

Another significant feature of the Greek legal framework concerns disparities in terms of rights attached to different legal categories. While essential human rights are generally guaranteed, socio-economic and civil right are dependent both on legal status and employment. This

often results in markedly different arrangements in relation to rights attached to different statuses. Recognised refugees, for instance, are given the full range of rights prescribed by the Qualifications directive. Third-country nationals generally have access to socio-economic rights, but it is legal residence and employment that guarantees most welfare entitlements (Government Gazette 2014; Maroukis 2013). In contrast, undocumented migrants are only entitled to emergency healthcare and use of public services relating to matters such as voluntary return and renewal of residence permits (Government Gazette 2005, Art. 82; 2014, Art. 26).

Key controversies relating to legislation between 2009 and 2016 concerned citizenship, violence against migrants, and more recently on the Syrian refugee crisis and the EU-Turkey agreement. In 2010, the government introduced law 3838/2010 which facilitated the granting of citizenship to migrants and granted the right to vote in local elections. The law challenged dominant exclusionary perceptions of ethnic citizenship, which was opposed by right-wing parties, and eventually declared unconstitutional by the Greek Supreme Court. Incidents of violence against migrants, linked to the extreme right party of Golden Dawn, highlighted the shortcomings of anti-discrimination legislation and attracted widespread criticism by human rights organisation (Council of Europe 2013). The adoption of the hotspot approach in 2015, the EU-Turkey agreement and the introduction of Law 4375/2016 brought on significant and controversial changes to the country's asylum laws, most notably in relation to the application of the concept of 'safe third-country', detention of migrants in need of international protection in closed Reception and Identification Centres and their return to Turkey.

Observations on the three understandings of justice from the Greek case

Justice as non-domination

If justice as non-domination is conceptually located in relations between EU member states on the one hand and third countries on the other, it appears difficult to relate to the Greek context. There is little evidence that the Greek state has imposed migration-related measures on third states as an independent actor. For example, while Greece has bilateral readmission agreements with neighbouring states such as

Turkey, most are EU-wide ones (EMN 2014). A more pertinent approach would consider the extent to which Greek legal frameworks and practices are dominated by the European Union and other member states. The Europeanisation of domestic migration and asylum laws and harmonisation with EU legislative developments is an outcome of the country's membership, but it has not always served its interests nor safeguarded migrants' human rights. The Dublin Regulation, for example, exacerbated pressures on already weak asylum and reception systems (Karamanidou and Schuster 2012; McDonough and Tsourdi 2012) before the suspension of returns to Greece following the *MSS v Belgium and Greece* judgement of the European Court of Human Rights and the EC-4/11 and EC-411/10 judgments of the European Court of Justice.

The management of the 2015 refugee crisis further illustrated these tensions. The hotspot approach and the EU-Turkey agreement resulted in migrants being contained in Greece in order to facilitate return to Turkey and placed disproportionate pressures on the Greek border control, asylum and reception systems (AI 2016a; ECRE 2016a). At the same time, policies aimed at alleviating pressure in Greece, such as support by EASO and FRONTEX personnel, relocations of asylum seekers to other EU states and financial assistance have proved insufficient in addressing the challenges posed by the intensity of refugee and migration flows (AI 2016a). It is thus questionable whether the hotspot approach and the EU-Turkey agreement adhere to the principle of non-domination, since they do not appear to take into account the interests of the Greek state.

Justice as impartiality

The principle of justice as impartiality suggests that human rights norms are applied to all migrants equitably and requires states to avoid causing harm in the sense of putting migrants in situations where their basic human rights are violated (Eriksen 2016). Serious harm, defined as facing the death penalty or execution, torture or inhuman or degrading treatment or punishment, or serious and individual threat by indiscriminate violence in international or internal armed conflict, is a key concept in both European and Greek law (Council 2014(a), Art. 15; Government Gazette 2013, Art. 2). The Greek legal order, however, gives rise to several categorisations that appear not to adhere to the principle of impartiality and that are likely to expose migrants to serious harm.

First, the designation of migrants as 'illegal' upon entry, while rooted in law, risks causing harm to migrants because of potential exclusion from the asylum procedure and the possibility of refoulement to a country with insufficient protection safeguards. By being labelled 'illegal', migrants are placed under the remit of the provisions of Law 3386/2005 on unauthorised entry, which allow for their detention and return. If entering through the Greek-Turkish borders, the Readmission Agreement between the two countries allows the Greek authorities to initiate the immediate return to Turkey (Government Gazette 2002). While the implementation of the Readmission Agreement has not been successful (EMN 2014), the legal context it established has allowed for practices of both informal and formal return mainly to Turkey (AI 2010a; 2014). In addition, labelling migrants entering Greece as 'illegal' rendered access to the asylum procedure problematic because it excludes them at the point of entry from legal provisions on reception and asylum procedures.

Second, access to the asylum procedure and international protection was further complicated by considering Turkey a 'first country of asylum' for Syrian nationals and 'safe third-country' for migrants of other nationalities following the EU-Turkey agreement (UNHCR 2016b). On this basis, most applications by Syrian, Afghani and Iraqi nationals have been declared inadmissible (Greek Asylum Service 2016a; ECRE 2016) and not examined in their substance. The blanket application of the safe third-country concept contradicts the requirement for individual assessment of the circumstances of each application (ECRE 2016b; UNHCR 2016b) and increases the risk of refoulement. There are also serious doubts on whether Turkey is in practice a safe country, given that instances of chain-refoulement to unsafe countries of origin or transit have been recorded both before and after the EU-Turkey agreement (AI 2010b; 2016b). Therefore the application of the 'safe third-country' concept increases the risk of harm and thus may not adhere to conceptions of justice as impartiality.

Third, recognition rates in Greece have been historically very low in comparison to the EU average, despite an increase after the establishment of the Asylum Service in June 2013. For instance, recognition rate in 2012 was 0.8 percent compared to the EU average of 25 percent and in 2014 14 percent compared to 33 percent (European Stability Initiative 2015; Greek Asylum Service 2016a). Given that the Common European Asylum System entails the harmonisation of both definitions

and procedures for examining and deciding on asylum applications, the significantly lower recognition rate in Greece suggests that legal categories are interpreted in a more restrictive manner than other in other member states and therefore not compatible with the principle of impartiality. It could further suggest a degree of arbitrariness (Eriksen 2016) contrary to conceptions of justice as non-domination.

Fourth, domestic law on occasion accords rights in a manner that does not adhere to the principles of equality and impartiality. For instance, legally resident third-country nationals and recognised refugees are eligible for family reunification, but recipients of subsidiary and temporary protection and humanitarian status are not (Kasapi 2016). Refugees can also be unified with a broader range of family members than legally resident third-country nationals, even if this only applies for three months following recognition (Government Gazette 2008; 2014). Similarly, unaccompanied minors with refugee status have full access to mainstream education, while those in detention do not. Further, domestic law differentiates between ethnically Greek migrants ('omogeneis') and non-ethnically Greek foreign nationals. For instance, spouses of 'omogeneis' entering Greece through the family reunification procedure can obtain a residence permit for five years compared to the maximum of three years proscribed for long-term residents (Government Gazette 2014, Art. 71, 81). These arrangements suggest that access to human rights is not equal or impartial, but negotiated by legal definitions as well as by nationality and migrant status (Morris 2012).

