The EU Migration System of Governance

Justice on the Move

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Edited by
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CHAPTER 1

The EU Migration System and Global Justice: An Introduction

Sonia Lucarelli

THE EUROPEAN UNION, IMMIGRATION AND GLOBAL JUSTICE: WHY AND HOW TO STUDY IT?

Migration has shaped the history of Europe.[1] Centuries of movements of people within great empires (Roman, Ottoman), flows of populations in the form of invasions or flight from wars or famine, and movements of workers have all contributed to making Europe what it is today.[2]

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[1] In this chapter, 'migration'/ 'migrant' is considered as a broad category which encompasses several categories of people reaching the territory of a foreign state to stay for a relatively long time. Hence no distinction is made (unless explicitly) as to the reason for fleeing one's country (economic or security-related). Moreover, we prefer to adopt the word 'migration', with all its human burden, rather than the cognitively more neutral and technical 'human mobility'. Our choice does not imply that there is no intra-state migration, but we are not focusing attention on this phenomenon. Finally, we focus particularly on irregular migrants and on migrants' arrival, not on the integration of migrant communities in European societies.

[2] For an overview of historical migration to/from Europe, see Livi Bacci (2012).

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Moreover, Europe's own emigration has helped to change the face and composition of communities outside Europe, as the anthropologist Erik R. Wolf reminded us in his famous *Europe and the People without History* (1982).

Over time, the social and political consolidation of nation states has not stopped intra-European migration but has significantly changed the perception of borders and citizenship, giving a different social meaning to the category of migrant. Up until the 1970s, several European states continued to be countries of emigration more than immigration.[3] But the European integration process (particularly the common market, free movement of people and the establishment of European citizenship), coupled with the growing interconnectedness of European societies, transformed the meaning of peoples' movement. Europe seemed to have become a post-Westphalian land and to have revised its understanding of borders and state sovereignty (Caporaso 1996; Sperling et al. 2009; Linklater 1996). It has even been able to develop an identity grounded in a 'temporal othering' (distinguishing itself from the conflict-prone Europe of the past) rather than in physical othering with respect to entities outside its borders (Wæver 1998)—better described as *frontiers*, given their unsettled nature. Yet in recent years a nationalistic rhetoric has been rediscovered, which views immigration as a contemporary sin threatening the purity of nations, or which depicts migrants as a potential challenge to the 'European way of life'. The memory of migration flows from Europe to the rest of the world as well as its role in forging internal transformations seems to have been lost by large portions of European society. In this context, even the intra-European movement of people has begun to be questioned. It is no coincidence that migration was one of the main issues discussed during the 2016 UK campaign for the referendum which led to the country's decision to withdraw from the EU (so-called Brexit).[4] Gradually, European borders have started to be described and enforced as hard borders, marking the limits of communities increasingly in terms of geo-cultural juxtaposition. In other words, Europe seems to be retreating towards a modern understanding of sovereignty, borders and identity.

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[3] This is particularly the case of Southern European states. For example, between 1946 and 1961 Italy saw the expatriation of more than 4,400,000 citizens, see http://www.orda.it/rizzoli/stella/numeri/emi4.spm.

[4] In the case of Brexit, the discussion mainly concerned intra-European migration (see http://www.migrationobservatory.ox.ac.uk/projects/migration-and-brexit/).

While this process probably started with the transformations which took place after the end of the Cold War, it has been reinforced by the pressure of international terrorism (Diez 2004). But important accelerating factors have also been the economic crisis which erupted in 2008 and the so-called migrant crisis of 2015–2016.

Indeed, the rise in the number of arrivals of migrants on the European territory in 2015 (about 1 million according to estimates, over 5 times more than the previous year[5])—at a time when Europe was still recovering from the social strain of a severe economic crisis—triggered a series of reactions on the part of several Member States aimed at stopping the flow of migrants. These included the creation of physical barriers (including real walls), the reintroduction of controls at internal borders in the Schengen area and the ratification of agreements with neighbours (Turkey in first place) aimed at externalizing the control of migrants' arrival to European coasts. In order to 'save Schengen' (to use the telling name of the Commission's communication—European Commission 2016), the EU adopted a series of measures aimed at reassuring its Member States of the EU's ability to 'protect' its external borders (such as the creation of the Border and Coast Guard and the launch of maritime operations aimed mainly at fighting human smuggling). Furthermore, the EU gradually enhanced the externalization of the management of migration by supporting the drafting of agreements with neighbouring countries by EU Member States (e.g. the Turkey agreement mentioned above, but also the Italy-Libya agreement of February 2017, see European Council 2017). The EU has also developed partnership framework agreements with African countries with the main purpose of stopping migration flows to Europe (one of the most developed is that with Niger) (CINI and Concord Europe 2018). These practices have had a relevant 'bordering function', making the EU's external borders more 'Europeanized' and securitized (hence less and less similar to unsettled *frontiers*), and by moving southwards to patrol and control the EU's borders.

