The EU’s Hospitality and Welcome Culture: Conceiving the “No Human Being Is Illegal” Principle in the EU Fundamental Freedoms and Migration Governance

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Abstract
This article aims to highlight the theoretical and philosophical debate on hospitality underlining the normative elements of framing migrants and refugees as individual agents in the light of hospitality theory and migration governance. It argued the critiques of the neo-Kantian hospitality approach and the EU welcome culture with regard to refugees in the EU from a philosophical perspective. The “No human being is illegal” motto is proposed to be conceived as a principle of the EU Charter of Fundamental Rights. The cosmopolitan right to visit and the universal right to reside were discussed in the context of human rights and co-responsibility. Linking the hospitality approach with migration governance enables the reconstruction of reception policies and practices, diversification of non-state actors that engage in migration governance mechanism, and polarization of political initiatives (e.g., politics of allocation and dispersal, readmission negotiations, convergence/divergence of priorities and strategic interests). The research findings highlight that the EU adopted a neo-Kantian hospitality approach that combines both “co-responsibility” and “vertical/heterarchical relations.” The EU’s “New Pact on Migration and Asylum” was considered proof of how the EU follows neo-Kantian hospitality that is manifested in dualism and contradictory approach. The study presents a typology that splits co-responsibility into individual/institutional actions and human rights/migration governance.

Keywords Neo-Kantian hospitality · Migration governance · EU Charter of Fundamental Rights · Welcome culture · EU’s New Pact on Migration and Asylum

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Introduction

“No human being is illegal”1 screams of Elie Wiesel, a Neo-Kantian spirit, are still ringing in our ears. So far, many human rights activists and judicial activists have carried banners of “No human being is illegal” and “Refugees welcome” during marching, protests, and demonstrations in the EU. “No human being is illegal” has remained as a motto for human rights activists and for some reason underestimated by scientific communities. Many scientists adopted the concept merely as an instrument for opposing political actors and governmental institutions. This study attempts to create a literature review on the “No human being is illegal” principle through investigating philosophical and normative debates on hospitality and arguing both legal-political practices in the EU migration governance2 context. In this framework, the research questions were listed as follows: What are the philosophical and normative roots of the “No human being is illegal” motto which is mostly used by human rights activists and judicial activists? To what extent is it related to the EU Charter of Fundamental Rights (EUCFR) and how it can be adapted in the human rights literature? Why the “No human being is illegal” motto should be linked to the human rights–based factors and criteria of the EU’s “New Pact on Migration and Asylum (NPMA)” and domains of the IOM Migration Governance Indicators (IOM-MGIs) framework? For whom the “No human being is illegal” principle will be an effective tool, and to which interests it will serve? Why has subsidiarity become a crucial factor to determine the confines of these interests and enhancing EU’s Fundamental Freedoms (EUFFs)? How do Kantian hospitality and Apel’s transcendental pragmatic approach offer a model for shifting the frame and ensuring new insights into thinking about universal hospitality and the right to reside? How could this be incorporated into EU and/or Member States’ reception policies, the real-world implications of the notion of subsidiarity, and the enactment of welcome at the local level?

The EU’s NPMA was conceived as evidence of how the EU applies neo-Kantian hospitality. Thus, this study scientifically criticizes the EU’s NPMA which has not adopted a human rights–based approach. The report merely quotes the international human rights law in a definition of the “principle of non-refoulement” (European Commission 2020a, p. 11). The research focuses on a hitherto unexamined dimension of the overlapping of the NPMA criteria/conditions and

1 Wiesel told undocumented immigrants: “You, who are so-called illegal aliens, must know that no human being is illegal. That is a contradiction in terms. Human beings can be beautiful or more beautiful, they can be fat or skinny, they can be right or wrong, but illegal? How can a human being be illegal?” Wiesel asserted that the “media should never use the term illegal immigrant” (Long Island Wins 2016).

2 Migration Governance: “The combined frameworks of legal norms, laws, and regulations, policies, and traditions as well as organizational structures (subnational, national, regional, and international) and the relevant processes that shape and regulate States’ approaches with regard to migration in all its forms, addressing rights and responsibilities and promoting international cooperation” (IOM 2004, 2019a). “Migration governance examines the emerging notion of migration partnerships in the political management and governance of international migration fluxes. The partnership approach to migration aims to balance the responsibility and beneficiaries of migration between source, transit, and destination countries” (Aliu 2020; Kunz, Lavenex and Panizzon 2011; The Economist Intelligence Unit 2016).
the IOM-MGIs framework’s factors/domains. It explicates the NPMA and the domains of the IOM-MGIs framework, such as migrants’ rights, “whole-of-government” approach, partnerships, the well-being of migrants, the mobility dimensions of crises, and safe, orderly, and regular migration (Aliu and Aliu 2021; IOM 2019b).