Justice as mutual recognition

Greek legislation on asylum and immigration recognises, to an extent, the specific identities of migrants through the category of 'vulnerable groups'. This category includes unaccompanied minors, persons who have a disability or an incurable or serious illness, the elderly, women in pregnancy or having recently given birth, single parents with minor children, victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, victims of trafficking in human beings, and persons with a post-traumatic disorder, in particular survivors and relatives of victims of ship-wrecks, a sub-category added in Law 4375/2016. In relation to reception, individual belonging to vulnerable groups are entitled to special care, socio-psychological support and medical treatment (Government Gazette 2007; 2011; 2016, Art. 14). In the case of hotspots, the Director of Reception and Identifi-

cation centres can transfer unaccompanied minors and those belonging to a vulnerable group to a Reception and identification Centre located inland or to other appropriate structures (Government Gazette 2016, Art. 15). In addition, asylum applications by individuals belonging to vulnerable groups should be examined by priority, and caseworkers conducting interviews should have training on the specialised needs of women, children, and victims of violence and torture who apply for asylum (Government Gazette 2016, Art. 52). Women applicants, in particular, can request to be interviewed by women caseworkers and with the aid of female interpreters (Government Gazette 2016, Art. 52).

However, other legal categories and definitions interfere with the recognition of specific identities and vulnerabilities. While the transposed Procedures Directives of 2005 and 2013 state that the detention of asylum seekers should be exceptional and advise against the detention of unaccompanied minors and pregnant women (Government Gazette 2016, Art. 46) the blanket application of illegality upon entry to Greek territory and provisions relating to hotspots have allowed for the detention of vulnerable groups (FRA 2011; AI 2016). Similarly, the detention of individual belonging to vulnerable groups under return procedures is permitted (Government Gazette 2011). In addition, the application of the safe third countries concept can be interpreted as challenging conceptions of justice as mutual recognition, since Turkey is considered safe without regard to the specific identities and experiences of individual asylum seekers.

A further arrangement that runs counter to justice as mutual recognition concerns the selection of asylum applicants for relocation is made on the basis of nationality. Currently, only nationals from Burundi, Eritrea, Mozambique, Bahrain, Bhutan, Qatar, Syria and Yemen are eligible for relocation (Asylum Service 2016b). However, selection on this basis ignores the specific circumstances and identities that might render applicants of other nationalities eligible for international protection.

Lastly, while the concept of integration may entail the recognition of the migrants' specific identities in other national contexts, in Greek law it is conceptualised primarily as a process of socio-economic participation and familiarisation with Greek culture, history and language (Government Gazette 2014). As such, there is little in law to suggest conformity with the principle of mutual recognition.

Hungary and migration

After the fall of the socialist system in Hungary, the first legal change was to quicken up the return of Hungarians living in the West who had left the country, or even those who may have lost citizenship due to restrictive policies (Hungarian National Assembly 1989). The Hungarian government assumed that the returning migrants were ethnically Hungarian and refugees of repressive of political systems. Hungary joined the Geneva Convention with geographic limitations in 1989. Also Hungary received larger number of 'refugees' from neighbouring countries, notably Romania, who crossed the border illegally and asked for asylum in Hungary due to ethnic and political repression in the sending country. Legislation had to be changed in 1993 by the effect of the war in Yugoslavia (from 1991) as the number of immigrants, asylum seekers radically increased and the regulations in practice failed to manage the situation. In 1993 the Act on the Entry, Residence and Settlement of Foreigners in Hungary or 'Aliens' Act' (Hungarian National Assembly 1993b) came into force to tighten the 1989 law. Finally, in 1998 an Act on Asylum entered into force (Hungarian National Assembly 1997), which ended the geographical limitations for refugees and specified the three categories of refugees applying to the Hungarian case with different procedures and rights.

During the EU pre-accession period, national rules and legislations on migration were adapted in order to harmonize with EU legislations and norms. The 2001 Act on the Entry and Residence of Foreigners (Hungarian National Assembly 2001) which was the legal basis of the free movement of EU citizens in Hungary, divided the legal status of immigrants into EU citizens and third-country nationals. In 2004 joining the EU both regulations and the institutional system of migration issues were transformed. In 2007 Hungary joined the Schengen Zone and thus complete freedom of movement was introduced. In the same period Hungary also introduced complete freedom of employment for EEA citizens. At the same time (between 1999 and 2011) Hungary introduced a special system for people in EU countries and Third Countries with historical and ethnic ties for gaining special privileges in migration and gaining citizenship outside the border of Hungary.

Terms, definitions and concepts: peculiarities of the Hungarian case

The Hungarian legal documents do not refer to 'migrants', but to persons with varying specific legal status allowing several forms of

longer-term residence. The usage of the more international notion of 'migrant' ('migráns') has only gained momentum in non-legal discourses (public and media discourses) in the wake of the 'migration crisis' of Europe. The Hungarian legal system defines the main types of migration ('bevándorlás') in reference to the EU legislation. In addition, it intends to provide exclusive rights to third-country and EU nationals with Hungarian background. Four main types of migrants are recognized in the Hungarian law: the asylum seekers and beneficiaries of international protection (Hungarian National Assembly 2007c), the EEA citizens (Hungarian National Assembly 2007a, act I), and the third-country citizens, except asylum seekers (Hungarian National Assembly 2007b), and the 'Hungarians abroad' (co-ethnic Hungarians living outside of the country).

The Hungarian legal system uses the term 'illegal migration/migrants' instead of 'irregular', but it does not refer to 'legal' or 'regular migration/migrants'; here the focus of the related acts is on the process of permissions and visas. Hungary follows different treatments in terms of rights according to categories of legal immigrants.

A residence permit in Hungary is provided on *humanitarian grounds* for various reasons: for a person recognized as a stateless person or as an exile (beneficiary of tolerated stay - 'befogadott'); for any third-country national who has applied to the refugee authority for asylum or for subsidiary form of protection or temporary protection; any third-country national who was born in the territory of Hungary who has fallen from the custody of his/her guardian having custody according to Hungarian law, as well as unaccompanied minors. Moreover, residence permit is granted on humanitarian grounds to third-country nationals who cooperate with the law enforcement authorities in fighting crime, in addition to those who have been subjected to particularly exploitative working conditions, or to third-country national minors who were employed illegally without a valid residence permit or other authorization for stay.

Particularly interesting seems to be the understanding of family members for family reunification purposes, although there is a difference/between those who enjoy the right of free movement (EEA nationals and their family members) and third-country nationals. In the latter case, the definition of 'family member' refers to the spouse, the minor child in common with his/her spouse, the minor child of

his/her spouse (also including adopted child in both cases). Nevertheless, even dependent parent(s), sibling(s) or other direct relative(s) may be granted residence permit for family reunification purposes if he/she is unable to care for him/herself due to his/her health status. In case of refugee's family members (that also includes the parent of a minor refugee) the above-mentioned kinships are recognized even in the lack of documentation proving the family relationship, except for the marriage with the spouse which must have occurred prior to the arrival of the refugee. The validity of the residence permit issued for family reunification could not be longer than the residence permit of the sponsor. In the case of EEA nationals, the definition is even wider. In addition to the above-mentioned groups, it also refers to civil partners and to 'those who have been granted residence by the authority as family members' (Hungarian National Assembly 2007a, Art. 2, par. bh). Unaccompanied minors, a particularly vulnerable category, may never be detained. In case of an unaccompanied minor whose application was rejected, besides the fundamental guarantees for non-refoulement return may not be implemented except for family reunification or (public) institutional care, which is provided in the country of origin. If this condition is not met, only the unaccompanied minors receive a humanitarian residence permit.