Various actors have contributed to the functioning and transformation of what we label the 'EU Migration System of Governance' (EUMSG): EU institutions, EU Member States, the other states participating in

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[5] See https://data2.unhcr.org/en/situations/mediterranean. UNHCR reports that the number of refugees in Europe rose by 43% in 2015, the second highest rise worldwide after the Central African region ±79% (https://www.unhcr.org/576408cd7.pdf).

the Schengen area, some neighbours, and NGOs. Each has struggled to define the internal rules of the game, the degree of burden sharing and relations with third countries. Each has contributed to redefining the very understanding of Europe's borders and sovereignty as well as the relationship between the latter and migration. Each has endorsed different understandings of what constitutes a 'just' migration policy. The European debate in the past few years has been illustrative of this latter point.

Research shows that one of the dominant legitimizing narratives used to sustain the practice of limiting migration across borders (even through arbitrary suspensions of the Schengen agreement or refusals to share the burden of arrivals) has been a normative one of a Westphalian nature (D'Amato and Lucarelli 2019). This widespread legitimizing narrative prioritizes the 'protection' of states citizens' in the face of massive arrivals of foreign people who would allegedly destabilize or even directly threaten the domestic society.

Against this line of reasoning, which also serves to legitimize measures aimed at differentiating between categories of migrants[6] and to limit their access to European countries, NGOs as well as several international organizations have stressed the importance of prioritizing respect for migrants' rights (see, e.g., OHCHR 2017; Amnesty International 2017). On these grounds, measures undertaken to limit arrivals to Europe such as the externalization of EU migration policy to third countries whose credentials in terms of respect for human rights are not strong to say the least, have been subject to severe criticism. The 2016 EU-Turkey deal to stop flows through the so-called Balkan route was blamed particularly for its negative consequences on migrants' human rights (Council of Europe 2016). Equally criticized have been the open violations of human rights in several EU Member States (Human Rights Watch 2018). The academic argument in favour of 'open borders' (Carens 1987, 2013; Block 1998; Clemens 2011) has also started to be debated in the media (*The Economist* 2017) and has been used in the political debate: 'Inevitably - claimed

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[6] In an attempt to keep this discussion within the boundaries of legal orders, a great effort has been made in recent years to classify migrants in categories subject to different treatment (legal/illegal migrants, temporary workers, economic migrants, asylum seekers, refugees, people in clear need of international protection, etc.), giving origin to distinctions which are frequently blurred, yet have heavy legal consequences for the migrants. On the ethical implication of labelling and categorizing in the area of migration, see Fassi and Lucarelli (2017), particularly Ceccorulli (2017).

UK shadow chancellor John McDonnell - [… t]he movement of peoples across the globe will mean that borders are almost going to become irrelevant by the end of this century, so we should be preparing for that and explaining why people move' (John McDonnell, quoted in BBC 2016).

To support the argument that we have a moral duty to help migrants and allow them in, a narrative frequently endorsed is the humanitarian one. Such a narrative, however, has been criticized for 'inadvertently producing voiceless and agency-less *victims*' (Sandro Mezzadra, quoted by Ceccorulli 2019) and for 'shifting our attention from development to emergency assistance, [also] establishing a moral geography of the world' (Musarò 2011, 1). These critics call for greater attention to migrants' subjectivity (Mezzadra 2015; Fassin 2011; Marvakis 2012), which can be disregarded even in the case of formal compliance with legislation on human rights.