It can be argued that there are many “Pros and Cons” of hospitality and migration governance in the EU. So far, many pessimistic and optimistic opinions of the EU perspective have created profound dilemmas and ambiguities in intellectual debates. The driving forces of hospitality, migration, and asylum lay behind the “demonstrations, populist movements, ethnocentrism, racist rhetorical discourses, ideological contestations, discrimination, and inequality” that the EU has been facing, recently. Therefore, there is a necessity to revisit the Kantian doctrine of universal moral values, transcendentalism, and the neo-Kantian hospitality approach. The EU’s response to the current refugee issue and political debates on irregular migration put the neo-Kantian hospitality approach at the forefront of the migration agenda.

On the relationship of the citizen to his own and other countries with regard to rights, Kant clarified the rights of emigration and immigration:

The subject (considered also as a citizen) has the right of emigration, for the state could not hold him back as it might a piece of property. But he can take only his mobile belongings with him; he cannot take his fixed possessions, as would indeed be the case if he were authorized to sell the land he had hitherto possessed and to take the money he received for it with him. The lord of the land has the right to encourage the immigration and settlement of foreigners (colonists), even though the native subjects should look askance at it. But he must see to it that private ownership of the land by the native subjects is not diminished. If a subject should commit a crime which makes it a danger to the state for him to associate with his fellow citizens, the lord of the land has the right to banish him to a foreign province where he will not share any of the rights of a citizen, i.e., he has a right to deport him. The lord indeed has the right to exile him completely (ius exilii), to send him out into the world at large, i.e., to foreign countries. And since the lord of the land thereby withdraws his protection from him, it is tantamount to making him an outlaw within his own frontiers (Kant 1952, pp. 449–450; Kant 1991, pp. 160–161).

Philosophical foundations of the “right to be a guest” and the “right to present oneself in a society” are embedded in transcendental idealism (TI) and transcendental pragmatic approach (TPA) (Kant 1996). Kant evaluates these rights from a cosmopolitan right perspective. Opposing this Kantian universal viewpoint, Apel argued a rational foundation for the ethics of co-responsibility at the local level. He highlighted the “individually accountable responsibility (private morality)” that mutually coexists with the “institutionally accountable responsibility (public morality)” as the ethics of “co-responsibility” of individual and institutional actors (Apel, 1988, 1990, 1993a, b, 1997; Levinas 1984, 1996; Schreiner 1989;
Tauber 1995). Apel criticized the Kantian principle of morality qua universalization of rights and duties which provides the “basis for appreciating particular value traditions as long as it is not connected with the insight that the moral principle of universalization is only a device for testing maxims. Thus, Hegel was right in suggesting the complete powerlessness of the Kantian principle. It is necessary to supplement the Kantian principle of universally valid morality with the historical presupposition of a substantial ethos/value tradition and co-responsibility in local level” (Apel 1997).

Neo-Kantian hospitality approach mostly contains state-centric ethical duties. Kant draws attention to the welcome culture created by sovereign states’ authorities. Even Kant’s “Perpetual Peace Idea” is an “interstates” initiative, and the idea over-values the relationships between states’ structures from an inter/trans-governmental perspective (Zavediuk 2014; Rajiva 2017). Kant’s “Perpetual Peace Idea” adopts two state-centric pillars and a human rights–based pillar. The third pillar enforces the relations between individuals in different countries. However, Kant located the individuals’ duties of hospitality in a process led by states and failed to construct the rights and duties of individuals (Kaldor 2002; Linklater 2002). In fact, Kant’s failure emerges in his distinction of a “cosmopolitan right to visit” and a “universal right to reside.” Kant identified the moral conditions of hospitality for cosmopolitan citizenship at the global level. Kant’s universality of a cosmopolitan right can be perceived as a limited concept when the conditions of a “universal right to reside” are considered appropriately. During the COVID-19 era, neo-Kantian hospitality has been institutionalized by the EU authorities and it caused inhospitable tendencies due to the restrictions of EUFFs (Aliu and Aliu 2021; Brown 2010; Derrida 2000, 2001). Therefore, the EU needs to rectify the blind spots in the neo-Kantian hospitality approach.

