Paving the Way for an Institutional Approach towards an Ethical Migration Regime

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Abstract

In thinking about moral principles for an international regime on migration, international lawyers and political theorists wishing to provide practical guidance should adopt a specific methodological approach suitable for international institutions. This paper proposes a methodological tool entitled "normative reflexive dialogue" to support theorists in dealing with the current institutional realities while developing and justifying moral principles that international institutions should follow. After describing the basic features of this approach, which links legal analysis with moral reasoning, GATS Mode 4 will be used as an example of a methodological approach to generating some substantive moral principles for a migration regime.

I. Introduction

What moral[2] principles should guide an international regime on migration? Anyone interested in finding a morally justified way to deal with the global challenge of migration will consider this to be one of the essential questions. Surprisingly, this is not the issue political theorists interested in migration ethics have been spending much time on. While it has been pondered by social and political scientists as well as by international legal scholars, philosophers and political theorists have been more interested in discussing the sovereign state and its claim to control its borders. Given this focus of research, one might argue that all we need to do is transfer these reflections to the international level and design the new migration regime accordingly.

In arguing against this simplistic view, the main objective of this contribution is to present a methodological approach on how to think about moral principles for international legal institutions, in particular in the context of an international regime for migration. Its main claim is that in deciding on the moral principles to be used in reforming an international regime, a specifically institutional approach must be employed. Without it, a philosophical investigation runs the risk of being unable to provide practical guidance in the process of creating or reforming an international institution, which, it is argued, it should do. I will propose the "normative reflexive dialogue" as a methodological tool to help achieve this goal.

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2 Unless otherwise specified, "moral" and "ethical" are used interchangeably here.

In line with this methodological argument, this paper aims to make a contribution to the philosophical and legal debates on the international aspects of migration ethics. Starting from a nationally focused debate, it recommends cautiousness in taking the different arguments related to migration ethics to the international level. Taking GATS Mode 4 as a practical example, it will be shown in action how this methodological way of thinking could help us think of moral guidelines within and for a specific institutional setting, i.e. an international migration regime. In the course of discussing GATS Mode 4, this paper presents some substantive arguments with respect to the moral guidelines that should inform the debate.

The paper is divided into two main parts. The first part provides a brief overview of the philosophical debate on migration before arguing for a distinction between three ethically relevant issues on migration ethics. Accordingly, it will be argued that a distinct institutional methodological approach is needed to deal with the question of what principles an international regime must uphold. This is followed by a description of the features of the normative reflexive dialogue. Building on this methodological discussion, the second part deals with GATS Mode 4 as example of an international migration regime. In using the normative reflexive dialogue, it aims to show what moral principles could be used in assessing and reforming this regime.

Before proceeding further, an important caveat needs to be made. This contribution focuses on legal labor migration, namely the regular movement of people for employment purposes. It would be very interesting to further develop the arguments presented here by adopting a comparative approach, focusing on the development of the refugee regime and its underlying ethical rationales. Contrary to the 1951 Geneva Convention and its 1967 Protocol, the ethical discussion on labor migration at the international level is still very much in limbo, offering important and challenging opportunities in terms of thinking about its normative foundations.[3]

II. On the way to an ethical international regime

A. Mapping the debate on the ethics of migration

Ethics of migration is to be understood here as a set of reflections that, taken together, represent a morally cogent answer to normative challenges related to the phenomenon of migration. In the current philosophical literature, migration is mostly treated as a policy question for liberal-democratic affluent states.[4] Strictly speaking, it is an ethics of immigration. In the words of Raffaele Marchetti, the focus has been placed on the "receiver" perspective and its corresponding moral challenges.[5] In this context, the issue of a morally justified immigration

3 The two works of reference for a normative approach on the refugee regime remain *Matthew Gibney*, The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees (2004), and *Matthew Price*, Rethinking Asylum: History, Purpose and Limits (2009).

4 For the sake of the present argument, I have used the term "state" as encompassing the relevant institutions of a politically organized community. The paper should not be understood as being only compatible with the classical nation-state. In many regards, the EU – as a community of nation-states – faces similar moral challenges.

5 *Raffaele Marchetti*, Toward a World Migratory Regime, Indiana Journal of Global Legal Studies, 15(2) (2008), 471–487, 477.

policy materialized in a debate on the ethical adequacy of a certain level of openness of borders. The question whether and according to what modalities a state is allowed to restrict immigration has for years been a key issue in the so-called "open/closed borders" debate.[6]

Given this focus on the state and its border policy, how should we consider the issue of an international regime on migration from an ethical point of view? It is worth pausing for a moment to consider the link between the two issues, namely a state's border policy and the international regime. Indeed, the temptation might be to simply try to take whatever has been developed for a national border policy and implement it at the international level. If a set of ethical reflections is valid in the context of a state's border policy, why should it be different in the context of an international regime?

The main methodological argument of this paper is that this view is wrong on a fundamental level. We need to distinguish between three separate issues and show that they correspond to different methodological objectives and approaches. The first issue has already been mentioned, namely the border policy of a (liberal-democratic) state. From a methodological point of view, arguments used in the debate are usually closely related to the alleged principles a liberal-democratic state ought to live by.[7] The second issue pertains to the international regime, namely the question of what ethical principles it should be built on, and what kind of reform we should strive for to improve an existing regime. At the same time, we need to consider the normative-ethical standards which a specific regime ought to respect. In turn, as I will argue, this is strongly linked to the standard of legitimacy a regime should respect. The third issue is situated somewhere between the first two and, in some respects, represents a link between them. Focusing again on the (liberal-democratic) state, this third issue concerns the ethical reasons of the state to commit itself to an international migration regime, i.e. to create it or develop it.

All three issues relate to what we have called the ethics of migration. In fact, a sort of communality in the substance exists between the three. Many times in their reflections, theorists mention moral values such as liberty, equality, or justice. The state – as a politically organized community – also plays an important normative role in all three issues. However, this commonality must not make forgotten that the way the arguments are framed and the objectives they pursue are different. From a methodological point of view, it appears mandatory to distinguish carefully between them: all three questions pertain to a specific methodological foregoing which needs to be carefully made explicit before any substantive work.

In addition to the "open/closed borders" debate and the issue of the liberal-democratic state reacting to this challenge, the present contribution focuses on the moral principles of an international regime. In a nutshell, in thinking about moral principles for an international regime, the needs of institutions must be taken seriously in order for a normative-prescrip-

6 For a comprehensive overview of the different subtopics in the open/closed borders debate, refer to *Veit Bader*, The Ethics of Immigration, Constellations, 12(3) (2005), 331–361; *Jonatan Seglow*, The Ethics of Immigration, Political Studies Review, 3(3) (2005), 317–334; and *Christopher Wellman*, Immigration, Stanford Encyclopedia of Philosophy (2010). For an argument on the requirement to consider procedural-political arguments, see *Arash Abizadeh*, Closed Borders, Human Rights, and Democratic Legitimation, in: David Hollenbach (ed.), Driven from Home, Protecting the Rights of Forced Migrants (2010), 147–166.