In other words, the migration crisis has exposed a number of normative and ethical issues connected to the current management of migration within the EUMSG: to what extent can such a system be reasonably deemed 'just'? Just for whom? Does the EU's management of migration live up to the principles of global justice? And which understanding of global justice? Ultimately, what are the political and normative implications for the EU as a *sui generis* polity which has long been described as a normative power (Manners 2002), if not an ethical power (Aggestam 2008) of a post-Westphalian nature?[7]

This book aims to explore these issues by analysing the EU and Member States' norms and practices on migration. In particular, the rationale for this book is threefold: first, it emphasizes that the management of migration and asylum in the EU approximates a governance system in which both Member States and EU institutions have a role which deserves to be studied in its own right. In line with this rationale, the first aim of this book is to explore the norms, policies and broader practices that the EU and a set of states have developed over time in order to cope with arrivals of migrants. This analysis is fundamental in order to grasp the political, institutional and cultural context nurturing migration policies in these Member States, their contribution to the overall functioning of the EUMSG and the influence the latter has on the transformation of their domestic policies and legislation on the topic.

[7] For an overview of the debate on the EU's distinctiveness thesis see: Whitman (2011). Critical voices include Sjursen (2006), Diez (2005).

Second, the book underscores migration governance as a complex effort to identify and weigh different justice claims depending on who is perceived to be the recipient of rights (the EU, the national community, human beings, the subjective individual) and on related moral responsibilities there attached. Accordingly, the second aim of the book is to add a largely unexplored dimension to the analysis of the functioning of the EUMSG by looking at EU and Member States' migration policies from the perspective of justice.

Third, by acknowledging the practices and discourses on migration and borders in the EU and exploring the relationship between different justice claims in and by the actors of the EUMSG, we aim to evaluate the implications these have on the EU's international actorness.

The goal of this chapter is to set the stage for this analysis. To achieve this aim, the chapter unfolds as follows: it first introduces the normative challenges posed by growing global interconnectedness and explains the relationship between globalization, global justice and migration. It then explores the relationship between state borders, migration and rights and eventually introduces the three different perspectives we will apply to global political justice in the area of migration. Subsequently, it addresses the characteristics of the EUMSG and explains this volume's contribution to the analysis of such a system. Finally, the chapter explains the organization of the volume.

Globalisation, Global Justice and Migration

Since the 1970s world interconnectedness has risen significantly, globalization has accelerated and elements of global political and economic governance have been developed (Ferguson et al. 2011).[8] The complex set of processes that we label globalization as well as the instances of global governance enacted have contributed to significant improvements in human conditions worldwide. Empirical research shows that (economic, social and political) globalization has spurred economic growth, promoted gender equality and improved human rights, but it has also raised inequality within and among states (Potrafke 2015). According to the Human Development Report 2016, 'the top 1 percent of global wealth distribution holds 46 percent of the world's wealth' (5). One

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[8] KOF Globalization Index—https://www.kof.ethz.ch/en/forecasts-and-indicators/indicators/kof-globalisation-index.html

person out of nine in the world is hungry and one out of three is malnourished; group-based disadvantages and discrimination are widespread and many of 'the 65 million forcibly displaced people, face extreme conditions' (UNDP 2016, 5). In this respect, birth plays a relevant role in the opportunity to belong to the world's better off, or not: a Norwegian citizen (first position in the Human development index—HDI) has a life expectancy of 81.7 years, an average education of 12.7 years in school, and a GDP per capita of about US$67,600; a citizen of the Central African Republic (position 188 in the HDI) has a life expectancy of 51.5 years, an average of 4.2 years of schooling and a GDP per capita of about US$587. Equally, in these as in other countries, access to political and civil rights varies immensely. All this occurs in a deeply interconnected world in which the decisions of a single powerful individual can strongly affect the living conditions of people in faraway countries. The observation of all these inequalities and limitations to human freedom and self-determination have nourished a lively debate on 'global justice'.

The idea of justice, explored for centuries with reference to the state, and more recently placed at the core of the normative theory by John Rawls' *A Theory of Justice* (1971), then started to be applied to the globe. In *The Law of Peoples* (1993), Rawls developed a liberal theory of global justice in which 'the peoples' adopt liberal-democratic principles within their own constituencies (or at least respect basic human rights and do not behave aggressively towards other peoples) and follow principles of conduct towards other peoples: these include respecting the freedom and independence of peoples, respect for treaties, the equality of peoples, non-intervention, the right to self-determination, respect of human rights, restrictions on warfare, and the duty to assist people who—due to disadvantageous conditions—cannot be part of the 'society of peoples'. Despite the many criticisms of Rawls' contribution to theorizing on global justice, one aspect of his thought is important to underline: the need to take into account, when dealing with global justice, both international and intranational relations. As Pogge points out in his introduction to a collection of seminal contributions to global justice, the globalization of world politics 'render[s] obsolete the sharp distinction between *intra*national and *inter*national relations [as if they were] two separate domains of moral theorizing' (Pogge 2008, xvii).