The EU institutions and agencies used a “top-down approach” and the politics of subsidiarity in a supranational system. The EU’s hospitality and welcome culture are controlled by EU law and the Member States’ police and security organizations. In other words, the EU adopted welcoming principles towards refugees and asylum seekers; however, these principles are contradictory and inconsistent in the application due to strict controlling migration tendencies of the Member States’ police and security organizations. For security reasons, the EU tolerates violations of hospitality and fails in preventing refugees’ pushbacks and regulating overloaded hotspots. Therefore, the EU’s political actions toward migration and refugee issues are through involving the third sector (i.e., civil society and nonprofit organizations) and using a subsidiarity instrument in migration governance (Aliu and Aliu 2019, 2021, Aliu et al. 2020). Co-responsibility between states’ authorities and the third sector is guaranteed by collaborative actions and a partnership approach. Thus, subsidiarity further extends co-responsibility between state and non-state actors in migration governance (Aliu and Aliu 2019; Anheier and Seibel 1990; Anheier 1991; Anheier and Toepler 1999; Backhaus-Maul 2010; Colombo 2012). Similarly, human rights activism initiatives of both individuals and institutions offer co-responsibility forms in “heterarchical (non-hierarchical)” relations. Thus, subsidiarity in migration governance has been transformed by individual and institutional human rights activism initiatives. A shift from top-down/bottom-up hierarchical relations
to “network-based and urban/local-oriented reflexive self-organization” occurred in these heterarchical relations (Baldacchino and Sammut 2016; Baumann and Dingwerth 2015; Belmonte and Cerny 2021; Blühdorn and Deflorian 2021; Cumming 2016; Curry 2018; Goldstein and Glaser 2012; Jessop 2003, 2009; Smismans 2008).

In this study, extensive literature review, normative theory, document analysis, and thematic analysis were applied, and the data were compiled from Kant’s reference sources, secondary sources, reports and working documents of EU institutions and UN agencies, and so on. The document and thematic analyses describe the nature and forms of documents and identify themes in the text. Document analysis enables that data to be analyzed and evaluated to elicit meaning and reach understanding. Document analysis ensures data that are organized into major themes, categories, and case examples (Bowen 2009). Normative theory serves as a guide for research in certain fields of social and political sciences. From the network theorists’ viewpoint, normative approaches concentrate on culture and the socialization process through which norms and values are internalized in actors (Habermas 2006; Ritzer 2011).

Literature Review: Groundwork of Philosophical Considerations and Hospitality Approach

Undoubtedly, Kant’s critique and re-examination of the Enlightenment synthesis, and the reaction to his theories by the next generation of German Idealism, have profoundly influenced the theory–practice nexus in humanities and social sciences disciplines (Boyle et al. 2013, p. 1). Epistemologically, cognition as a process of acquiring knowledge and conceiving through thought, experience, and the senses explicates the components of hospitableness, welcome culture, and philanthropy (Kant 1996, pp. 328–329). The combination of moral consciousness and mental representation enables a reciprocal recognition and reconstruction of the conditions of migrants, refugees, and asylum seekers as guests in a host society. It is crucial to conceive the conditions of the “right to be a guest” and the “right to present oneself in a society” (Allison 2004; Hanna 2013; Kant 1996).

Since a “violation of rights” in a country on the globe is felt in all, the cosmopolitan right perspective is considered a representing right that supplements the “unwritten code of the right” of a country and society necessary for the sake of any public rights of human beings (Kant 1996, pp. 330–331). Apel argued a huge transformation of Kantian transcendental philosophy by highlighting the “a priori of the communication community and ethics” in local traditions (Apel 1988).

Griffioen and van Woudenberg conducted an interview with Karl-Otto Apel on the universality of ethics. According to the interview transcriptions, Apel claimed that there exists a universally valid and rational foundation for ethics. He asserted that the ethical rationality of “co-responsibility” can transcend local traditions (Apel 1990). Apel’s discussions about universal ethical rationality and universally valid and rational foundation for ethics highlight the “disintegration of moral self-consciousness.” This point is contradictory to the neo-Kantian hospitality approach. Apel argued “discourse ethics” as a reaction to the transnational issues of justice and
co-responsibility. Apel’s discourse ethics approach contains some implications for neo-Kantian hospitality. According to Apel, the issue of ethics should be taken up not only by arguing global justice and solidarity at the world order level but also by reasoning “ethics of co-responsibility” beyond the individually accountable responsibility that mediates between ethical and strategic rationality at multiple levels (e.g., local, regional, and national) (Apel 1993a, pp. 506–507).