7 See, e.g., Philip Cole for an author arguing that there is a deep tension within liberalism on this question: *Philip Cole*, Philosophies of Exclusion: Liberal Political Theory and Immigration (2000). See also *Martino Mona*, Das Recht auf Immigration: rechtspolitische Begründung eines originären Rechts auf Einwanderung im liberalen Staat (2007).

tive approach to have any practical relevance. This argument requires further clarification: What does it mean to strive for practical guidance and what are the specific implications for institutions? The following chapter will answer these questions.

B. Paving the way for an institutional approach

A normative approach, according to what is presented here, can be said to aim at having practical relevance if it pursues the objective of playing a role in an ethically guided reform of an institutional framework. In this context, our normative enquiry is based on the general objective of having prescriptive-practical relevance in the sense of being able to provide moral guidance when it comes to a reform of current institutional frameworks, such as an international regime on migration.[8] This characterization assumes a certain view of political theory, an approach to facing the morally urgent challenges we witness in today's world while trying to provide moral guidance on how to overcome them through better institutions.[9] However, this does not imply that political theory is not in a position to fulfill other useful normative tasks – also with practical relevance.[10]

The moral guidance to be provided is to be understood as being related to the significant issue of legitimacy. The main objective of this contribution could be rephrased as being to reform an international regime in the sense of making it more legitimate. Within the context of this contribution, this quest for legitimacy is to be understood as morally well-grounded justification of a specific institutional framework.[11] In this sense, it appeals to something very common at its core. It refers to our fundamental condition of human beings acting and reflecting on moral reasons in a potentially conflicting political situation. As Rawls explains, "justification as argument is addressed to those who disagree with us […]; being designed to reconcile by reason, justification proceeds from what all parties to the discussion hold in common".[12]

This understanding of legitimacy as justification refers to a deliberative exercise of critical and comparative argument since it confronts rival normative propositions for the adoption or the rejection of some norm "against a background presumption of possible objection".[13] It specifically engages with standards of political morality in that it discusses the basic norms and goals of institutions. The capacity of a normative proposition to survive objections, even hypothetical, is the characteristic use of justification in this context.

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8 For methodological reflections along similar lines but with regard to migration issues, see *Joseph Carens*, Realistic and Idealistic Approaches to the Ethics of Migration, International Migration Review, 30(1) (1996), 156–170.

9 This way of proceeding owes a lot to the Rawlsian tradition with respect to the importance of institutions. However, contrary to Rawls, it places much more urgency on the non-ideal investigation. For a similar focus, refer to *Allen Buchanan*, Justice, Legitimacy and Self-Determination: Moral Foundations for International Law (2004); *Amartya Sen*, What Do We Want From a Theory of Justice?, Journal of Philosophy, 103(5) (2006); and *David Wiens*, Prescribing Institutions Without Ideal Theory, Journal of Political Philosophy, (2011), 1–26.

10 For a similar position, refer to *Zofia Stemplowska*, What's Ideal About Ideal Theory?, Social Theory and Practice, 34(3) (2008), 319–340; and *Holly Lawford-Smith*, Ideal Theory – A Reply to Valentini, Journal of Political Philosophy, 18(3) (2010), 357–368. For a somewhat more skeptical stance, refer to *Adam Swift*, The Value of Philosophy in Nonideal Circumstances, Social Theory and Practice, 34(3) (2008), 366–367.

11 For a similar approach, see *Allen Buchanan*, The Legitimacy of International Law, in: Samantha Besson/John Tasioulas (eds.), The Philosophy of International Law (2010), 79–96.

12 *John Rawls*, A Theory of Justice (1971), 580.

13 *John Simmons*, Justification and Legitimacy: Essays on Rights and Obligations (2001), 124.

Given the general objective of moral guidance in the process of reform, the contribution's main goal is not to sketch the ethical foundations of a perfect migration regime. Its focus is much more on the non-ideal and gradual reform towards a more legitimate migration regime. Of course, as we will see, the two are linked insofar as they both require normative work on the underlying moral principles that we want to pursue. However, the objective of guidance requires the theorist to take institutions seriously in his or her normative work.

Given this objective of formulating a reform proposal towards a morally cogent international regime, what does it mean to take institutions seriously? For the sake of the present discussion, I purposely remain quite vague on the exact definition of "institution" or "institutional setting". Theorists have used similar terms, such as "institutional system"[14] or "practices"[15]. For the present contribution, I will focus on the term (legal) "regime" as a specific sub-class of a broader "institution".

The influential definition of "regime" proposed by Krasner in 1982 will remain our main source of inspiration here.[16] I propose to retain two elements of this definition. On the one hand, a regime is a set of legal norms – of different normative quality – functioning with the objective of regulating a specific field of international cooperation. On the other hand, this set of norms, formally organized – however going from a very loose framework to a comprehensive structure lead by an organization[17] – functions as normative framework specifying obligations and commitments of the relevant stakeholders. In a similar context, Ghosh defines a migration regime based on three pillars: a set of shared objectives, a normative framework, and coordinated institutional arrangements.[18]

Given this definition of "regime" as part of the broader concept of "institution", the importance of institutions could be understood in two different, quite paradigmatic ways. Firstly, and almost uncontroversially, theorists acknowledge that institutions matter in the implementation phase of normative principles. Recognizing that it is one thing to develop normative principles and models but another one to implement them, more and more theorists have come to address issues of implementation of their normative insights.[19] Secondly, institutions are significant in the phase in which normative theories are developed and justi-

14 E.g. *Andrea Sangiovanni*, Justice and the Priority of Politics to Morality, Journal of Political Philosophy, 16(2) (2008), 137–164.

15 E.g. *Charles Beitz*, The Idea of Human Rights (2009).

16 A regime is a set of "implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choices." *Stephen Krasner*, Structural Causes and Regime Consequences: Regimes as Intervening Variables, International Organization, 36(2) (1982), 1–22, 2. For further contributions, *Andreas Hasenclever/Peter Mayer/Volker Rittberger*, Theories of International Regimes (1997).

17 Examples of regimes include the "asylum regime" (concerning the Geneva Convention and its Protocol), the CITES (Convention on International Trade in Endangered Species of Wild Flora and Fauna), or the Basel Convention on the international movement of hazardous waste. The question whether an international migration regime could properly function without an international organization at its top can for the time being remain unanswered. For a strong plea in favor of a World Migration Organization, see *Jagdish Bhagwati*, Borders Beyond Control, Foreign Affairs (2003), 98–104.

18 *Bimal Ghosh*, Managing Migration: Whither the Missing Regime?, UNESCO (2005), 1–20. See further *Eric Cavallero*, An Immigration-Pressure Model of Global Distributive Justice, Politics, Philosophy & Economics, 5(1) (2006), 97–127.