The Hungarian legal system distinguishes four types of protection which are concerned with Refugee status in the EU law. These are the refugee ('menekült'), the beneficiary of subsidiary protection ('oltalmazott'), the beneficiary of temporary protection ('menedékes'), and tolerated stay ('befogadott'). Of particular interest, the 'tolerated stay' is granted for 'a foreigner not complying with the criteria for recognition as refugee or beneficiary of subsidiary protection but, in the event of his/her return to the country of origin, s/he would be exposed to a risk of persecution for reasons of race, religion, ethnicity, membership of a particular social group or a political opinion or to behaviour' (Hungarian National Assembly 2007c, Section 25/A). The refugee authority recognizes somebody as a person with tolerated stay if the prohibition of refoulement has been established in the immigration procedures, or the application for asylum has been rejected, but the prohibition of refoulement has been established.

Before 2010 the Hungarian immigration policy on beneficiaries of international protection was rather permissive concerning obligations or optional provisions stemming from EU law. From 2010 onward the

Hungarian legislation has become steadily stricter. Within the framework of EU directives of the Common European Asylum System, it means that Hungary transposed mainly the stricter rules from the *Acquis*, such as asylum detention that was introduced in 2013. The person granted refugee status, or subsidiary protection, receives a national identity card (not a residence permit), and the refugee/subsidiary protection status has to be revised every three years. The Immigration and Asylum Office (IAO) is responsible for the asylum procedure, and the integration of the beneficiaries of international protection. Nevertheless, the IAO is also the immigration authority, not only the asylum authority. This centralized administration means a unified application of law on the one hand, but it also means that the local authorities have no role in the process.

The basic rights, benefits and material conditions are the same for both 'regular' applicants and those who are put under asylum detention (Hungarian National Assembly 2013, Section 89). Furthermore, in line with the EU Directive, detention should be a last resort. Still, in practice in Hungary, (asylum) 'detention became a key element in the Government's policy of deterrence', UNHCR observed (UNHCR 2016c). The difference regarding the right to the provided benefits lies between those who are indigent (in case of first-time applicants, the reception with all the benefits is free of charge) and those who are not, or later proven to have concealed their financial possibilities (they either have to pay or refund later). Since 2015, applicants, who are not in detention, are also entitled to join the Hungarian public work programme (Hungarian National Assembly 2015a). Furthermore, after nine months, asylum-seekers may work under the general conditions applying to foreigners.

Reception of asylum applicants is organized around three types of facilities: reception centres ('befogadó állomás'), community shelters ('közösségi szállás') and guarded asylum reception (detention) centres ('menekültügyi őrzött befogadóközpont'). The possibility of private accommodation is also given but is in practice atypical. The Asylum Act also identifies persons with special needs: 'unaccompanied children or vulnerable persons, in particular, minor, elderly, disabled persons, pregnant women, single parents raising minor children or persons suffering from torture, rape or any other grave form of psychological, physical or sexual violence' (Hungarian National Assembly 2007c). Persons under these categories are provided special treatment throughout the whole process. Those, who do not apply for asylum

and enter Hungarian territory illegally, or who overstayed and lack appropriate documents, are dealt with by the aliens policing authorities (See Hungarian National Assembly 2007b; and Hungarian Government 2007). They are treated separately both when it comes to process and detention facilities (alien policing detention centres).

As the number of asylum-seekers started to increase significantly in Hungary in the middle of 2015, the reception system underwent some important changes. Simultaneously to completing the border fence and sealing the green border, the Government introduced the so called 'transit zones'. These zones were established at the southern border of Hungary (in Tompa, Röszke, Beremend, and Letenye, the latter two at the Hungarian-Croatian border did not operate). In the transit zones, asylum and immigration authorities, and the security services are present. This is where applicants for asylum are registered, and primary interviews are conducted. In case of applicants who do not belong to any of the vulnerable groups, a specific accelerated procedure, the so-called border procedure, is conducted. Transit zone resembles the hotspots in its functioning (accelerated procedure and all its possible shortcomings). As from the summer of 2015, with daily arrivals reaching 6 or even 11 thousand people, the authorities established temporary facilities - sometimes also referred to as 'transit zones', which may have caused confusion - in the capital (at, and in the proximity of, main railway stations) throughout the summer period until September.

After having established it in 2010 and following the criticism of UNHCR and the European Commission, the Hungarian asylum authority ceased to apply the 'safe third-country' concept in 2012. The situation became more controversial when the Hungarian government, struggling with the inflow of asylum-seekers in the summer of 2015, went further in codifying this policy by publishing the list in a decree (Hungarian Government 2015b), that named the safe third countries. The list included: all EU Member States, EU candidate countries (except Turkey, which was added to the list later, in Government Decree 63/2016, following the EU-Turkey deal - (Hungarian Government 2016)), Member States of the European Economic Area, US States that do not have the death penalty, Switzerland, Bosnia-Herzegovina, Kosovo, Canada, Australia, and New Zealand.

In September 2015, struggling with the management of the situation, Hungary was also offered 'hotspot assistance' by the Commission,

which was, turned down by the government shortly after (Hungarian Government 2015a). Behind this move were two basic convictions: first, that Hungary is not a 'frontline state' in the sense that asylum-seekers reach its territory only after having already been in another EU Member State, namely Italy or Greece (this can be important when it comes to executing transfers based on the Dublin Regulations). Second, that migration should not be simply 'handled', it should be stopped. According to government officials, the whole hotspot system design builds on an opposing conviction, with different relocation and resettlement options, and with setting up the hotspots themselves within the territory of the EU.

An interesting point on the understanding or misunderstanding of differences between resettlement and relocation happened on February 2016, when the prime minister announced that Hungary should hold a referendum on whether the country should accept the proposed mandatory quotas of 'settling' (the expression he used was not 'relocation' or 'resettlement', but 'settling' or 'settlement'). The aim of the referendum was to contest the obligatory distribution of asylum applications, (mis)interpreted by the referendum and the government as a mandatory relocation system. As we can see, the EU decision in 2015 was about 'relocation' and the translation of the referendum question into English used the word 'resettlement'. However, the question was about future obligatory settling/settlement or, more precisely, forced settlement. As everyday people - even the media - do not have knowledge or experience about the differences between the two concepts (or even three: 'relocation', 'resettlement' and 'settlement') - nor is it defined in any Hungarian legal documents, the goals and effects of the EU decision about relocation or resettlement could easily be misunderstood.