Apel defended the assumption that hospitality and cosmopolitanism are embedded in the discourse ethics by developing the “Kantian deontological ethics” (Apel 1997, p. 199). Apel proposed to structure universalistic ethics of co-responsibility by distinguishing “private and public morality.” Responsibility cannot be fixed to individual accountability or personal responsibility. Co-responsibility must involve individuals, institutions, a wide variety of key stakeholders (i.e., public stakeholders, private stakeholders, civil society stakeholders), and networks for gaining collective actions, effectively (Apel 1993b, p. 9; Levinas 1984, 1996; Schreiner 1989; Tauber 1995).

The neo-Kantian approach considers hospitality as state-centric ethical duties. According to Kant, migrants ought to be welcome by sovereign states’ authorities. Freedom of travel must be granted to migrants within the borders of states to enable the adjustment of migrants in civil communities. The principles and elements of neo-Kantian hospitality are embedded in the “Perpetual Peace Idea” in which Kant sets out a cosmopolitan vision (Zavediuk 2014, p. 170). In the “Perpetual Peace Idea,” Kant stated three pillars of this eternal peace:

The intercourse of nations is to be confined to a right of hospitality (Art. 3). The first Definitive Article requires that the constitution of every state should be republican. The second Definitive Article states that the law of nations must be based upon a federation of free states (Art. 2). The third Definitive Article of Perpetual Peace puts forward that the rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality (Kant 1915).

The first pillar deals with the structuring internal constitution of a “republican and representative state with a separation of powers.” The second pillar is about creating the federalism of free states. The third pillar draws attention to the limitation of the conditions of universal hospitality. Kant argued that the relation of the “federated states to one another and the whole would be fixed by cosmopolitan law” (Caygill 2000, p. 314; Franke 2001, p. 31; Kant 1915; Rajiva 2017, p. 385). In essence, the third pillar is relevant to the cosmopolitan right of individuals and the conditions of universal hospitality. Neo-Kantian hospitality can be located in between moral universalism and cosmopolitan federalism (Benhabib 2004). The three pillars of eternal peace can be translated into the narratives of hospitality in the field of refugee reception by classifying the rights of a state. In the rights of a state, the republican constitution is completely compatible with the rights of human beings and encapsulates the norms and elements that promote and secure peace, rule of law, supremacy, subsidiarity, and principle of administrative discretion.

Kant claimed that the “predicament of human life outside of the protection of the sovereign is surely a state of war.” Kant recommended that “peace is something which may only be formally instituted in a political manner.” Kant goes on
in “Perpetual Peace to underline this point regarding the central importance of state politics to international peace with his three pillars of the Perpetual Peace Idea (Franke 2001; Kant 1915).”

Gani addressed the issues of the Enlightenment and inhospitality through clarifying the norms of Enlightenment and normative roots of the EU (Gani 2017, p. 426). To better conceive those, one should consider the theory–practice components of the neo-Kantian hospitality approach. A striking point of Kant’s perpetual peace idea is that he structured the conditions of cosmopolitan rights and hospitality (Kaldor 2002, p 276). Although Kant claimed that each person has a duty of hospitality to other human beings entering sovereign or strange lands, he puts the individuals’ duties of hospitality in a process led by the sovereign states’ authorities. It is essential that the citizens of one state ought to be concerned about the welfare of other human beings and humanity. However, the neo-Kantian hospitality approach failed to move beyond traditional international law, which is related to the “rights and duties of states,” to world law/cosmopolitan law, which is relevant to the “rights and duties of individuals” (Linklater 2002, p. 264).

In the third Definitive Article of Perpetual Peace, Kant discussed both the “cosmopolitan right to visit (Besuchsrecht)” and the “universal right to reside (Gastrecht).” Kant asserted that.

Hospitality signifies the claim of a stranger entering foreign territory to be treated by its owner without hostility. The latter may send him away again, if this can be done without causing his death; but, so long as he conducts himself peaceably, he must not be treated as an enemy. It is not a right to be treated as a guest to which the stranger can lay claim – a special friendly compact on his behalf would be required to make him for a given time an actual inmate – but he has a right of visitation. This right to present themselves to society belongs to all mankind in virtue of our common right of possession […] This right to hospitality, however – that is to say, the privilege of strangers arriving on foreign soil – does not amount to more than what is implied in a permission to make an attempt at intercourse with the original inhabitants. In this way far distant territories may enter into peaceful relations with one another. These relations may at last come under the public control of law, and thus the human race may be brought nearer the realization of a cosmopolitan constitution (Kant 1915).