19 See the different essays in *Christian Barry/Thomas Pogge*, Global Institutions and Responsibilities: Achieving Global Justice (2005).

fied. This idea has attracted controversy as some theorists see the very meaning of normative theorizing as being at risk as a result of too much reliance on existing institutions.[20] On the other hand, it is my contention that a normative-prescriptive approach meant to practically guide the reform of an institution has no choice but to take institutions seriously in the first place.[21]

C. Outline of a normative reflexive dialogue

My main claim with regard to a normative-prescriptive approach is that, if it is to have any practical relevance, such an approach should take institutions seriously in an almost "technical" sense. It is important to consider the relevant institutional features connected with moral arguments in the process of formulating and justifying morally cogent reform proposals. In order to do so, I would like to outline what I call a normative reflexive dialogue.[22] The basic idea of this dialogue is to try to bring to light and structure the process of mutual normative interactions between moral arguments, institutional constraints, and normative-prescriptive guidelines. This dialogue can be said to be normative in that it aims at the formulation of normative-prescriptive guidelines (final objective), and reflexive in that the dialogue requires an ongoing process of integrating and combining its moral and institutional components. As a dialogue, each dimension must properly engage with the others.[23]

The normative reflexive dialogue requires first and foremost an in-depth understanding of the institutional setting in question.[24] Secondly, normative proposals are based on the moral arguments which are to be found "within" the institution. A normative theory should be first of all concerned with the functioning, but also into the normative foundations of an institution. It is only in a second time that normative-prescriptive guidelines meant to reform it can be developed. The idea is not that the theorist has to dig deep enough to find the moral foundations of a given institution. At some point, this exercise merges into his or her own interpretation of a given institution in light of institution-independent moral values. In the

20 On this, see *Adam Swift*, The Value of Philosophy in Nonideal Circumstances, Social Theory and Practice, 34(3) (2008).

21 I am indebted to Sangiovanni's "practice-dependence thesis". *Andrea Sangiovanni*, Justice and the Priority of Politics to Morality, Journal of Political Philosophy, 16(2) (2008), 137–164.

22 This concept is inspired by a similar approach taken by *Samantha Besson*, Institutionalizing Global Demoicracy, in: Lukas H. Meyer (ed.), Justice, Legitimacy and Public International Law (2009), 58–91, 58–59; *Samantha Besson*, The European Union and Human Rights: Towards A Post-National Human Rights Institution?, Human Rights Law Review, 6(2) (2006), 323–360, 327–329.

23 The use of the concept "dialogue" is preferred to the "bottom-up"/"top-down" characterization in that it better embodies the mutual and reflexive process of normative interactions. For the use of bottom-up/top-down, see *Kalypso Nicolaidis/Justine Lacroix*, Order and Justice Beyond the Nation-State: Europe's Competing Paradigms, Order and Justice in International Relations, 1 (2003), 125–155, 128; *Samantha Besson*, The European Union and Human Rights: Towards A Post-National Human Rights Institution?, Human Rights Law Review, 6(2) (2006), 323–360, 328. Compare the elements of my normative reflexive dialogue with the "political-pragmatic factors" Gosepath discusses when assessing global justice theories. *Stefan Gosepath*, The Global Scope of Justice, Metaphilosophy, 32(1–2) (2001), 135–159, 154.

24 This apparently harmless task in fact hides some complex issues. The main difficulty is linked to the challenge of *describing* a regime and how it functions, which in fact amounts to offering an interpretation of it. This, in turn, is unthinkable without evaluative judgments. This difficulty is crucial if the focus lies on a *legal* institution (i.e. a legal regime). It then requires reflection on what general conceptual framework is to be used (e.g., a Dworkinian one) and what consequences this choice has on a more general theory of the nature of law (jurisprudence). It should be noted that political theorists tend to rely on a Dworkinian approach. See, e.g., *Aaron James*, Constructing Justice for Existing Practice: Rawls and the Status Quo, Philosophy & Public Affairs, 33(3) (2005), 281–316; *Charles Beitz*, The Idea of Human Rights (2009).

strictest sense, the ultimate moral values upon which the institution seems to be built are not "within" the institution but are imported by the theorist reconstructing and interpreting the ultimate foundations of the institution. However, the crucial point that has to be considered is that these moral values are immediately grasped, discussed, and mobilized within the institution in question. Based on this, the theorist will resume the development of normative insights from within the institution and for the institution, integrating concerns pertaining to feasibility constraints and the consequences of a specific reform proposal.

To illustrate the issue – if only as an analytical device for better understanding – it is valuable to think of this dialogue as a normative seesaw starting with an interpretation of the moral foundations of a given institution in light of moral values that are themselves independent from the institution. In a further move, the dialogue integrates morally relevant institutional constraints with the objective of formulating morally cogent institutional reform proposals.[25] While current features of an institution are taken as a provisional given, the theorist will instill a sort of external critical potential into his or her investigation by referring to institutionally independent moral values. In turn, the normative-prescriptive guidelines will be chosen based on their capacity to go beyond the current institutional setting, that is their capacity to lead to incremental and gradual progress towards a better respect for moral values.

Exactly what institutional elements should be taken into account? In general, a powerful reason for acknowledging the importance of institutions is to consider the difference between a single case and a rule. In developing a normative prescription related to a single case, theorists do not have to take into account the effects of transforming the principles they articulate with respect to a single case into a rule meant to apply within an institution. Furthermore, they usually do not take into account the consequences, i.e. any incentives, systemic consequences, or potentially counterproductive or self-undermining effects.[26] As Buchanan writes, "the simple but neglected point is that one cannot go from a moral argument for the soundness of a particular course of action in a single (usually highly idealized) type of case to a general principle that is suitable for institutionalization".[27] In a nutshell, theorists should take the specific functioning of institutions into account.

The main idea is to specify in what sense some institutional features could be considered as normative constraints on the moral prescriptions we want to develop. In this regard, I will deal with two main types of constraints: feasibility constraints and constraints related to self-undermining consequences. Although these constraints are of different types, they have the function of enabling us to exclude options that would prevent us from formulating morally cogent and institutionally cogent reform proposals. In other words, by specifying the constraints that a normative theory should respect, we aim to delimit the spectrum of institutionally feasible reform proposals.

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25 My approach has many similarities to what James presents as "political constructivism". See *Aaron James*, Constructing Justice for Existing Practice: Rawls and the Status Quo, Philosophy & Public Affairs, 33(3) (2005), 281–316.

26 Buchanan has made a strong case for this on the basis of his reflections on an international rule of secession. *Allen Buchanan*, Justice, Legitimacy and Self-Determination: Moral Foundations for International Law (2004); *Allen Buchanan*, Theories of Secession, Philosophy & Public Affairs, 26(1) (1997), 31–61.

27 *Allen Buchanan*, Justice, Legitimacy and Self-Determination: Moral Foundations for International Law (2004), 23.

With respect to the consequences, it must be considered what effects the implementation of a reform proposal would have on the whole system. If those effects run contrary to the goals and values that the institution should pursue (self-undermining consequences), the reform proposal must be reformulated. The methodological point is that this check should not be performed at the end of a normative work, but that it has to be an important part of this normative work, meaning a part of this dialogue between normative theory and the specific functioning of an institution.