Observations on the three understandings of justice from the Hungarian case

Justice as non-domination

In the case of Hungary, the problem of dominance appears basically on two territories of legal and institutional arrangements. On the one hand, the problem is given by some arbitrary actions, procedures and arrangements of the Hungarian state for limiting access to international protection by third-country nationals. On the other hand, we find arbitrary actions of the Hungarian state introducing extraterritorial naturalization without consulting the concerned states, such as the

procedures and arrangements concerning third-country nationals with historical-ethnic ties to Hungary.

In the first case, the Hungarian state gave way to, and engaged in, dominating practices vis-à-vis individuals and third states alike by actions, such as making amendments to existing law in Act CXL of 2015 (which included the criminalization of the 'crossing of the border closure') (Hungarian National Assembly 2015b), the legally questionable implementation of the accelerated border procedure (violation of human rights), and the introduction of a state of exception in case of crisis situation caused by mass immigration, or bringing in new legal arrangements, such as the concept and listing of safe third countries. Along with this, the state managed to effectively exclude some potential asylum-seekers from enjoying their internationally guaranteed rights, and arbitrarily altered a sensitive, interstate legal procedure, that impaired the interests of a third state, namely, Serbia. Act CXL of 2015 is also noteworthy because of the introduction of the concept of 'crisis situation caused by mass immigration', a kind of state of exception in the Agambenian sense, in which legal guarantees of non-domination may be suspended, allowing the government to use exceptional measures, and disregard important laws. Also Hungary is trying to block the return of asylum seekers to Hungary within the Dublin system.

Concerning the second category of dominance, as of Act XLIV of 2010, ethnic Hungarians can be naturalized on preferential terms (Hungarian National Assembly 2010). This act was aimed at the unification of the Hungarian nation in its symbolic sense, including those ethnic Hungarians who have been excluded since the Treaty of Trianon (1920), which after World War I, distributed two thirds of the historic Hungarian territories among the neighbouring countries. The highly political decision was contested among these countries, specifically for those prohibiting dual citizenship, and thus caused tensions in the bilateral diplomatic relationships.

As a way to understand that, we have to be aware that this situation was partially produced in a context where states are formally equal partners, but practically are in complex, and highly unequal relationship with each other even in terms of being integrated into migratory global flows. Without a deeper analysis of the frustrations this caused, we can safely assume that the recent Hungarian rhetoric and policy of dominance is not just a factor of political will, but also structural processes behind. The Orbán

government's address of this issue – for the first time since Hungary's accession – has been verbally hostile against the EU 'dominance' since its 2010 inauguration. The 'migration crisis' provided an excellent opportunity for further criticisms of the incorrect policies invented and enforced by EU bureaucrats. The most conspicuous issue was the 'forced settlement quota'. Interpreting policies laid down in the Council Decision 2015/1523 (Council 2015b) as arbitrary interference in Hungarian sovereignty, the government brought 'external domination' directly in the middle of the question. Nonetheless, we have to be aware that the Hungarian position within the EU also holds the risk of being dominated by other actors who have vastly different institutionalized practices and historical migratory processes than that of Hungary who has been both an emigrant and has just received migrants from neighbouring countries.

Justice as impartiality

The principle of impartiality is endangered in various ways in Hungary, most notably in: i) The lack of integrated view on the various categories of migrants in migration policy documents and the lack of the implementation of any complex strategy of integration of migrants; ii) The establishment a four pillar system which contains various hierarchies and priorities with differential procedures among and within categories of migrants. In Hungary until September 2013 there was no governmental Migration Strategy - which could have provided some normative principle to the various categories of migrants. Although its adoption could be considered positive, there were also some critical aspects from the point of view of impartiality:

1. It could not integrate all the processes of migration, most importantly immigration and emigration which could have given a basic impartial perspective of handling together the rights of outgoing 'Hungarians' and incoming 'foreigners'.
2. The document promised the construction of a universal perspective for an integration strategy for all migrants but this has not been adopted ever since.
3. The migration strategy stated that Hungary supports and facilitates all forms of legal migration, although official communication of the government from 2015 blatantly contradicts this principle.
4. Lack of monitoring and evaluation of the strategy.

(UNHRC 2016d)

The Hungarian institutional system is built on four, hierarchical pillars (Melegh 2016). The state clearly aims at the priority to ensure full rights to Hungarian minorities living outside the country. There are certain privileges, the most important one is that Hungary provides full citizenship for those who can prove that he/she had a Hungarian ancestor born in the territory of (historical) Hungary (Hungarian National Assembly 2010). Another pillar of the policy is the category of EU and EEA citizens benefiting from free movement (of persons and labour) based on the EU law. The third pillar is the third-country nationals who are treated in accordance with EU policies/legislation with regards to third-country nationals. The fourth pillar refers to those seeking international protection and/or crossing the borders of Hungary in an irregular manner whose rights were strictly tightened in 2015 and 2016 as an answer to the migration crisis. The hierarchical treatment of the different 'types' is a sign of the lack of impartial treatment.

Justice as mutual recognition

Justice as mutual recognition refers mainly to integration policies and the recognition of cultural and social diversity. Three areas where justice as mutual recognition is clearly in danger are: i) The unequal access to nationality and thus the preferential treatment which reduces the institutional capacities toward immigrants without historic-ethnic ties to Hungary; ii) The unequal recognition of migrants who do not form an accepted 'historical minority' which enjoy certain legal and cultural support having that status; iii) The lack of institutionalized recognition of cultural diversity.

With regard to the access to nationality the key problem is not the preferential treatment of certain groups, but the withdrawal the institutional capacities handling the application for nationality of other migrants. Since 2011 the Hungarian government has channelled most of its institutional resources helping the privileged group while resources has been dramatically reduced for the other groups. The *EEA migrants* enjoy the social and political rights that come with EEA citizenship (Melegh and Feischmidt 2013). The formation in the early 1990's of a privileged zone of 'Europeans' as a governmental priority with a 'club logic' is reinforced with the appearance of increasing number Hungarian emigrants directed mainly to EEA countries since 2004 (Melegh 2016). As said, the *co-ethnic Hungarians* originating from EU and non-EU Member States have favourable conditions at all levels of the immigration process. Howsoever, these special treatments of mutual

recognition are not out of political aspiration since it entitles national level voting rights for them. The mutual recognition of immigrants with *ethnic backgrounds of historical minorities* is more favourable than other TCNs because they could have well established autonomy on a local governmental level and organizations which facilitate their socio-cultural recognition and integration. At the same time they enjoy preferential treatment in accessing local and national media and various forms of cultural funds. They also enjoy certain privileges of political representation on a national level. However, the other *TCN groups* receive no institutionalized support such as language and vocational training, or housing support.

The mutual recognition as regards to cultural diversity is institutionalized only in a limited way. There is a clear hierarchy of general recognition of diverse cultural origins and identities. The Hungarian government is maintaining a repressive and assimilatory discourse of building a homogeneous nation. These homogenization efforts are also related to the structure of the historical migration processes Hungary has been experiencing.

Norway and migration

Norway is a somewhat exceptional country in Europe in political terms. It is one of the few European countries that are not members of the European Union. Rather it has structured its connections with European institutions and organizations through membership in the European Economic Area (EEA) and a host of other agreements and accessions to EU policies. Moreover, Norway has a long-standing tradition for active internationalism through the United Nations and its many organizations, as well as a forerunner in state-led foreign aid programs for developing countries. There has been considerable consensus in Norwegian society and politics on this line of policy which has also been an integral part of the country's foreign policy.