In fact, it would be highly problematic to limit a reflection on global justice exclusively to the level of international relations, even more if

they are understood simply as intergovernmental relations. It is indisputable that global justice behoves us to consider justice at different levels (domestic, intergovernmental, transnational and global) and in relation to different actors (such as states, international organizations, individuals, national and transnational groups). Can we consider just, an international system in which stateless persons have basically no rights? Is a system just, in which, in the name of protecting persecuted civilians, military intervention follows which destroys the living conditions of those still living, with the intervening states not assuming responsibility for socio-political and material reconstruction? Is a system just, in which states can discriminate among causes of 'clear need' of refugees, attributing different rights to those risking death from famine and those risking death due to political persecution?

Indeed, migration is a particularly privileged perspective from which to study global justice: it is a global phenomenon which involves people, states, and international organizations. Equally, it is a phenomenon which puts into direct confrontation individual human beings' claims for legitimate justice with those of sovereign states. The international norms and rules in this area are very thin and pertain primarily to conditions for asylum. But migrants and states alike are subject to respect for broader human rights and norms safeguarding states' sovereignty. In other words, migration is at the crossroads of different worlds of justice, and the management of migration is a battleground with claims for justice that are difficult to reconcile.

Migration, Borders and Rights: Ethical Perspectives

Migration is as old as humankind on earth,[9] but its social meaning has historically changed. Whether it be in response to basic human needs (food, shelter, …) or to more elaborated social needs (e.g. improved living conditions), humans have always moved to and resettled in geographic areas other than where they were born. This has contributed to the diffusion of the human species on the planet, made possible encounters that rendered its DNA stronger and more resilient, and shaped the social and

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[9] For an overview of migration history, Gibney and Hansen (2005), Livi Bacci (2012), Castles et al. (2014).

political history of human communities. Yet, with the creation of the first settled communities, population movements have begun to come to terms with potential clashes between moving people and stationary communities. The more the physical space has become densely covered by organized political communities, the more mobility has become a potentially contentious issue. However, it was with the consolidation of the state as polity of reference that the *borders* of the political community started to be perceived and enacted as 'solid'. Although historically subject to changes, state borders were never as flexible as empires' frontiers. Moreover, more than before, a state's borders designed the external margin of the area of rights: they were the line which separated state's citizens—subject to internal rules, owners of rights and duties and recipients of protection—from the external world. In other words, gradually 'frontiers' became 'boundaries'. In the *jus publicum europaeum,* the borders of justice coincided with the borders of legality and hence with the borders of state sovereignty (Schmitt 1950). In this system of states, individuals were granted rights as members of a community rather than human beings; domestic legal systems and the rules governing inter-state relations determined the laws affecting their lives. With the development of elements of cosmopolitan law, beyond domestic and international (inter-state) law, individuals became bearers of rights (and duties) on their own, regardless of their community(ies) of belonging. This created the conditions for looking at migrants not only as people attempting to pass the border of rights of a closed community, but as individuals with rights and duties on their own. Yet they remain at the border of competing understandings of justice: one which favours the rights (and concerns) of the hosting community, and one which prioritizes the rights of migrants as human beings, if not as individuals, each with specific subjective needs.

Such tension is at the core of the literature on the ethics of migration.[10] A relatively recent branch of philosophical reflection, the debate on the ethics of migration has been dominated by normative theory ('what ought to be') more than by the exploration of the justice claims of concrete opposing factions in the debate on immigration in political communities at the domestic, international and global level. In other words, the debate has been dominated by an attempt to reply to questions such as: shall communities enforce a policy of closed borders? Under which conditions

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[10] The field of enquiry is now wide and growing, for an overview, Carens (2013), Fine and Ypi (2016), Gibney (2004), Greblo (2015), Miller (2016), Sager (2016).

are closed borders just? Do we have a duty to save migrants at sea? Which criteria for selective immigration are just? Is there a universal right to migrate? What we propose here is to use this debate to explore what are the *claims for justice* legitimizing actual decisions within the EUMSG. We explore the link between broad perspectives on justice and specific ethical positions in relation to the actual policy of migration. In order to do so, we identify three positions on global political justice and their equivalent in the area of migration.[11]

Justice as Non-domination: The Responsible Westphalian Perspective

The first position is *justice as non-domination*. This refers to a situation of non-subjugation, control or interference of an actor by any other actor. According to this view, the integrity and sovereignty of states are respected together with their system of protecting rights (Eriksen 2016, 11; Pettit 2010). Applied to the field of migration, non-domination is intended in relation to state-like entities or political actors such as the EU, its Member States and third countries and presupposes fair and equally participated relations.