In line with the issue of the undermining consequences, considering the feasibility issues allows us to take into account two further normative desiderata. On the one hand, by specifying the constraints that a normative theory has to respect, the focus is placed more on the "input"-side. In broad terms, there are three types of feasibility constraints: empirical possibility (is the proposal feasible at all?), norm-based feasibility (compatibility between the reform proposal and the most important norms of this institutional framework) and actor-based feasibility (feasible in light of the relevant actors, in light of both their capacity, and their will).[28] On the other hand, due consideration should also help us with the question of what features of a reform proposal should be supported in trying to improve feasibility. This connects with the objective of making a proposal more accessible, both in considering the overall systemic consistence and the expected behaviors of the relevant actors.[29]

Neither the feasibility nor the consequences of a specific reform proposal could be assessed in an institutional vacuum. They must be assessed in light of the overall objectives being pursued and the other important norms and institutions. Under the heading of "holism", Buchanan has argued that one needs to make assumptions about other principles of the different legal orders and their interactions.[30] This idea of "holism" points to the requirement of an all-encompassing theory capable of making sense of interdependences and interactions between the numerous legal norms and institutions. However, this objective is beyond reach. I argue that the point about holism must be understood as a call for more systematicity when considering an institutional framework and normative-prescriptive theorizing. An institution cannot be considered a vacuum, but rather as complex interrelations with other legal institutions. For the theorist, this implies the requirement to present, in a transparent way, what conception of the other key legal issues he or she wants to endorse.

28 Compare with the distinction introduced by Joseph Carens between three types of constraints: institutional (existence of the modern state with its prerogative to control borders), behavioral (moral standards should not be unreachable for a normal person), and political (policy options must be broadly feasible, but there is also a potential risk of backlash). *Joseph Carens*, Realistic and Idealistic Approaches to the Ethics of Migration, International Migration Review, 30(1) (1996), 156–170, 158. For further refinement, see *William Galston*, Realism in Political Theory, European Journal of Political Theory, 9(4) (2010), 385–411, 401–402.

29 By focusing on the quality of the reasons that are used in arguing for a specific reform proposal, discourse-compatibility is close to Buchanan's "moral congruence" or Pettit's and Martí's "shareability". For Buchanan, moral congruence means the possibility for a principle to be supported "from a wide range of moral perspectives, secular and religious". *Allen Buchanan*, Justice, Legitimacy and Self-Determination: Moral Foundations for International Law (2004), 63. For Pettit and Marti, a proposal will be "shareable" if "relevant individuals can equally give it countenance and importance". *José Luis Martí/Philip Pettit*, A Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain (2011), 137.

30 *Allen Buchanan*, Justice, Legitimacy and Self-Determination: Moral Foundations for International Law (2004), 63.

An example might help clarify these two main points on feasibility constraints and consequences. Let us suppose that we want to reform the current international regulation on the issue of the self-determination of peoples.[31] The first point (feasibility) requires us to consider a theory arguing for the abolition of the nation-state altogether. Of course, this proposal represents one way to "reform" the current regulation. However, it will completely fail to find practical relevance, most notably because nation-states remain the law-makers at international level. This proposal could be said to have heuristic value in that it helps us thinking about a radically different way to conceive relations among individuals, but not one that could claim to be practically guiding.

The second point (consequences) requires us to consider a feasible theory that does not take the specific dynamics of international law into account. If the theory was to claim that every relatively homogenous group of people must be entitled to build their own state, what would be the consequences in terms of peace, stability, or justice at the global level (possible goals of the international system)? If this proposal was consequently to be integrated into international law, which incentives would be put in place?

Summing up, this methodological discussion has highlighted how a normative reflexive dialogue combines in-depth understanding of the institution (in casu a specific migration regime), moral reflections and considerations on the proper functioning of institutions striving to formulate and justify morally cogent principles for institutions.

The proper functioning of the normative reflexive dialogue is to be understood as an ongoing process of mutual normative fertilization among those moral and institutional components. It is important not to conceptualize this dialogue as the mere meeting of the different components. It is much more the process of an ongoing and mutual collaboration between the different elements. For the theorist, this means the demanding requirement to conduct the dialogue between all the relevant components, thereby pursuing the goal of morally guiding a reform process.

III. GATS Mode 4: towards a just international migration regime?

Taking over this methodological foregoing, this chapter aims at sketching an ethical investigation of the GATS Mode 4. This object of investigation is in the first line a sort of case-study for the approach outlined above. In a second line, the reflections developed here offer a very tentative approach in discussing if GATS Mode 4 can be said to be a just migration regime and, if no, in which way we should try to reform it.

A. GATS Mode 4 as a migration regime

The proposed working definition of a (legal) regime is based on two elements: on the one hand, a set of legal norms – of different normative quality – functioning with the objective of regulating a specific field of international cooperation and, on the other hand, this set of norms functioning as a normative framework specifying the obligations and commitments of all the relevant stakeholders.

31 This is of course the most important issue in Buchanan's work.

Let us start with an empirical observation: compared, e.g., to the refugee protection regime, the discussion on global economic migration has not lead to the creation of something approaching a solid and viable regime.[32] Four paradigmatic cases – the Berne Initiative launched by Switzerland in 2001,[33] the international Dialogue on Migration launched by the IOM,[34] the 2005 Multilateral Framework project on Labour Migration by the ILO[35] or the 2006 High-level Dialogue on International Migration and Development by the UN[36] – illustrate the current situation: the search for an adequate forum of discussion on how to further organize a possible regime and the formulation of some kinds of "soft" legal standards and norms.[37] It is especially interesting to note that all four projects stress the need to think about a regime or an institutional framework that fulfills some criteria which come close to what is proposed in this paper. Furthermore, the number of important projects launched so far could be read as evidence for the interest that states and international organizations have in finding a satisfactory solution to the migration challenge.

Further to all these projects, one still unfamiliar possibility needs to concern us: GATS Mode 4.[38] Albeit still limited in terms of scope and impact,[39] there are good reasons to consider GATS Mode 4 and, more generally, the WTO framework as an interesting starting point for looking for a potential migration regime.[40] First of all, the WTO is a multilateral framework in the true sense of the word: almost every state of the world is a member of the organization. Although the WTO does not pursue the objective of regulating global labor migration, its role in the progressive liberalization of movement of people as service suppliers between the member states could be important in laying down the basis for an international regime. Secondly, WTO provisions are binding, enforceable, and apply in non-discriminatory man-

32 For further literature on the issue of an international migration regime, see *Kathleen Newland/Demetrios Papademetriou*, Managing International Migration: Tracking the Emergence of a New International Regime, UCLA Journal of International Law and Foreign Affairs, 3 (1998), 637–657; *Philipp Martin/Manolo Abella/Christian Kuptsch*, Managing Labor Migration in the Twenty-First Century (2006); *Thomas Schindlmayr*, Sovereignty, Legal Regimes, and International Migration, International Migration, 41(2) (2003), 109–123; *Rachelle Kunz/Sandra Lavenex/Marion Panizzon*, Multi-Layered Migration Governance (2011); and *Richard Koslowski*, Global Mobility Regimes (2011).

33 The most important outcome of the Berne Initiative process is the International Agenda for Migration Management (IAMM), a reference system and non-binding policy framework of cooperation between states in planning and managing the movement of people in an acceptable way. See <http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-policy-and-research/migration-policy-1/berne-initiative/development-of-the-iamm.html> (last access: 21.5.13).

34 The results of each dialogue are published in the "International Dialogue on Migration Series". See <http://www.iom.int/cms/idm> (last access: 21.5.13).

35 ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labor migration. See <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_178672.pdf> (last access: 21.5.13).

36 This has led to the subsequent creation of the Global Forum on Migration and Development. See <http://www.gfmd.org/> (last access: 8.11.12).