Kant defined “hospitality/hospitableness” as the right of a foreigner not to be treated with hostility because he has arrived on the land of another. According to Kant, a foreigner can be turned away in good condition; however, as long as he behaves peaceably, he cannot be treated with hostility (Kant 1996). Brown argued a critique of Kant’s hospitality approach by examining Kant’s distinction of a “cosmopolitan right to visit” and a “universal right to reside.” He stressed that the critique of Kant’s hospitality approach presumes hospitality outlining all conditions required for cosmopolitan citizenship for inclusive cosmopolitan justice. Thus, hospitality is linked to the fundamental normative requirement necessary to set up a moral condition for intersubjective communication at a global level. At this level, it is likely that discursive communication relevant to the “substance of a future condition of
cosmopolitan justice is to be subjected to the global public reason” (Brown 2010, p. 308).

Derrida criticized Kantian hospitality and he asserted that Kant’s condition of a “universal right to reside” limits the universality of cosmopolitan right. He argued that it is a necessary condition for the creation of a cosmopolitan condition and structures a “mutual consistency” and “equal reciprocity” among the visited and visitor (Aliu and Aliu 2021; Brown 2010; Derrida 2000, 2001). The necessity for “mutual hospitality” and “conditioned hospitality” between the visitor and the visited is a critical issue due to globalization, the unbalanced power relations, inhospitable tendencies, the usage of forced contacts, and the pragmatic attitudes towards the “de-centred and de-nationalized forced migrants.” Derrida argued that there is unconditional hospitality that ought to ensure the right of refuge to all migrants. However, he highlighted the conditional aspect of hospitality that must be some limitations on the rights of residence. He distinguished “the duty of hospitality” and “the right to hospitality” to deal with the contradictory aspect of hospitality (i.e., conditional/unconditional) in cosmopolitanism (Aliu and Aliu 2021; Derrida 2000, 2001). The content of welcome culture in the EU can be enriched by an absolute (unconditional) hospitality approach that gives attention to, what Levinas calls it, “speech or welcome of the face” and not “thematization” (Derrida 1999, p. 21).

Derrida’s critiques put the ethical issue and “cosmopolitics”\(^3\) of the cities of refuge at the core of cosmopolitanism. Above the nation-state concept, he argued that “a free city”\(^4\) ought to handle the hospitality and refuge issues and the right to asylum through cultivating an ethic of hospitality. Thus, Kant’s idea that the “law of cosmopolitanism must be restricted to the conditions of universal hospitality” was strongly opposed by Derrida.\(^5\) The “restrictive conditions of hospitality” must ensure the security level of a free city. Besides the critique of Kant’s restriction of the law of cosmopolitanism to the conditions of universal hospitality, Derrida also opposed two limits of Kant that have implications of reflection, transformation, and progress (Derrida 2000, 2001, 2004). First, Kant excluded hospitality as a “right of residence” and limited it to the “right of visitation.” He argued that the “right of residence” is an object of a treaty between states. Second, Kant assigns conditions to it to make it dependent on state sovereignty. Hospitality signifies the public nature of

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\(^3\) As Levinas says “language is hospitality” (Derrida 2000, p. 135), political actors and scientists should be very careful when they argue reception policies and practices, governance of reception, the discourse of hospitality, hate speeches of populist political actors, crisis and polarization of politics, unequal and unstable power relations, divergent priorities and interests, welcome culture in the EU, and so on.

\(^4\) From the cosmopolitanism perspective, Derrida makes a legitimate separation of the two forms of “Metropolis”—i.e., the “City” and the “State.” The hospitality, mobility, and border tensions between some forms of globalization and the claims of states have been around the radical dualism that pits “polis and cosmopolis” as opposites (Walker, 2003). However, the “cities of refuge” have the adequate capacity of “\(\text{phronesis}\)” (practical wisdom) that encapsulates the accumulated history, law, and experience of hospitality. The municipalities and city councils have a novel status for the city that complies with the Charter for the Cities of Refuge and the International Agency for Cities of Refuge.

\(^5\) This brief discussion is necessarily limited given the allotted space. Derrida’s critiques of Kant’s hospitality and local level cosmopolitics far exceed this contribution (Aliu and Aliu 2021; Derrida, 1999, 2000, 2001, 2004).
public space. In the Kantian sense, hospitality is controlled by the law and the state police. In this context, it is the “violations of hospitality”; however, just as much for the sovereignty of cities these violations have become problematic in the EU recently (Aliu and Aliu 2021; Derrida 2001).