According to this perspective, a state's sovereignty is a value to be respected. This implies in the first place a state's duty to protect its own citizens. In the second place, it implies respect for other states' sovereignty. The logical consequence of this position is a state's right (and duty) to control the community's borders, decide on who has the right to pass such borders and who is entitled to citizenship. Selective immigration (if not closed borders) would respond to the idea that a state is a community of people who have special bonds of loyalty and shared affiliation (Miller 2005a); such bonds provide the resources of meaning indispensable for social cohesion (Habermas 1994).

The first contributor to the thesis of the legitimacy of imposing selective migration ('closed borders') is Michael Walzer. In his widely read *Spheres of Justice* (1983), moving from a moderate communitarian position, Walzer supports the idea that, in order to achieve 'a society free of domination' (1983, xiii), each community needs to protect its integrity by

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[11] The three categories are those proposed in the context of the research project Globus (*Reconsidering European Contributions to Global Justice*), of which this book is an offspring. More information in the preface to the volume.

deciding on the conditions for admission and exclusion to the community itself. These conditions should function to maintain cohesion within the community. Hence, they represent the conditions for self-definition of the political system. In other words, the community's capacity to enact its borders of inclusion is constitutive of the community itself and is a precondition for fulfilling a distributive criterion of justice.[12] This is not the simple, mechanical recognition of the fact that bodies (be they material, political or social) need to be delimited by borders, but the recognition that these borders identify and protect a community's peculiar culture (Walzer 1981, 1983). This responds to the individuals' right to form a distinct and stable group of people 'committed to dividing, exchanging and sharing, first of all among themselves' (Walzer 1981, 1). The community in this view resembles a *club* that has the right to protect its cultural homogeneity (Walzer 1981).

Nonetheless, states are bound to help 'strangers' who are destitute, persecuted or stateless. This requirement varies depending on whether the state is somehow responsible for their movement, on the ideological or ethnic background of the migrants (which should be close to that of the state community), and whether they have alternatives or not (Walzer 1981; see also Miller 2005a). In the most extreme versions of this position, as with Wellman, 'legitimate states are entitled to reject all potential immigrants, even those desperately seeking asylum from corrupt governments' (2008, 141). In other words, communities have a right to defend what in international relations would be labelled their 'ontological security', the security of the most profound self.[13] It is clear that this position assumes a typical ideal representation of the state as the locus of

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[12] 'Principles of distributive justice are […] best thought of as providing moral guidance for the political processes and structures that affect the distribution of benefits and burdens in societies, and any principles which do offer this kind of moral guidance on distribution, regardless of the terminology they employ, should be considered principles of distributive justice' (Stanford Encyclopedia of Philosophy 1996 [revised 2017]), https://plato.stanford.edu/entries/justice-distributive/.

[13] Antony Giddens (1991), defined ontological security as a 'person's fundamental sense of safety in the world [which] includes a basic trust of other people [in order to] maintain a sense of psychological well-being and avoid existential anxiety' (1991, 38–39). J. Mitzen (2006), B. J. Steele (2008) and others have developed and applied the concept to international relations, mainly translating the reflection on the individual to the state level.

a homogeneous community, with a shared national identity which guarantees fundamental social bounds. The more moderate versions of this position—of which David Miller's 'liberal nationalism' is possibly the best example—recognizes states' rights to enact selective immigration, prioritizing the community's collective interest over immigrants' particular interest (Miller 2005b, 2008, 375). In fact, according to Miller, national borders are boundaries that legitimately protect the national community and because of this, have an ethical significance. However, clarifies Miller, 'although national values and national priorities can be reasonably invoked when deciding *how many* to take over any given period of time, when it comes to selecting among the applicants, only "neutral" criteria can legitimately be used' (Miller 2008, 388).