37 For a similar position, refer to *Marion Panizzon*, Trade and Labor Migration: GATS Mode 4 and Migration Agreements, Dialogue on Globalization, 47 (2010), 1–56, 7–8.

38 For a general normative-ethical account, see *Tomer Broude*, The WTO/GATS Mode 4, International Labor Migration Regimes and Global Justice, in: Roland Pierik/Wouter Werner, Cosmopolitanism in Context: Perspectives from International Law and Political Theory (2010), 75–105.

39 *Marion Panizzon*, Trade and Labor Migration: GATS Mode 4 and Migration Agreements, Dialogue on Globalization, 47 (2010), 1–56, 9.

40 This way to look at GATS Mode 4 benefits from a move away from considering GATS-related issues as purely trade issues. With respect to Mode 4, the distinction between trade development and migration is not clearly settled.

ner to all member states.[41] With the exception of the international refugee regime, the commitments entered into by member states within GATS Mode 4 could in that respect be considered the only international binding norms limiting the national sovereign prerogatives on the admission of aliens.[42] Thirdly, the dispute settlement system promotes an efficient way to deal with divergences among the members.

What are those Mode 4 provisions? The GATS regulates tradable services along four "modes", among which the temporary movement of labor is included. Mode 4 applies to trade in services "by a service supplier of one Member, through presence of natural persons of a Member in the territory of another WTO Member" (temporary migration of service suppliers). It applies to natural persons going abroad in order to provide a service, as employees or as a self-employed professional. Although the duration of a person's stay must be defined within the commitments, Mode 4 is essentially concerned with the temporary movement of service providers. GATS Mode 4 does not grant people the right to access the employment market in the host country, nor does it affect measures regarding citizenship, residence, or permanent employment.[43]

According to Art. XVI GATS, the authorization of service suppliers under GATS Mode 4 depends on the specific commitments which a particular member has entered in its GATS schedule. In other words, member states enter into commitments in the different services sectors, and it is on the basis of the scope of liberalization in the services sectors that the domestic market is open to foreign service suppliers.[44] As Panizzon explains:

"Typical border barriers in Mode 4 are visas, while common behind-the-border regulations are qualification requirements, licenses or limitations on foreign ownership. Commitments thus provide for the actual level of access to another WTO Member's services markets and determine to which degree that foreign national will be treated equally or more favorably to a domestic worker in services. A 'market access' commitment indicates the type of services sectors a Member is opening to foreign competition (banks, insurance, tourism, construction) and how much market access it is offering."[45]

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41 In this respect, it must be noted that, if consequently implemented, GATS Mode 4 would impede a state's ability to discriminate on the grounds of nationality. See *Kalypso Nicolaidis*/*Alexander Betts*, The Trade-Migration Linkage: GATS Mode IV (2009). Available here: <http://www.princeton.edu/~pcglobal/conferences/wtoreform/Betts_Nicolaides_memo.pdf> (last access: 22.11.2012).

42 *Rey Koslowski*, Global Mobility and the Quest for an International Migration Regime, in: Joseph Chamie/Luca Dall'Oglio (eds.), International Migration and Development Continuing the Dialogue: Legal and Policy Perspectives (2008), 103–144.

43 For an introduction, see <http://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm> (last access: 8.11.12). See further *Marion Panizzon*, Trade and Labor Migration: GATS Mode 4 and Migration Agreements, Dialogue on Globalization, 47 (2010), 1–56; *Joel Trachtman*, The International Law of Economic Migration: Toward the Fourth Freedom (2009), ch. 8.

44 Broude notes that if a member commits itself to open its services market in a certain sector under Mode 4, "it must provide market access, Most Favored Nation and national treatment to foreign labor, significantly constraining the autonomy of its labor immigration policy in that sector. It is therefore not surprising that specific commitments under Mode 4 have been so far very modest and subject to significant reservations." *Tomer Broude*, The WTO/GATS Mode 4, International Labor Migration Regimes and Global Justice, in: Roland Pierik/Wouter Werner (eds.), Cosmopolitanism in Context: Perspectives from International Law and Political Theory (2010), 75–105, 79.

45 *Marion Panizzon*, Trade and Labor Migration: GATS Mode 4 and Migration Agreements, Dialogue on Globalization, 47 (2010), 1–56, 13.

With respect to our working definition of a regime, GATS Mode 4 – as part of the general WTO framework – seems to fulfill the two conditions. Firstly, it is a set of legal norms – of different normative quality – functioning with the objective of regulating a specific field of international cooperation, namely the movement of specific economic migrants between WTO member states. Secondly, this set of norms is formally organized – being put under the more general framework of the WTO and its principles, rules, and procedures – and it functions as a normative framework specifying the obligations and commitments of all the relevant stakeholders.[46]

B. Laying the moral foundations

This outline far from provides any in-depth understanding of the institutional setting of the GATS Mode 4. However, the scope of the present contribution precludes us from going into more detail. The following reflections serve as a case study of the methodological approach proposed above. As has been explained, it is essential to stress that the normative reflexive dialogue presupposes a comprehensive analysis of the institutional setting in question, i.e. in order to understand its main patterns of functioning and its main normative tensions.

The main challenge is to try to establish the moral foundations of the institution at hand, in our case the migration regime of GATS Mode 4. In other words, we should try to highlight on which moral fundamental principles this institution is built. As already explained, this challenging task amounts to an (openly creative) interpretative issue. It is clearly more than a description of the way in which actors see the institution. It is much more an answer to the question of which moral principles could and should we consider the institution to be built on. It clearly appears that part of this interpretative effort is the mobilization of institution-independent moral values that could be used in the specific setting of the institution.

In our case study, these foundations might be reconstructed along two key principles. Firstly, the GATS Mode 4 institution should be understood as being ultimately based on the equal value of all human beings. For the time being, this first principle means that there is no possibility to conceive the legitimacy of an international legal institution that would be in contradiction to the requirement to consider human beings as being of equal worth.[47] What

46 This way to describe the regime highlights the issue in question as being one of distribution. The good to be distributed can be defined as "membership in a political community", "presence on the territory" or "access to the labor market". Most importantly, they all refer to the numbers of people which can be admitted by member states.

47 For a definition, see *Jeremy Waldron,* Basic Equality, Public Law and Legal Theory Research Papers Series 8(61) (2008), 1–44. For recent treatments of the issue in the cosmopolitan tradition, refer to *Simon Caney,* Justice Beyond Borders: a Global Political Theory (2005); *Kok-Chor Tan*, Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism (2004); and *Gillian Brock*, Global Justice: a Cosmopolitan Account (2009). For a historical perspective, see *Francis Cheneval*, Philosophie in weltbürgerlicher Bedeutung: über die Entstehung und die philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne (2002).

remains largely unclear are the further normative implications that are to be constructed on the basis of this fundamental principle.[48] Most importantly, it remains at the core of every cosmopolitan position to specify to what extent this equal moral worth justifies moral obligations being put upon others.

As a matter of systematicity with regard to other key principles of the international legal order, this first principle echoes the broad range of human rights that are recognized as belonging to human beings by virtue of their humanity. The claim is not that these (legally entrenched) human rights support this first principle but rather that the two are ultimately built on a similar normative commitment to basic moral equality.