The issue of migration was not high on the agenda in the first two decades of post-war politics and institution-building, perhaps not so surprising as Norway for a long time was a country of emigration rather than one of immigration. In institutional terms, Norway was a signatory to both the United Nations Declaration on Human Rights (1948) and the Refugee Convention (1951). In this sense, Norway institutionalised basic principles such as the right to apply for asylum and non-refoulement, that is the right not to be returned to country of origin in

cases of serious threats to life or freedom. Moreover, the regulation of foreigners and access to Norwegian territory was part of the budding Nordic cooperation of the 1950s. Through the signing of the Nordic Passport Union (1952) with the other Nordic partners (Denmark, Finland, Iceland, and Sweden) Norway instituted passport-free travel in the region. In other words, Norwegian migration politics at this time did distinguish not only between citizens and non-citizens, but also accorded a special status to Nordic citizens through free movement across regional borders.

Toward the end of the 1960s Norway started to see an increase in migration. This happened conjunctively with a larger European trend of increased labour migration both internally in Europe as well as from countries outside Europe (Messina 2007). This new wave of migrants was almost exclusively labour migration to low-skilled jobs. The main sending countries of migrants to Norway were Pakistan, Turkey, Yugoslavia and other countries in Southern Europe (Kjelstadli, Tjelmeland and Brochmann 2003). This wave of migrants was welcomed as there was a surplus of jobs in Norway's budding oil economy. Nevertheless, after some years, labour unions and political actors argued for the need to curtail and regulate labour migration to protect the labour market for Norwegians. Thus, in 1975 Norway instituted a halt to open labour migration ('innvandringsstopp').

In the 1980s and 1990s, then, migration to Norway was mainly by refugees through the UN refugee quotas and asylum seekers. The Balkan War ushered in new migrants from that part of Europe, while in the latest wave of migration there was an increase in refugees and asylum seekers during and in the aftermath of the wars in Afghanistan and Iraq. Moreover, in the period from 2014-2016 Norway also saw its share of the increased migration to Europe on the back of the Syrian civil war and increased geopolitical tensions in the Middle East. This latest development led to extensive debates on asylum policies, reception of asylum seekers, and the future of integration policies.

Overall, Norway's approach to migration has been law-based, partly based on international conventions and on domestic laws covering different aspects to access to Norwegian territory. The territorial notion to migration has been strong. The Immigration Act focuses in this sense much on territorial access. Nevertheless, there has been a tendency in recent years toward a more comprehensive approach. This

means that access, integration once residence is established, and citizenship policy has been seen as part of one more coherent policy field.

Terms, definitions and concepts: the peculiarities of the Norwegian case

Norwegian law on migrants is regulated through different legislative arrangements. The Immigration Act (Utlendingsloven 2016) is the main piece of legislation which regulates the entry to national territory of foreigners and their eventual residence there. There are also certain regulations ('forskrift') that the Government and its Ministries can issue that do not need to go through the legislative process, but need to be in accordance with existing law. Finally, Norwegian migration law exists in a context of European law as well as human rights conventions and other international treaties. As an EEA member, Norway is bound by the EU treaties where these apply. In the case of migration, this has specific consequences for labour and economic migration to Norway due to the rights attached to free movement. Moreover, Norway has decided to take part in the Schengen system of passport-free travel in Europe as well as the Dublin system on asylum applications. The European Convention on Human Rights and other more specific human rights codes have also been part of Norwegian law since 1999. The domestic laws and principles on migration are, then, bound by these pieces and principles of international and supranational legislation.

While clearly regulating migration, the Immigration Act does, however, not make use of the term 'migrant', rather it is based on the word 'foreigner' (utlending) which is also part of the very title of the law. The term 'migrant' is, then, not clearly defined as such in the Immigration Act, yet the law regulates a host of different aspects of migration to Norway. The law defines a foreigner as anyone who is *not* a Norwegian citizen. The law stipulates in order to give the grounds for regulation and controlling access and exit from Norwegian territory and the stay of foreigners. Crucially, the law states that this should be in accordance with Norwegian migration policy and international obligations. In other words, the law is not standing on its own: it needs to be seen in accordance with broader policy-making. Moreover, the law clearly states that it is to facilitate *legal* movement across national borders. In this sense, the law defines a migrant as someone who enters Norwegian territory legally. From this follows that Norwegian migration law is focused on legal migrants and legal migration. There is no self-standing law on 'illegals'. Rather, the main law on migrants and

foreigners gives the rules and regulations under which different categories of migrants can have access to Norwegian territory and following this take up residence, first temporary and then possibly permanent.

Observations on the three understandings of justice from the Norwegian case

Justice as non-domination

It is obvious that Norwegian asylum policy as it has been defined in this report is at least close to the least demanding conception of justice, that is, justice as non-domination. A main principle in the legal definitions of asylum seekers and refugees is that the categories for protection should be clear. Moreover, there is clearly an effort in the legislation to avoid arbitrary decisions that may harm some individuals more than others. The more demanding conceptions also fall by the wayside when we look at state-to-state relations in asylum affairs. This is for instance the case when Norway decides on so-called safe countries for returning migrants and failed asylum seekers. This is clearly not a system where mutual recognition or impartiality is of significance. Norway decides on safe countries based on information from LANDINFO which is an independent government agency. While the recommendations from LANDINFO rely on an array of sources, safe country decisions have been disputed, both by the UN High Commissioner for Refugees (Crouch 2016) or by official representatives of sending states such as Afghanistan (Berglund 2016) In this sense, Norway seemingly does not adhere to the reciprocity which forms the core of the justice as mutual recognition as it can be doubted whether it has sought to '(...) establish cooperative arrangements and active dialogues with affected parties in order to determine what would be the right or best thing to do in any given circumstance' (Eriksen 2016, 20).

Justice as impartiality and justice as mutual recognition

Given Norway's increasingly strong interconnectedness with the EU and EU legal principles, one can argue that its migration law in part approximates a notion of justice as impartiality. Economic migrants in Norway are basically EU or EEA citizens who exercise their rights under EU law. Rights to free movement and the principle of non-discrimination based on nationality are part of the Norwegian migration regime. There is no 'universal' right to economic immigration to Norway: it is limited to EU and EEA citizens. In this sense, in terms of economic migrants, we cannot deem this too close to a notion of justice as

mutual recognition in a *global* sense. It is a territorial extension of rights to the transnational realm, where the notion of national belonging is less prevalent for rights attribution. While transnational, it is, however, still limited only to *European* citizens. Arguably, this transnationality falls somewhere between the first two notions of justice as non-domination or impartiality. Clearly, the principle of non-discrimination based on nationality rests on an understanding of a negative freedom where, for instance, a worker should be exempt from arbitrary disadvantage in the labour market as a result of their nationality. Yet, it is also clear that this does not extend to a cosmopolitan law for all in a universal sense which would be a requirement to meet the basic precepts of justice as impartiality. The definition of economic migrants in Norway, through the 'EEA connection' is quasi-cosmopolitan in its extension of rights to non-citizens with EU citizenship or nationality in an EEA country, yet falls short of universality in a true cosmopolitan sense. Rights as economic migrants in this Europeanized setting are not human rights: they are transnational rights which extend the territorial remit of rights considerably.