The latter aspect is particularly relevant and points to the most troubling aspect of conciliation between a liberal view of politics and the claim that the state has a right (and duty) to close its borders. The argument here is that even in the case of liberal democracies, characterized by internal pluralism and differences (political and increasingly also cultural and ethnic),[14] policies of selective immigration are legitimate tools to guarantee 'cultural stability' (Perry 1995, 105) and avoid excessive alterations of the socio-cultural fabric (for a review, Stanford Encyclopedia of Philosophy 2015; Greblo 2015, 24–25).

Selective immigration, if not closed borders, are also defended in the name of other reasons such as the right to self-determination of political communities and individuals' freedom of association (Wellman 2011); the need to safeguard the welfare state and avoid the economic costs of immigration (cf. Greblo 2015, 57–64); the need to protect the state and its citizens against possible terrorist or criminal infiltrations brought on by immigration, an argument frequently used also in the public debate and part of the broad process of securitization and criminalization of migration (Huysmans 2006; Guild 2009; Atak and Simeon 2018). Next to these 'internal' reasons for considering a policy of selective immigration just, a further argument is made by the supporters of a non-domination

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[14] In liberal thought, traditionally, it is the individual who is the beholder of rights. However, liberal thinkers reflecting on liberalism in multicultural societies have explored the conditions under which groups are also beholders of rights. Kymlicka, for instance, focuses on the conditions for a liberal multicultural society (1995). Key is his identification of thresholds of liberalism which could not be dismissed in the name of tolerance for different cultures. On this aspect, see also Cerutti (2017, 30), Lucarelli (2020, Chapter 7).

approach to justice: a policy of open borders not only would not help the worst off, but would also damage the countries of origin by draining human resources (Miller 2005a).

Given the arguments used and here briefly summarized, it is clear that claiming to adopt a policy of selective immigration does not necessarily imply having a nationalistic perspective on politics, and may also be justified on the basis of liberal views. For instance, a selective approach to migration could be justified on the basis of the argument that liberal societies can grant basic rights only to a limited number of migrants; if they accept more and do not grant them decent living conditions, they fail to uphold their own principles (see, e.g., Ruhs 2013). However, in this case, the liberal-democratic state would have to compensate for such selective policies by investing at the international and global level to overcome the conditions of inequality which cause migration in the first place (Greblo 2015, 25).

Moreover, the liberal state would also have to consider the special position of those whose 'vital interest [in life] cannot be secured in the country where [they] currently reside' (Miller 2005a, 196)—i.e. those entitled to seek asylum.[15], but also the global poor (Miller 2007). In this perspective, a just migration policy also includes taking on historical responsibilities (Miller 2007).[16] Hence a purely Westphalian principle which puts national citizens first without taking on global responsibilities would not satisfy the criterion of global justice as non-domination.

Justice as Impartiality*: The Cosmopolitan Perspective*

The second stance on global justice—*impartiality*—adopts a cosmopolitan perspective that puts individuals at centre stage: human

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[15] In reality, some scholars claim that it is possible to respond to justice claims of the persecuted ones by helping them in their country of origin or offering limited temporary protection (Wellman 2011, 123) As we will see in the rest of the book, this argument has entered the public debate and has even had an impact on the 2016 EU Commission proposal for reform of the asylum system which has emphasized the non-permanent nature of refugee status in the EU by underlining the need for repeated checks with respect to protection needs (Ceccorulli 2018).

[16] This issue is highly controversial, as it could imply considering most migration from former colonies a result of local and global inequalities created by the former colonizers and would imply considering a generous immigration policy as a form of compensation for past wrongs (cf. Collste 2015, Ch. 12).

beings are the ultimate units of moral concern. This conception of justice is strongly related to the concept of non-discrimination, equal basic rights and liberties and human dignity (Eriksen 2016, 14–15). As evaluated in the field of migration, impartiality would imply the acceptable treatment of migrants and asylum seekers mainly according to leading international (and EU) laws and conventions, on non-discrimination with respect to (EU or Member State) nationals, and also on the impartial treatment of persons in need of protection. Coherent with this perspective on justice is the position of the supporters of open borders for migrants. There are at least four ethical grounds on the basis of which the thesis of open borders has been supported: libertarian (there is a right to migrate), utilitarian (promotion of well-being), democratic (political coercion cannot be legitimate unless it is under the democratic control of all those coerced) and egalitarian (everyone would have equal opportunities) (e.g. Carens 1987; Stanford Encyclopedia of Philosophy 2015). Despite the difference in argumentation, they all come to the conclusion that a just migration regime would entail more open borders for migrants. Clearly, this challenges the Westphalian understanding of hard borders as a necessary requirement of state sovereignty.