However, this principle alone is not sufficient to illuminate the moral foundations of the GATS regime. As an international institutional setting, the GATS – and more generally the whole multilateral framework of which it is a part – relies on states as its most important members. For a practically oriented investigation, states are indeed important as international law-makers. Yet, the present point concerning the moral foundation goes further than merely considering the relevance of states as law-makers: it aims at the best possible interpretation of the moral foundations of the institution. In casu, this means the requirement to reconstruct and integrate the value of the states.

This strategy would indeed be problematic if it were not be possible to reconcile the first principle (moral equality) and the value of states in a single coherent framework. This would be a crucial piece of evidence that the present legal institution – which is based on the value of sovereign states – is morally deeply flawed. Fortunately, there are good reasons to argue that states are morally relevant and are compatible with moral equality. Indeed, many would argue that states (liberal-democratic ones, at least) are indeed necessary for the political component of this equality to be possible in the first place: there is no way for human beings to experiment and be considered equal without integrating their existence within a political community in which they are recognized as political equal.

In this sense, one of the most powerful arguments advanced for the moral value of political communities (in our case, organized as states) connects with the idea of self-determination. Short of providing a complete theory on that point, it must be noted that this position is not conceptually linked to communitarian-nationalist views.[49] Rather, it pertains to a democratic argument where the expression of individuals and their right to co-determinate the political framework in which they live are at the forefront.[50]

For the present purposes, it is important to state that this argument must be compatible with the moral equality of all human beings. This raises difficult questions with respect to states that are themselves not legitimate in the first place, i.e. mainly states that do not respect the equal moral value of human beings (e.g., tyrannical states). Thus, we are faced with a discrepancy between our reconstruction of the moral foundations (based upon the value of lib-

48 In that sense, *moral* cosmopolitan commitments (that are shared by all cosmopolitan theorists) shall not be conflated with *institutional* cosmopolitan commitments (about global political institutions). For an author advocating the latter, see, e.g., *Charles Beitz*, Social and Cosmopolitan Liberalism, International Affairs, 75(3) (1999), 515–529.

49 E.g. *Michael Walzer*, Spheres of Justice: a Defence of Pluralism and Equality (1983); *Peter Meilaender*, Towards a Theory of Immigration (2001). Miller has tried to develop a cosmopolitan position that grants states a central importance. *David Miller*, National Responsibility and Global Justice (2007).

50 For a defense of this claim, *Ryan Pevnick*, Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty (2011).

eral-democratic political communities) and the current state of affairs, where an important number of arguably illegitimate states play an important role.[51] With regard to our reflections, this means we have the additional challenge to develop specific measures on how to fill the gap between the model that is to be developed based on an idealized interpretation and these specific states.

If we accept these arguments, we could claim to have proposed an interpretation of the moral foundations of the institution in question based upon two pillars: the moral equality of human beings and the value of (at least liberal-democratic) political communities. Before proceeding further, however, it is important to face an important question: where, to put it bluntly, do these moral principles come from?

This important question makes it clear that, as has been explained above, our interpretation of the moral foundations of a specific institution cannot but "import" normative material that is external to the institution. Firstly, from a methodological point of view there is an implied requirement to be openly normative in the sense of being transparent about one's assumptions. One should not claim to have "discovered" the true moral foundations of an institution but rather transparently present how one comes to favor a specific position and the corresponding interpretation. Secondly, there is the question of what position is to be chosen. Should one argue from a specific position – such as cosmopolitanism – and develop an interpretation of the regime on that basis? Or should one adopt an approach inspired by a sort of overlapping consensus, showing that some principles could be supported by several distinct normative perspectives? Adopting the second strategy, Broude distinguishes between cosmopolitanism, realism, "society-of-states" approaches and nationalism.[52] He argues that "when the real multi-dimensional complexities of the global labor migration debate are grafted on to ideal theory, each approach proves capable of adjustment, suggesting a number of general policy prescriptions. These provide us with a common, pragmatic basis for evaluating international labor migration regimes, the outer bounds of what is considered morally acceptable, if not ideally so, by each theory."[53]

In the present contribution, I will try to link the two strategies mentioned above. The interpretation that has been proposed above clearly relies on a cosmopolitan perspective which is claimed to be most in line with our understanding of the value of human beings. In a second step, I will argue that the principles I propose could also be supported from other normative perspectives.

51 Theorists working on the EU or other international institutions composed only by "legitimate" states do no face this problem. Interestingly, *Kant* in his "Perpetual Peace: a Philosophical Sketch" already limited his investigation to the alliance of political communities organized as "republics".

52 This classification is taken from *Simon Caney*, Justice Beyond Borders: a Global Political Theory (2005), 1–25. For a similar approach, see *Bimal Ghosh*, Towards a New International Regime for Orderly Movements of People in: Bimal Ghosh (ed.), Managing Migration: Time for a New International Regime? (2000).

53 *Tomer Broude*, The WTO/GATS Mode 4, International Labor Migration Regimes and Global Justice, in: Roland Pierik/Wouter Werner (eds.), Cosmopolitanism in Context: Perspectives from International Law and Political Theory (2010), 75–105, 90.

C. To the institution …

Given the methodological stance discussed earlier, how could we give more substance to the two principles identified above for the sake of reforming the regime of GATS Mode 4? With respect to the international migration regime, I believe that three important general moral principles can be developed from the cosmopolitan commitment to moral equality. All three will be relevant in thinking about how to reform an international migration regime.

Firstly, the basic moral rights of every human being must be protected.[54] Moral equality, in this first dimension, entails a commitment to protect and safeguard what it means to be a human being. Basic moral rights should be protected as a means to making a decent human life possible. Of course, this apparently banal point presents several difficulties, both on a conceptual and on a practical level. Most clearly, it entails a number of normative concepts whose specification is not an easy task: "decent" life, "basic" right, "moral" rights, and so forth.[55] However, for the time being, these difficulties should not obscure the main point: If moral equality is to mean something relevant, it should contain a commitment to protect the basic moral rights of every human being. The standard of protection that ought to be reached should be determined on the basis of an account of which minimal human interests should be protected.

An international migration regime will respect this first principle if it promotes patterns of behaviors that secure those basic moral rights.[56] This applies to the rights of persons directly involved in moving under the international regime (namely, labor migrants). It should also apply in a more indirect way to persons whose situation is in some way influenced by the migration regime (e.g., people staying in the host country).

Secondly, and echoing the first point, the belief in moral equality entails a positive commitment to enabling every human being to reach a level of subsistence that makes a decent life possible. In comparison to more egalitarian formulations of this commitment, my claim is here clearly sufficientarian by nature. It entails the commitment to do something in order for people to reach a normatively defined threshold that corresponds with what we think makes a decent life possible.[57] With respect to the international migration regime, this second principle means that the regime should promote a distribution of obligations and rights that will in the end make it possible for every human being to reach this threshold.