Ethically, Kant stipulated against deporting people who face injustice and whose lives are in danger at their home state. It can be considered in the scope of the “non-refoulement principle.” Likewise, some practical manifestations of Kantian cosmopolitanism are as such: the European Convention on Human Rights, the European Refugee Protection Program, and the European Refugee Resettlement Program (Gani 2017, p. 428). In the light of these considerations, it is worth creating a nexus between the “No human being is illegal” principle and the EU law with a particular concentration on the European Human Rights Law and the EUCFR which was included in the Lisbon Treaty and became a legally binding instrument (Craig and de Búrca 2015). Defining a person as “illegal” implies that the person is prone to any illegal activity. Thus, it forces countries to take necessary measures against people prone to any illegal activity. In the case of hospitality, the classification of an irregular migrant as “illegal” limits toleration and legitimates the securitization policies and strategies, risk assessment and management, and politics of deterrence. Likewise, describing irregular migrants as “illegal” enhances the political motives of far-right political movements, creates a cultural bias, and deepens alienation of the “other” in a society. The Refugee Convention (Article 31 on non-penalization, detention, and protection) recognizes people must sometimes do illegal things to claim asylum since protection is dependent on escape, evasion, and access to the territory. This is also incorporated into EU laws and regulations. However, there is a tricky deal of slippage in the political discourse of far-right political actors who use the term “illegal” as a synonym of “irregular.” Even though these terms are not interchangeable (even if “illegal” is used in common parlance and political discourse), far-right political actors conceptually transform the irregular status of refugees and asylum seekers by increasing the usage of the “illegal” notion. Not all refugees move irregularly, and most people with irregular status merely overstay visas. Despite the images of people coming on boats, most people with irregular status never did anything like that. Irregular status and irregular mobility are not the same things.

The Politics of Subsidiarity and the EU Welcome Culture: a Human Rights and Migration Governance Perspective

Kant’s TI and Apel’s TPA essentially involved a comprehensive clarification of how intellectual notions can appropriately apply to the human sense experience (Friedman 2013, p. 72). These approaches ensure a clue about locating migrants and refugees in migration governance and EU law. However, the politics of subsidiarity may create complexity because it has an ambiguity in nature. For instance, the EU’s shared competences cannot be conceived as shared responsibilities and/or shared strategic interests by the EU Member States.
The EU hospitality and migration governance are linked with the EU competence theory, sovereignty, and the principle of administrative discretion. The issues of migration, refugee, and asylum are included in the EU’s shared competences. Thus, the EU deals with many challenges and obstacles to applying migration policies and strategies in the areas of shared competences (Aliu 2020).

In essence, the notion of “subsidiarity” belongs to legal terminology. The Treaty on EU–Protocol 2 on the application of the subsidiarity principle lays down 3 criteria intended at building the desirability of intervention at the EU level: “Does the action have transnational features that cannot be resolved by the EU Member States? Would the national effort or inadequacy of the action be contrary to the provisions of the Treaty? Does the action at the EU level have precise benefits?” (European Parliament 2020; EUR-Lex 2016, 2020).

Subsidiarity is a corollary principle of the “principle of conferral” (Article 5(2) of the Treaty of the EU). “Under the principle of conferral, the EU should act merely within the confines of the competences conferred upon it by the Member States in the Treaties to achieve the goals set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States” (Craig 2010, 2012; Craig and de Búrca 2011; EUR-Lex 2016, 2020). In the scope of competences shared with the EU Member States, the EU level is most relevant to reach the goals set by the Treaties (principle of subsidiarity) (Craig 2010, 2012; EUR-Lex 2016, 2020).

From a political science viewpoint, subsidiarity is concentrating on the political inquiry on how to organize a society “bottom-up” in an efficient and functional manner. According to subsidiarity as a political instrument, citizens and their associations ought to take first responsibility for neighborhoods, communities, and society. In case they are not necessarily performing to attain the common goals, the state and its organizations should take over. In the nineteenth century, subsidiarity included a process of “decentralization” inside the Catholic Church and involved numerous philanthropic associations on the local level (Aliu and Aliu 2020). The decentralization process caused a transformation of the Catholic Church and subsidiarity provided a leading position to its charities, citizens, associations, civil society organizations (CSOs), and nonprofit organizations. So far, there has been a strong and vibrant quarrel between “Social Democrats – demanding public social services being delivered by the local state – and Christian Democrats arguing that Churches and their charities ought to be the main deliverers of public social services.” In 1961/1962, the German Supreme Court’s verdict asserted that “the local state and nonprofit organizations ought to collaborate together as partners by producing public social services.” From this viewpoint, subsidiarity can be conceived as a division of labor between local/central administration and nonprofit organizations: “(1) the state must guarantee the legal rights of citizens and is responsible for financing their legal demands; and (2) nonprofit organizations produce public social services and are involved in the official process of policymaking.” This kind of “partnership” between state and non-state actors (e.g., nonprofit organizations, philanthropic foundations, global/local CSOs) became functional and effective in the EU (Anheier and Seibel 1990; Anheier 1991; Anheier and Toepfer 1999; Backhaus-Maul 2010).