Borders in the Westphalian world of states have always been treated asymmetrically, acknowledging the right/freedom to exit as legitimate and to be protected, while denying or limiting the right to enter. A country that limits the right of exit would be considered tyrannical, while the same would not be said of a country forbidding entry to foreigners. Yet according to Joseph Carens, one of the leading scholars adopting this position (Carens 1992), '[t]he current restrictions on immigration in Western democracies […] are not justifiable. Like feudal barriers to mobility, they protect unjust privilege. […] What is not really compatible with the idea of equal moral worth is the exclusion of those who want to join. If people want to sign the social contract, they should be permitted to do so' (1987, 270; see also 2013). Also moving from a cosmopolitan perspective (yet not denying the relevance of borders for state democracy), Seyla Benhabib (2004) denounces the use of the 'old map' of state sovereignty to search for guidance in navigating the new waters of transnational migrations and global interdependence: state sovereignty and borders need to be re-thought.

One of the most powerful challenges to limitations on immigration regards the immorality of the so-called lottery of birth (Schachar 2009): the fact that people acquire citizenship—and hence rights and living

conditions—on the basis of something (birth) over which they have no control.

Moreover, freedom of movement across borders can also be considered a form of compensation for social, political and economic inequality (Carens 1992). Indeed, according to this position, freedom to move is both a person's basic right and a more instrumental prerequisite to achieving other goals (e.g. autonomy, freedom from want and need) (Bader 2005, 338). Migration can also represent a form of redistributive justice at the global level, even if the net impact on the countries of origin is controversial (Oberman 2011).

Having said this, the largest majority sharing the 'open borders' position recognizes that there are limits to freedom of movement. The cosmopolitan perspective on migration, then, ranges from a more extreme position that considers migration a fundamental human right—hence calling for complete freedom to cross borders—to a more moderate position that considers the right to move, but not the duty to welcome every migrant, therefore calling for *more* open borders, rather than complete open borders.

By adopting a moderate understanding of the cosmopolitan perspective on migration, as complacent with the requirement of 'Justice as Impartiality', we would consider the management of migration across borders as 'just' if it respects the human rights of migrants and the principle of equal treatment of persons in need of protection; we would also expect a policy of 'porous' borders as proposed by Benhabib: one that allows for movement of people, and yet also respects the fact that the world is organized in states, each with public authorities responsible for the territory of the settled population. Moreover, we would also expect a policy which engages in attempts to develop global governance of migration aimed at promoting *human* development and *human* security, which provides safe avenues of mobility and expands the spectrum of those who have a right to protection to people escaping famine or, for instance, the negative effects of climate change.

Justice as Mutual Recognition: The Concrete Other Perspective

Probably the most demanding of the three, justice as mutual recognition acknowledges the relevance of each subject's (individual, group or polity) voice in being heard and requests the active participation of subjects in governing the phenomena affecting them. In the case of

migration, mutual recognition would not only imply taking into account the personal stories of the persons concerned and their vulnerable statuses, but would also consider them as agents and not simply spectators in the governance of migration. Rather than adopting a governmental paternalistic attitude, these critics affirm, we would need to pay attention to migrants' subjectivity and the autonomy (Mezzadra 2015; Fassin 2011; De Genova 2017). Hence, even where there is no blatant violation of a migrant's human rights, there may be a violation of his/her right to be recognized in his/her own specific subjectivity and needs. In the case of asylum seekers, the legal requirement that each request should be processed and evaluated in its own right seems to comply with a similar approach; however, some of the measures undertaken to cope with the so-called migration crisis in Europe have severely challenged (and frequently violated) such a requirement.[17]

As discussed by Eriksen, that 'which brings *justice as mutual recognition* to the fore is that -…- there are structural forms of injustice which extend beyond states as well as injustices which fly under the radar of formal justice' (Eriksen 2016, 19). This implies the need to consider who is excluded when a particular agent defines what is just, and whose voice is not considered in the process of defining formal procedures. A similar conception leads to the recognition that different groups have different views and thus need to be considered in their specificity for a deliberation or policy to be considered 'just' under this stance. The classical example is that of specific cultural or national groups. However, this conception runs the risk of crystallizing identities, mirroring the limits of Westphalian perspectives, which tend to objectivize national communities, applying identities to migrants that they would not necessarily consider as defining their subjectivity.