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54 My approach endorses an interests-based theory of rights. See *Joseph Raz*, The Authority of Law: Essays on Law and Morality (1986), 166 ff. For an overview, see *Leif Wenar*, Rights, Stanford Encyclopedia of Philosophy (2011). The link between those basic *moral* rights and legally entrenched rights (such as international human rights) is indeed a very difficult one to specify. However, for the present purposes, it seems sufficient and possible to assume that some of the basic moral rights will indeed match some basic legal rights.

55 As will be apparent, my view could be read in resonance with a capability approach. See *Amartya Sen*, Inequality Reexamined (1992); *Martha Nussbaum*, Women and Human Development: the Capabilities Approach (2000). For a general overview, refer to *Ingrid Robeyns*, The Capability Approach, Stanford Encyclopedia of Philosophy (2011).

56 *Guy Goodwin-Gill*, Migrant Rights and "Managed Migration", in: Marie-Claire Caloz-Tschopp/Vincent Chetail (eds.), Mondialisation, migration et droits de l'homme: un nouveau paradigme pour la recherche et la citoyenneté / A New Paradigm for Research and Citizenship (2007), 161–187, 170.

57 For a classical text (albeit very anti-egalitarian) on this idea, see *Harry Frankfurt*, Equality as a Moral Ideal, Ethics, 98 (1987), 21–43. For critical reappraisals, see *Roger Crisp*, Equality, Priority, and Compassion, Ethics, 113(4) (2003), 745–763; *Angelika Krebs*, Gleichheit oder Gerechtigkeit: Texte der neuen Egalitarismuskritik (2000); and *Paula Casal*, Why Sufficiency is not Enough?, Ethics, 117 (2007), 296–326. This commitment could be read in resonance with a capability approach. For such an account, see *Martha Nussbaum*, Women and Human Development: the Capabilities Approach (2000).

Thirdly, on a meta-level pertaining to the (moral) justifiability of a specific regime, this commitment to moral equality supports a further principle that we could call the "due justification" principle. This principle is grounded in the idea that every person should be considered as a "moral reasons-bearer". By this, I mean that every person whose moral rights (whatever they might be) are restricted has the right to know the moral reasons justifying the restriction. That is not to say that restrictions of such rights cannot be legitimate at all but rather that they should be duly justified. To deny a person's request to get a moral justification, i.e. to know the moral reasons, would be to deny him or her moral equality qua person.[58]

This idea should mainly be understood as a way to secure a morally justifiable migration regime. The regime should be justifiable with regard to the individuals whose rights and duties it regulates and affects. In other words, and as has been explained above, the regime – in line with the justification on which it ultimately relies – should be morally acceptable to all individuals who are affected by it and who are considered as being moral equals. This focus on justifiability does not necessarily mean that every individual should have accepted the regime ad nominem (e.g., in a global democratic decision-making process).[59]

In that regard, an international migration regime will respect the principle of due justification if it is organized in a way that makes such a justification compatible with the status of equality of every possible human being. In other words, the principle formulates a threshold in terms of the justification that is to be attained if the distribution of obligations and rights through the migration regime is to respect the moral equality of all.[60]

Assuming that states are morally compatible with our fundamental commitment to moral equality, the three ethical principles outlined so far must make room for the legitimate interests of the state. Two such interests are at the forefront, namely the interest to protect itself against far-reaching and unpredictable developments and the interest to keep control of the regime created.

The first interest is about ensuring that the state has enough flexibility to enable it to respond to rapidly changing circumstances. With respect to the classical migration literature, it echoes public order arguments, according to which the state should be able to close its borders in cases of emergency or total collapse. Therefore, an international regime should include a principle allowing the state to waive its obligations in specific circumstances. The clauses specifying this principle could be used when basic institutions of the state are in danger of collapsing or where – more contestably – the domestic labor market is put under heavy

58 This echoes the position developed by Rainer Forst. See *Rainer Forst*, Towards a Critical Theory of Transnational Justice, Metaphilosophy, 32(1–2) (2001), 160–179.

59 Arash Abizadeh has pushed this line of argumentation, thereby distinguishing between a liberal scheme of justification (based ultimately upon *justifiability* to all considered as equals) and a democratic scheme (based upon "real" consent). See *Arash Abizadeh*, Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders, Political Theory, 36(1) (2008), 37–65.

60 Of course, the much disputed issue of a right to international free movement appears to be connected to this issue. But, although many cosmopolitan thinkers have argued for the recognition of free movement as a basic right, the principle of due justification is, strictly speaking, independent from a position on this issue. Short of postulating/refusing a right to international free movement, it only means that the restriction of a right is only acceptable on the basis of a due justification.

pressure.[61] The main difficulty does not lie in anticipating clear cases where the state's obligation under the international regime can be waived, but rather in drawing the line separating a justified and an unjustified recourse to such clauses. In any case, a morally cogent proposal on the justified limits of an obligation under the international regime presupposes a more general answer to the moral value of the state.

Beside those public order clauses, it is also absolutely central to make room for the interest of states to co-determine the basic normative framework and the further development of the international regime. In other words, states must be given the right to participate in the development of the international migration regime. Expressed in negative terms, this claim represents a safeguard against a regime that could escape the political authority of its member states. If it is to be accepted, the regime should be able to guarantee to its member states that it will not develop beyond the powers that it has been given. To take a concept used when talking about supranational institutional frameworks, the regime should not have a Kompetenz-Kompetenz but should remain within the political realm of the ongoing consent expressed by the member states.

More generally, this reflection echoes the requirement to formulate the migration regime in a way that allows the state to pursue its own legitimate interests within certain limits. These limits are clearly represented by the interests of the regime's other stakeholders (the individuals directly affected and the other states and their own interests). However, in accordance with the principle described above, these limits also include the requirement for the regime to be justifiable with regard to all those who must be considered moral equals. This clearly means that some interests which a state might want to pursue through the migration regime are not legitimate, i.e. not being justifiable with regard to all affected individuals considered as equal. In that sense, it should clearly be part of our reflections to try and specify what legitimate interests a member of the migration regime should be able to pursue.[62]

Thus, the normative account outlined puts neither the existence of the states nor fundamentally their sovereign prerogatives on migration matters into question. Furthermore, it does not require state or other relevant actors to become moral heroes – that is to accept a too strong moral burden that would make the pursuit of their legitimate interests impossible. It merely requires them to find a consensus on a regime based upon the recognition of the moral equality of all and to organize this regime along a corresponding distribution of obligations and rights on migration-related matters.

As it appears, this proposal seems to be able to pay due attention to the requirement of feasibility constraints. In being able to integrate the interests of states into the determination of the migration regime, the present model seems to fulfill this feasibility condition. This becomes evident when it is compared to a migration regime that would transfer all powers related to immigration policy to a supranational body which would, in turn, distribute rights and duties to all the relevant stakeholders. To conceive and theorize such a model could have some heuristic value, but it would fail to provide practical guidance.

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61 Panizzon notes that the current GATS Mode 4 is devoid of such a mechanism. *Marion Panizzon*, Trade and Labor Migration: GATS Mode 4 and Migration Agreements, Dialogue on Globalization, 47 (2010), 1–56, 36. This could indeed explain, partially, the reticence of states on entering into commitments.

62 This point echoes important reflections of the "open/closed borders" debate. See *Joseph Carens*, Open Borders and the Claims of Community, APSA Annual Meeting Paper (2010), 1–55.