Recently, the subsidiarity debate in the EU has mainly concentrated on “(1) regulations by contracts between nonprofit organizations and the state and (2) civil
society and the empowerment of citizens. From a legal perspective, the state is still responsible and has the power to decide; however, nonprofit organizations are developing with their resources and expertise a strong bargaining position.” From the perspective of welfare pluralism, the social productivity of the CSOs as a third sector is getting more attention. Subsidiarity remains as an effective and practical tool to “distribute rights and responsibilities between citizens and organizations, civil society and state or the nonprofit world, and the market economy, hierarchically” (Backhaus-Maul 2010, pp. 1494–1495).

Subsidiarity governance balances power relations between state and non-state actors to safeguard the common goods (Aliu 2020; Colombo 2012, pp. 3–4). From Kant’s viewpoint, “recognition” is a dominant thought of justice or value acts as the unbiased referee amid the multicultural fray. The reason for this is twofold. Initially, it is a politics of the same recognition for everyone. Second, recognition is a moral presupposition of equal value (Baumann 1999, pp. 111–112). The issues of recognition of diversity, multiculturalism, social transformation, and the policies of culture have a significant impact on the implementation of reception policies and welcome culture in the EU (Hiebert et al. 2015; Meissner and Vertovec 2015; Vertovec 2011, 2012).

Table 1 illuminates a typology of human rights and migration governance in terms of the “co-responsibility” of the individual and institutional actions. At an “immediate/local” level or a “free city” level, a human rights activism initiative can be conceived better by explicating its roots of meanings, influences, and insights. It means an attempt to protect and welcome a person who is classified as an undocumented or irregular migrant by a nation’s public institution. The UDHR and the ECHR protect the EUFFs of people. The non-refoulement principle according to the 1951 Refugee Convention also protects the lives of people who cannot return to their homeland due to security concerns. However, human rights activism initiatives (individual/institutional) attract our attention in turn to the “powerlessness, recognition, and responsibility.” What increases the powerlessness of migrants is a police or military intervention, detention, or repatriation that causes human rights breaches. These kinds of operations prompt civil society protests and media reactions. Far-right political movements in the EU jeopardize the very heart of human rights values, create new social activism, and reconfigure the political discourse and the EUFFs of people in the EU (Baldacchino and Sammut 2016, p 232; Blühdorn and Defflorian 2021).

Migration literature essentially underlines the importance of “responsibility-sharing” of states based on horizontal and hierarchical relations. However, this study claims that there must be a shift in the form of “responsibility-sharing” from “hierarchical relations” to co-responsibility that is essentially associated with “heterarchical (non-hierarchical) relations.” Heterarchy is a “neologism” introduced for the “reflexive self-organization” and forms of co-ordination that involve neither anarchy nor hierarchy (Jessop 2003, 2009). The heterarchical relations consider a disconnection among “hierarchical (top-down/bottom-up) and network (peer-to-peer) analyses.” The heterarchical relations incorporate elements of both networks and hierarchies as an organizational continuum (Cumming 2016). Heterarchical relations are structured by high interdependencies of actors and similar power distribution between them. Typical structural arrangements
Table 1  A typology of “human rights” and “migration governance” in terms of the co-responsibility of the individual and institutional actions

| Human rights | Migration governance |
|--------------|----------------------|
| **Individual actions** | **Institutional actions** |
| Migrants’ rights (IOM-MGIs Domain 1) | The mobility dimensions of crises and capacity-building (IOM-MGIs Domain 5) |
| = > The principles of EUCFR (e.g., dignity, freedoms, equality, solidarity, justice) | Safe, orderly, and regular migration (IOM-MGIs Domain 6) |
| = > Fundamental principles of the UN-GCR and the UN-GCM | = > Human rights law |
| | = > Fundamental principles of the UN-GCR and the UN-GCM |
| | = > EU agencies (e.g., FRA, Eurojust, EASO, Frontex) |
| Well-being of migrants and funding opportunities (IOM-MGIs Domain 4) | “Whole-of-government” approach and stakeholders (IOM-MGIs Domain 2) |
| = > EU citizens support, European civil initiatives, and societal co-responsibility | Partnerships, collaborations, and consensus-building (IOM-MGIs Domain 3) |
| = > European altruism and philanthropy | = > Solidarity and co-responsibility (e.g., Diaspora, CSOs, NGOs) |
| = > EU funding schemes for individuals | = > EU institutions and stakeholders |
| = > Charity initiatives of the third sector | = > Subsidiarity principle |
| | = > EU legislation |
| | = > EU talent partnership program |