Chapter 5

National case studies: Perspectives of justice and implications for the EUMSG

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This chapter draws together the results of the preliminary analysis on the migration legislation of Italy, France, Germany, the United Kingdom, Hungary, Greece and Norway. Considered together, and examined thorough the lens of the three conceptions of justice examined above, the case studies point out the tensions and potential contradictions existing both between the different demands of justice and, empirically, within several components of the EU Migration System of Governance (EUMSG).

Justice as non-domination

Some of the terms and concepts used in the migration domain – be they nation specific or EU norms and regulations and their transpositions into national contexts – testify to potential violations of the principle of non-domination as to the relationships between the EU, Member States and third countries, and/or between the EU and Member States.

The emergence of power-informed relationships with third countries is one of the most significant cases found through this analysis. The Member States, as well as the EU, adopt and elaborate approaches – based on *quid pro quo* practices or privileged relations with some countries at the expense of others – that rely on the existence and the exploi-

tation asymmetrical power relations. For example, through the 'decreto flussi' ('flows decree') approach – linking foreign workers' quotas to the third-country's cooperation in the fight against 'clandestine immigration' and the readmission of irregular nationals – Italy can exert its power on relations with specific countries, privileging those countries where effective cooperation in migration management is at play and discriminating the others. *De facto* discriminatory legal and conceptual framings like this reveal subtler instances of the arbitrary interferences presented above. As it may already be inferred, the third-country's integrity and sovereignty can be encroached upon with measures whose definitions and declared targets do not directly involve a state-to-state relationship. In this sense, instruments like the 'decreto flussi' are liable to infringe the non-domination principle affecting both migrants and their country of origin. This is similar, to a large extent, to the approach developed by France in drafting bilateral agreements with third countries. Here, the rise of a discourse based on the concept of 'co-development' has produced a situation where the political and economic advantage of France towards the concerned third countries is used as a leverage to impose France's own priorities, in particular to control irregular migration and govern mobility in a more efficient manner for its economic system. Germany is also a notable case, since it does not only push its agenda on third-countries through 'regular' bilateral agreements provided with readmission clauses. Arguably, Germany has realized a subtler and possibly more effective way to exert domination on third states through the (in)famous EU-Turkey deal on asylum seekers – the controversial 'informal' agreement where Germany is considered one of the primary advocates. What makes the deal relevant in normative terms is that it allegedly enables a Member State to indirectly dominate over third, non-signatory countries (e.g. Syria) without the drawbacks that a bilateral commitment would entail.

On the other hand, Member States can be (or perceive themselves to be) victims of domination by the EU or by other Member States. One case in point is Greece, where the whole process of Europeanisation of migration and asylum legislation has not always served the country's national interest. Greece and Italy, more than others, have endured EU's specific approaches, such as the Dublin regulation, the hotspot approach, the perverse consequences resulting from the understanding of the relocation system, which have only exacerbated pressure on already weak systems. Italy, for example, has perceived the hotspot as

'imposed' by the EU, as a measure to ensure the proper fingerprinting of all migrants and 'select' different categories of migrants.

The case of Hungary is particularly interesting as it shows both dynamics at play. On the one hand, the country's perception that its position within the EU holds the risk of being dominated by other actors that have vastly different institutionalized practices and historical migratory processes, has often led Hungary to react to 'EU dominance', for example criticizing the 'forced settlement quota' system (Council Decision 2015/1523, Council 2015b) as arbitrary interference in Hungarian sovereignty. At the same time, Hungary gave way to, and engaged in dominating practices vis-à-vis individuals and third states alike. Not only is Hungary trying to block the return of asylum seekers to Hungary within the Dublin system, but the state managed to effectively exclude potential asylum seekers from enjoying their internationally guaranteed rights, and arbitrarily altered a sensitive, interstate legal procedure, that impaired the interests of a third state, namely, Serbia. Moreover, with Act XLIV of 2010, Hungary established preferential terms to naturalize ethnic Hungarians, including those 'historical' ethnic Hungarians that since the Treaty of Trianon (1920) have been living in the neighbouring countries. This was a highly political decision that was not conciliated with these countries and caused tensions in the bilateral diplomatic relationships. In this sense, the case of Hungary adds to the exam of justice as non-domination provided in the previous chapter indicating that, despite the 'Westphalian assumption' underlying this normative notion, attention must also be paid to mutual perceptions and national identities in order to accurately identify interference effects despite the relative lack of 'material factors' at play.

The perspective of state-on-state domination – either in a direct form or through the takeover of the EU system – may seem so threatening that the intergovernmental dimension *per se* might be regarded as a danger. If that were the case, any conception of justice different from non-domination would be not just an alternative vision but rather a solution to an objective problem. Nevertheless, the zero-sum-game is only one of the possible configurations of non-cosmopolitan, non-supranational relations among Member States, between the Member States and the EU or with third countries. The persistence of a 'Westphalian' dimension was not intended, especially in Europe, as ruling out all non-state actors as simply irrelevant. This goes for the migration policy area too and in the case of Member States in particular, where

decentralised and sometimes local actors play a relevant role. In normative terms, the presence of a plurality of governmental actors trying out new ways to achieve gains in terms of effectiveness does not (necessarily) mean impinging on cosmopolitan values or ruling out any possible role of the EU in this policy area. Breaches of the principles of non-domination are expected, both within the EU and in dealing with third states, but neither is inevitable.

Justice as impartiality

All case studies present formal reference to international norms and values in the treatment of migrants and refugees – e.g. the International and European Convention on human rights – but also to the Constitutions of some of the Member States, which, in certain cases, similarly envisage the respect of fundamental human rights. Beside the adherence to the principles of the protection of human rights, being signatory to these international instruments can also imply a concrete commitment to the mentioned role of ‘enforcer’ of cosmopolitan values and norms. This seems to be the case with the stable integration of UNHCR members in their respective asylum process. Moreover, many countries among those examined recognise specific ‘national’ statuses of humanitarian protection. The distinction between the rights recognised to refugees and the recipients of other forms of protection (see for example residence permits *durance* above) can contrast the principle of impartiality, as it produces different categories of individuals in need.

Even though several Member States have abandoned the use of negative terms such as ‘illegal’ or ‘clandestine’ migrants, opting for the more neutral ‘irregular’, only regulars have full recognition of rights and the treatment of irregular migrants is always at risk of rights violations. As has been noted, where the term ‘illegal’ is widely used, such as in Greece, this implies an even greater risk of violation of migrants’ rights, adding to a more general problematic access to rights depending on different legal categories and nationalities. This kind of discrimination is nevertheless more general than simply related to one case. All countries have different treatments on the base of nationalities, starting from the right to regularly enter the countries, such as in the framing of the ‘*decreto flussi*’ in Italy or bilateral agreements framed in France, that create a differentiated system of entry depending on nationalities, skills and occupations. At least as far as formal documents are concerned (the same does not go for public debate),

Germany seems able to avert (or more effectively hide) the subtle process of 'criminalisation' by using terms tantamount to 'unpermitted'.