But the concept of mutual recognition also encompasses a wider meaning, which includes the need to think of justice in relation to migration beyond Westphalian narratives and the cosmopolitan perspective. One way to approach this issue is to consider the 'other spheres of justice'

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[17] For instance, the creation of the hotspot system, set up in Italy and Greece to manage high flows of arrivals and avoid secondary movements (to other EU states) during the migrant crisis led to the adoption of pre-selection procedures for asylum seekers (based on nationality) leading to discriminating procedures (CARITAS EU 2016; Danish Refugee Council 2017; Casolari 2015; Ceccorulli and Lucarelli 2017). All this despite the fact that the EU has one of the most advanced systems of asylum, recognising specific needs beyond those envisaged in the Geneva conventions (Gil-Bazo 2006).

(Balibar et al. 2012). Namely, what happens at the borders of the various conceptions, ideas and forms of justice, taking into account the border itself as a space of contentious politics. Following a similar conception of 'borderline existence' of justice, we can consider justice in its dynamic moment, that is, in relation to the processes of subjectivation that give rise to the justice-seeking subject. Balibar, Mezzadra and Samaddar invite us to think about justice as what is left outside the reach of existing theories of justice, or at the margins. In this way, they advance the possibility of thinking about migration in relation to strategies of differential inclusion which produce marginality as 'the result of specific struggles and tense constellations of power and resistance', where migrants appear not only as marginal subjects, but as justice-seeking subjects constantly challenging the normative and political order, and as a continuous test for democracy (ibid., 6).

A similar conception of justice would mean adopting an open definition of what is 'just'. Rights infringements that would normally be considered accidental deficiencies of migration regimes would appear in this way more as elements of 'structural injustice' (Young 2003), as the result of structural institutional dynamics that produce migration as marginality. A wider conception of mutual recognition thus poses the challenge of broadening ethics concerns to include a level of political responsibility that considers migration a 'total social fact' (Sayad 1999) and migrants as political subjects on their own. From this perspective, the cosmopolitan stance is not so much one that stresses an open border option over closed borders, but one that overcomes methodological nationalism in the study of migration and demystifies categories, recognizing their very definition as a contentious field, and the result of struggles in which migrants play an active role (Wimmer and Shiller 2002; De Genova et al. 2018). Migrants appear here both as subjects with specific needs, and as subjects who with their movements and presence, constantly expose the contradictions of political systems and migration systems of governance—such as the one centred on the EU—to challenges and changes.

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Each perspective on justice entails different moral obligations and justice prescriptions. The obligations towards one's own community might well conflict with obligations towards generic others and/or

specific others. Tensions are inevitable, and sensitive to the shared understanding of what binds the host community together; the more citizenship is defined according to ethno-national criteria, the closer the community and the less inclined to take into due consideration the negative implications of its restrictive policies on migrants. But also, the greater the sense of ontological insecurity associated with migration, the more the Westphalian justice criterion is made to prevail over the other two and might eventually lead to policies that in fact violate the principle of non-domination, as in the case of quasi-imposition of border controls on third countries.

The aim of this book is to explore how the EUMSG functions through the lenses of the three worldviews of justice presented here. This should allow us to highlight the conflicting justice claims occurring in the actual management of migration, as well as to contribute with empirical investigation to a research field (that of the ethics of migration) which frequently lacks empirical contributions.

Now that we have introduced the criteria to assess just behaviour in the area of migration, we shall better introduce the 'actor' to be analysed: the EU Migration System of Governance.

The (Evolving) EU Migration System of Governance

The EU has been frequently described as an evolving system of governance (e.g. Marks and Hooghe 1996, 2004; Caviedes and Maas 2016) which is itself part of wider systems of governance. For instance, in the area of security governance in Europe, the EU is one actor within a wider European system of security governance involving the EU, the North Atlantic Treaty Organization (NATO), the Organization for Security and Cooperation in Europe (OSCE), and states as well as private security actors (Kirchner and Sperling 2007; Sperling 2014; Cottey 2014).

In general, a 'governance approach' looks at the vertical and horizontal interactions between different actors, serving as an organizational framework, in order to explain how public goods are produced (Webber 2014, 18; cf. Krahmann 2003). 'Governance' is distinct from 'government' in that it points to a lack of hierarchy, centralization and control, while stressing the existence of multiple forms of regulation involving a wide range of actors to solve specific problems or provide a common good (Enderlein et al. 2010, 80; Webber 2014). The concept is not new in