The second main methodological desiderata relates to the acceptability of the principles set out with respect to the overall consequences and incentives they could create. By offering a legitimate tool for states to coordinate the movement of people, the model proposed could indeed create positive incentives for states to further cooperate on related matters (cross-commitments). With respect to illegal migration, the fact that the international regime will be synonymous with a larger number of legal opportunities to migrate – and hence to control migration in a more efficient way – should also be taken into account when assessing the consequences.

The proposal hence appears both feasible and accessible, in that it requires an evolution of the current order rather than a radical transformation. This argument should not, of course, be confused with the difficult political task of negotiating such a regime among states. A comprehensive assessment of potential consequences is beyond the reach of this work. However, it is still important to stress the need for systematicity. We must keep track of the relevant norms that interact with the proposed normative principles. As a general matter, it seems possible to interpret and further construct our account in accordance with the current international order.[63] Tensions with regard to the status quo – most importantly concerning the sovereignty of nation-states – are indeed inevitable, but the principles outlined do not really oppose the existing order. The issue is also highly relevant within the context of WTO law. In order to think about a morally cogent reform proposal for a specific part of the system we must consider the potential interactions with other WTO-norms. In this context, the principle of "equality" among the member states and the principle of Most Favored Nation (MFN) must be taken into account when assessing the overall consequences of normative-prescriptive moral arguments.[64]

D. … and back

We are now in the position to outline the normative-ethical substance that can be used when thinking about reforming an international migration regime. Rather than formulating a comprehensive proposal, the objective is to highlight the most important points that we were able to find out using the conceptual tool of the normative reflexive dialogue.

On the basis of a cosmopolitan commitment to the moral equality of every human being, an international migration regime should promote patterns of behaviors, through the distribution of obligations and rights, that respect the moral basic rights of all. It should promote a sufficientarian commitment to help people reach a sufficient threshold in terms of resources needed for having a decent life. Overall, the regime should be compatible with the concept of due justification owed to all persons that are directly affected by it. At the same time, the international migration regime must make room for the legitimate interests of states to keep control over their migration policies and to pursue their other legitimate objectives. Most importantly, this includes a right to react appropriately to cases of emergency and a general right to enjoy political self-determination within certain limits.

Does this very rough sketch satisfy the desiderata of normative potential? In other words, does it still have some normative critical force or is it simply some kind of normative justification of the existing order?

63 A comprehensive analysis would have to take into account important migration-related international treaties, such as human rights-related treaties.

64 See for further explanations on the other relevant principles, *Marion Panizzon,* Trade and Labor Migration: GATS Mode 4 and Migration Agreements, Dialogue on Globalization, 47 (2010), 1–56.

It is interesting to note that for political scientists or international legal scholars, the question seems almost redundant. Of course the model has critical power. The problem is, rather, that it fails to be realistic in the sense of setting out directly applicable institutional solutions. However, this criticism misses the point in that this is not actually the objective. The first objective was to lay down the methodological approach needed to think about and develop a reform proposal for a (more) just international migration regime. Short of providing directly applicable solutions, the model has the objective to set out the main components of a morally cogent regime. Moral guidance must not be confused with ready-to-use political solutions.

Short of having immediate political actuality, an international migration regime conceived so as to promote migration policies that respect basic moral rights, support the alleviation of extreme poverty without completely denying states a margin of (re)action has good chances of being supported by distinct philosophical perspectives.[65] Notwithstanding a fundamental skepticism against any regulation of international proportions as defended by hard-core realists, even a realist-based perspective which grants the state a wide margin of appreciation in the pursuit of its interests could recognize that an international regime should function in an effective and legitimate manner for the benefit of all individuals directly affected by it. For the present argument, it is irrelevant if those other perspectives will end up defending the principles described above for different reasons (as they will arguably do). It is also irrelevant if, in some specific cases, the balancing of the different interests at stake would be done in a somehow different way if one were to follow another model. Important is the recognition that those general principles outline how to reform a current regime towards a more just and legitimate migration regime.[66]

On the other hand, it could indeed be argued that the model fails to be critical enough. It concedes too much to the existing international order, for instance in securing states' important prerogatives. As I have argued above, to refuse to take states into account amounts to an abandonment of the objective of being practically relevant in the sense of providing moral guidance in a reform process. Important in this respect is the fact that the proposal has normative (critical) potential. In several aspects, the model lays down ambitious and far-reaching ethical standards and objectives. More fundamentally than how far away those objectives still are from the current situation – and they are indeed quite far away – it is important to note that those ethical standards and objectives are to be understood as an aspiration towards a better situation. Similarly to what Cheneval calls a "principe civilisateur"[67] in the context of the European integration, this model represents a normative commitment that goes beyond current institutional realities and that is meant to inspire and guide changes.

65 *Tomer Broude*, The WTO/GATS Mode 4, International Labor Migration Regimes and Global Justice, in: Roland Pierik/Wouter Werner (eds.), Cosmopolitanism in Context: Perspectives from International Law and Political Theory (2010), 75–105, 91–97. In a similar sense, *Bimal Ghosh*, Managing Migration: Whither the Missing Regime?, UNESCO (2005), 1–20.

66 This optimism regarding the possibility to find common normative grounds shall not obscure the political realities. As a matter of example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) has not been so far ratified by a single industrialized country.

67 *Francis Cheneval*, Legitimationsgrundlagen der Europäischen Union (2005), 268 ff.

IV. Conclusion

The main objective of this paper was methodological in nature. This was first made explicit in our commitment to disentangling distinct issues linked to the ethics of migration. Secondly, the main challenge was to foster the discussion between political theorists and international legal scholars in trying to find out a methodological way of thinking about moral principles for a reform of an international migration regime. The GATS Mode 4 was chosen as an example in order to show how the normative reflexive dialogue was to link normative-prescriptive work, moral arguments, and properly institutional considerations. Both the normative and the political potentials of GATS Mode 4 as a possible labor migration regime make it a promising object of investigation. International legal scholars and political theorists interested in the ethics of migration should devote intellectual energy to it.

In terms of substantive ethical proposals, the contribution of this paper is indeed modest. It has merely outlined a general road map for further research. However, I hope to have shown which types of ethical fundamental commitments – based upon a cosmopolitan framework – could be usefully employed in the process of thinking about an ethically cogent reform proposal. Indeed, the very general commitments described in this paper need to be further specified and transformed into practical prescriptions.

How could it happen? In line with the need for systematicity defended in this contribution, more in-depth work on the WTO and on GATS Mode 4 is necessary in order to be able to specify the practical prescriptions that should be built on the fundamental ethical premises. In this sense, this paper can be read as a contribution to transdisciplinary undertakings. I hope to have shown how challenging this approach was, but also how promising. Legal scholars and political theorists should be willing to address the question whether a given institutional framework is just or not and, depending on the answer, think about how to reform it.

If one accepts the argument presented here, the dialogue between the two disciplines is no longer optional, but is really part of the necessary steps that have to be taken by political theorists and legal scholars. This methodological approach links the two in a fruitful but challenging dialogue. In fact, political theorists are literally forced to address quite specific legal issues and to develop an overall picture of the interactions taking place, before being able to develop a convincing practice-oriented moral argument.