The relation between regular stay and 'work contracts' emerges as a source of potential limitation against impartiality, as it discriminates in different ways individuals and nationalities depending on job availability and actual opportunity to access work. Given the emphasis on 'universality' in conceiving justice as impartiality – deliberately factoring out, in a sense, 'contingent' aspects – it comes as no surprise that tensions regarding the compliance with this normative conception are forceful at the national level, where labour- and welfare-related policy issues are more relevant. More generally, the relation between the possibility to get a work permit and the double criterion of nationality (bilateral agreements) and employment situation, via the labour shortage evaluation such as in France or targeted recruitment policies such as in the Five-tier Point System active in the UK, are hardly compatible with a cosmopolitan idea of justice and even less with impartiality, unless we define impartiality as a technical parameter for the efficiency of the labour market. Moreover, the formal link between the employment situation and the residence permit – epitomized by the Italian 'residence contract' – can create a direct subjugation to employers.

A restrictive interpretation of family reunification, noted in most cases, is also a source of concern, as while the unity of the family is considered as a value to protect, the access to family reunification can be restricted in many ways as seen above. In Italy for example, family reunification has been defined in a pejorative way through time.

A final observation concerns the different types of limitation of personal freedom in detention centres, sometimes of asylum seekers and even of minors. Here we can observe the production of a sort of 'special right' for foreigners. This is even more visible in all types of emergency approaches dealing with migrants, notwithstanding the ordinary legislation, and even more remarkable after the introduction of new centres with a dubious juridical nature as part of the hotspot approach in countries such as Greece and Italy.

Finally, as observed in the evaluation of the EU's approach, the definition of a national lists of 'safe countries' potentially opposes the principle of impartiality.

Justice as mutual recognition

One aspect that emerges from the case studies is the tension between justice as mutual recognition and the power that the EU and Member States have to unilaterally create and impose categories to other subjects, thus producing particular identity labels that may or may not be shared by the subject themselves. As noted by Mounz, while this 'reproduces the power of the State through simultaneous inclusion and exclusion [...] People, meanwhile, do not imagine their lives or identities in the terms of immigration policies and the categories they produce (in Baird 2016, 6). As pointed out above, the lack of dialogue and reciprocity makes it virtually impossible to comply with the recognition principle, since it prevents the involved parties from unravelling 'sticky labels' and bring to the fore the 'concrete other'.

This tension is visible, for example, in each case where ethnic or national belonging of the migrants has been considered the predominant criteria to classify incoming people – regardless of their specific subjectivity, both in terms of self-representation and peculiar life experiences. Moreover, a conceptual and legal framing based primarily on executive and bureaucratic rules rather than statutes – as it is the case with the UK – leads to a relationship between the arrival country's public authorities, and the migrants and/or states of origin that is informed by a (more or less latent) hierarchical principle. This normally discourages any genuine form of dialogue.

Moreover, in the case of the Member States, the 'emergency approach' adopted had the effect of reducing the attention to specific needs of groups or individuals. If the emergency approach has tended to consider migration as a temporary phenomenon, and thus acts against a more holistic view, the security issue related to the terrorist threat has led to even further risks. In the French case, for example, the formal declaration of the 'state of urgency' after the terrorist attacks in Paris in November 2015, converted into law, has led to an increase of the powers of police against the normal judiciary procedure, resulting in many complaints by organizations concerned with human rights protection and reports of mistreatment. Even the normal functioning of the state of urgency has an impact on migrants' life, as it justifies the increase in border control, identity control and administrative search inside the French national borders.

Several countries have introduced a compulsory form for migrants where they have to declare their respect and adherence to the laws and values of the country. This is the case for Italy, with the 'integration agreement', and France, with the 'Republican Integration Contract', but also other countries such as Germany and Hungary have similar instruments. These documents are accompanied with personalized paths to integration, where the migrants must show their knowledge of documents such as the national Constitution or their commitment to the learning of the national language. Independently from the values embodied in these 'agreements' or 'contract' (a misleading name, given that migrants have no choice but to sign them), they represent a reduced attention to cultural difference and the imposition of supposedly shared national values over migrants. It is nevertheless worth of notice that the value of these documents is mostly symbolic and, for this very reason, particularly insidious, as they contribute to the production and reproduction of the image of migration as a threat to the national identity and something external. This is even more significant if we consider that these documents refer to some fundamental values or rules of the country, but only migrants are required to formally commit to these values and rules. This responds to a shift in the approach towards migration that we can observe in many Member States, where the increase in the restrictions and conditionality clauses for regular migration have been accompanied by a nationalization of the discourse over migration and a resurgence of the theme of national identity. A remarkable case is that of France, where the presidency of Sarkozy has shifted the discussion towards a direct link between migration, integration and national identity with the consolidation of separated competencies in a new ministry created in 2007.

Overall, the enlisted examples show that the opposition between 'the concrete other' and the 'generalized other' is complicated by what we can consider an internal split in 'the concrete other' when dealing with migration policies. A split is created between citizens, being individuals entitled to universal rights, and migrants, being a subject of a state (this also explains the different provisions for the stateless persons). We observed before how the different treatments on the basis of nationalities can produce different sources of tensions for all the conception of justice we are considering. Yet it is worth adding that, independently from these different treatments, a 'generalized other' of the foreigner is created by linking migrants to their national origins. Before they are subjects of rights, migrants are conceived first and foremost

as citizens of other countries. This eliminates the possibility that a 'generalized other' is formed on the basis of the common concrete interests of people of different national origins and cultural formation *vis-à-vis* the hosting country. This implies strong consequences for the European migration system of governance, as it rests in a middle ground between nation states and a supranational political formation. While the European Union seems to replicate the exclusive logic of nation states on migration at a different scale, the possibility of a new path for justice not rooted in the political logic of sovereignty remains open.

Chapter 6

The EU, migration and justice: a tentative conclusion

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Seen from a normative standpoint, migration is a very tricky issue in that it touches upon and puts under strain the legitimate justice claims of a number of different actors: states, non-state polities (the EU), international organizations, but also citizens, individual migrants, clusters of migrants (asylum seekers, regular and irregular migrants and so on). What each one of these actors perceives as a legitimate justice claim might appear an essential violation of justice from the perspective of another. The relation of migration to a concept of justice based on a multi-layered evaluation is equally complicated to assess; namely, justice as non-domination, as impartiality and as mutual recognition. As already observed, these three conceptions refer to different levels of interactions between the subjects of what we defined as the EUMSG. Non-domination refers to a condition in which an actor is not subjected to (i.e. is free of) any kind of arbitrary interference or control on the part of other actors. *Impartiality* recalls an idea of 'equal basic rights and liberties' and the pre-eminence of human rights over sovereignty rights. Mutual recognition stresses the role of reciprocity and the right of each relevant subject (individual, group or polity) to be recognised in their identity, ruling out the possibility to determine 'a priori' what is normatively right and fair.

