The European Migration System and Global Justice

A First Appraisal

Enrico Fassi and Sonia Lucarelli (eds)

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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 dispropor-

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 EURODAC, 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 discretional 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 carful 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, readmission, 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 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

[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'.

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.