The existence of competing (or conflicting) normative claims is by no means only true of migration, yet people's transnational movement is a particularly troublesome issue as it touches upon the fundamental sovereign prerogative of a state to decide who is allowed to enter and stay on its own territory and with which rights and duties. This implies to include specific questions in relation to the three conceptions of justice in our discussion. In dealing with non-domination, we have to consider the complex relation between the EU and its Members States, as well as the relations with third actors. In terms of *impartiality*, we have to inquire how legal categories are defined and their impact on the application of universal norms of human rights. In dealing with mutual recognition, we have to ask to what extent the lack of recognition with respect to the subjectivity of migrants may correspond to an act of injustice.

The analysis conducted on terms, definition and concepts employed within the EUMSG has highlighted the inevitable tensions between ideal aspirations and the concrete handling of migration. In an ideal cosmopolitan world, the freedom to move from one country to another would be granted as a universal right, and there would be no distinction between types of migrants. In the real world, organized in states or not-too-dissimilar polities (the EU), migration is the *de facto* entry in a socio-political community of citizens (with rights, duties, values and a shared political identity) assumed to be a coherent group where the immigrant is an 'odd man out'. As a consequence, the hosting community attaches labels (refugee, economic migrant, regular/irregular migrant, asylum seeker) and applies selection criteria (nationality, country of origin, risk of persecution, gender, age, ethnicity, historical background, economic situation) to immigrants. Based on this categorization, immigrants are sent through different paths, staying in different types of temporary hosting structures, having different prospects of remaining in the country of arrival or being returned home or somewhere else. In an ideal cosmopolitan world, all this would amount to a system of domination of states on individuals. In the real world, however, this is just the outcome of the rules of the game that make socio-political life as we know it possible – and probably more democratic than it would be if a world state did exist and humankind were actually organized in a world cosmopolitan polity.

However, an evaluation of justice only based on sovereign states' prerogatives would not be sufficient for a number of reasons. First, the Westphalian logic is by no means the only one that is able to provide

legitimacy to international conduct, as evidenced by the development of international law, particularly with reference to human rights. Second, being that migration is a global, age-old phenomenon that has greatly affected the features of today's socio-political world, it seems reasonable for it to be managed through instruments of supranational governance and global norms, even though the latter still fare very poorly in terms of effectiveness and coherence. Third, in a world populated by subjective individuals and not (only) national citizens or human beings as natural rights bearers, each and every migrant is a unique person, whose migration claims should be evaluated based on their subjective features for a system of migration to be really fair and just. In the long run, then, the real world's migration governance is called to strike a balance among different logics of justice, which, at least today, appear hardly reconcilable.

The burden of this reconciliation weights on the EUMSG, even more than traditional state actors. This occurs for two main reasons. The first has to do with the expectations about the EU as an international actor. The EU has shaped its self-representation around the idea of being a community of values where human dignity, freedom/liberty, democracy, equality, justice, rule of law, solidarity, regulated liberalism/capitalism and ecological modernisation are in centre (Lucarelli and Manners 2006). The EU's foreign policy has been based on those values, and a certain distinctiveness in this respect has frequently been claimed by the EU itself, scholars (Manners 2002; Keukeleire and Delreux 2014; Whitman 2011) and observers (Cf. Chaban et al 2015; Lucarelli 2014). Ultimately, the EU's legitimacy and credibility depends on its ability to show coherence with respect to those values, and effectiveness with respect to its own political objectives (Lucarelli, Cerutti, Schmidt 2011). It comes as no surprise, then, that the EU frequently refers to its own values in its documents on migration, is highly attentive to the respect of international agreements and underlines the importance of respecting human rights and the human dignity of migrants. It is not surprising either, that, among the declared aims of the EU's search and rescue operations in the Mediterranean, the protection of the EU's borders is accompanied by the protection of migrants' lives (see the Agenda on Migration of 2015). At the same time, however, the protection of borders can actually trump the protection of human rights – as it is the case with the recent EU-Turkey agreement. In this case, the discrepancy between actual behaviour and self-representation becomes all the more clear and troublesome for a values-based actor as the EU.

Second, migration governance is particularly problematic to the EU due to the latter's peculiar system of governance. The existence of different levels of governance, a highly complex system of shared competences between EU institutions and the Member States, and the array of different national legislations on migration existing in each Member State make the EU system of migration vulnerable to a series of breaches of justice. Cases of 'internal domination' on EU-Member states have occurred and have been denounced in Italy, Greece, and Hungary. At the same time, instances of Member States-to-Member States 'internal domination' have resulted from lack of solidarity, as well as unilateral decisions affecting others (i.e. Germany's decision to let in Syrian refugees without prior consultations with its fellow Member States). Moreover, breaches of the impartiality principle are also the inevitable result of small-yet-relevant differences among the Member states' legal systems and practices with respect to migration and asylum.

However, there is another feature of the EU system of governance that impinges on the EU's ability to abide by justice in its migration policy: its complex nature as a 'process' other than an 'actor'. By its own character, the EU is not only an international actor, but also a *process* of integration of states – a process/actor that has always tried to cope with the double goal of 1) (re)creating the conditions for the process to carry on, and 2) being efficient as an actor in the management of a certain policy area. The massive arrival of migrants to the European territory and their uneven distribution among the Member States soon started to challenge and put at risk the main achievements of the European integration process (the Schengen agreement above all), as well as the EU's credibility in the eyes of increasingly Eurosceptic domestic publics. The EU's response has consisted in an attempt to manage the domestic challenges posed by migration, while at the same time safeguarding migrants' safety. However, the instrument used (attempts to Europeanise the national component of the EU migration system, the hotspot and relocation approaches, agreements with third countries, Trust funds) have sometimes resulted in more breaches of justice as non-domination (against EU-Member States and EU-third countries), impartiality (as in the case of the EU's list of safe countries of origin, or the weak human right protection conditionality clauses included in the EU's agreements with third countries), and mutual recognition (the framing of the response as an emergency has diminished the ability of the system to ensure due attention to the distinctive other, which instead tends to be collapsed into categories of generalised others).

Does this imply that the EUMSG fails to comply with justice claims and pursue its normative goals? Such a verdict would be too harsh. The EU system is one of the most advanced in terms of attention granted to the protection of human rights, and has improved its ability to subsume national differences while also guaranteeing a certain attention to specific individual needs, as evident with the introduction of subsidiary protection and other forms of 'humanitarian' protection envisaged at the Member States' level. Moreover, the tension among the three notions of justice is not an intrinsic feature of the EU, but can rather be regarded as a result of a conflict between the normative logics that underlie the three conceptions of justice, and that appears really hard to cope with.

Furthermore, as stated in the introduction of this report, a final verdict on the compliance of the EUMSG with global justice cannot be grounded only on a preliminary assessment of the terms, definition and concepts employed and will need further research on the European practices.

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Migration is at the heart of the current political debate in Europe. Moreover, the migration crisis has disclosed a number of normative and ethical issues connected to the current management of migration in the EU. This report provides a preliminary insight into the EU's policy on migration. It looks specifically at the terms the EU chooses, the definitions it devises and the concepts and understandings it endorses in its migration policies. In order to grasp the actual working of an emerging EU Migration System of Governance (EUMSG), the same terms, concepts and definitions are also examined with reference to a set of national cases: Italy, France, Germany, United Kingdom, Hungary, Greece and Norway.

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