Source: Authors’ own contribution
for heterarchical relations contain universities, networks, public–private partnerships, and co-management in the governance of local and regional development (Goldstein and Glaser 2012). Heterarchical relations can occur “where strong urban/local levels exist, or where urban/local levels assert themselves in areas left undeveloped by higher levels” (Curry 2018, p. 144). This approach draws attention to the local level of cosmopolitics that involves non-state actors and networks (including both individual and institutional actions) to support, coordinate, and/or supplement state actors’ plans, strategies, and operations. Heterarchical relations shift the power relations and co-ordination from national to local and/or from national to transnational levels (Belmonte and Cerny 2021). Heterarchical relations emphasize the stakeholders as the central actors of policymaking. It is essentially successful in increasing participation and incorporating all stakeholders or leaving regulation in their hands (Smismans 2008). The co-responsibility nature of heterarchy has a basic component of contemporary world politics (Bauermann and Dingwerth 2015, p 123).

According to co-responsibility of “heterarchical (non-hierarchical) relations,” reasoning ethics of co-responsibility beyond the individually accountable responsibility mediates between ethical and strategic rationality at multiple levels (e.g., local, regional, and national) (Apel 1993a). The NPMA’s intergovernmental and interstate-centric dimensions jeopardize co-responsibility and effective migration governance mechanisms at multiple levels (Carrera 2020). The NPMA’s interstate solidarity approach which leads to asymmetric responsibilities enshrines the competences of central authorities (national level) and the EU institutions and agencies (supranational level), and it also limits the involvement of non-state actors at multiple levels (Aliu and Aliu 2019, Aliu and Aliu 2021).

The human rights–related operations in migration governance can fill in the gap between theory and practice. At the individual level, the EU citizens and the European civil initiatives (e.g., charity initiatives of the third sector, European altruism and philanthropy) have a propellent power to develop the migration governance framework. At the institutional level, the EU institutions, EU agencies, and stakeholders have the potential to organize, coordinate, and support human rights–related actions and social events. The EU institutions and their stakeholders tend to fill in the gaps of reception and integration through local humanitarian initiatives and improving the quality and conditions in the hotspots.

The EU institutions and their stakeholders have a vital role in strengthening migration governance, humanitarian aid, and welcome culture. In this regard, heterarchical governance and co-responsibility can be functional by involving (non)state actors. In terms of the EU legislation, heterarchical governance is instrumentalized by the subsidiarity principle. By emphasizing the fluidity between the different layers, it is possible to shape the distribution of competence and powers in political areas by acting between different activity levels of political actors (Hooghe and Marks 2001). In essence, the EU aims to embed co-responsibility in the NPMA which is a key instrument to boost collaboration and solidarity in migration governance.
The EU’s Co-responsibility and the New Pact on Migration and Asylum: the Role of “No Human Being Is Illegal” Principle

Responsibility is seemingly a legal term. It has a normative aspect. It is an “obligation that overflows the framework of compensation and punishment.” This overflowing runs in many directions, thanks to the chance assimilations encouraged by the polysemy of the verb “to respond”: not just in the sense of “to answer for” but “to respond to” (an inquiry, a request, an injunction, and so on) (Ricœur 2000, pp. 11–12). Responding to the powerlessness, recognition, and responsibility aspects of the “No human being is illegal” principle is not a “zero-sum game” that contributes to the favor of insiders by exploiting the outsiders (Hernández 2008, p. 31). It must include the characteristics of human rights, solidarity, human prosperity, fundamental freedoms of people, and cosmopolitan reception culture.

The NPMA attempts to create a balance between responsibility and solidarity among the EU Member States. It is a foreseeable and reliable migration governance mechanism that includes a pragmatic and realistic approach (IOM 2020; UNHCR 2020; von der Leyen 2020). Through the implementation of the NPMA, the EU aims to set up strong borders, including the relaunch of the Dublin reform and asylum rules, and modernize a common European asylum system. These developments enable a functioning Schengen Area and pave the way for further enlargement with the WBCs (Aliu and Aliu 2021; von der Leyen 2019).

The NPMA has been announced during the COVID-19 pandemic. It claims that the EU institutions and agencies care about the living and health conditions of the (ir)regular migrants during the pandemic. COVID-19 has exacerbated inequalities (e.g., access to healthcare, welfare services, criminal matters, hate speeches associated with specific ethnicities) and economic difficulties (e.g., issues about employment, debt, inflation, remittances) in the EU. According to the NPMA, there is a growing role of the EU agencies (Aliu and Aliu 2021) to deal with securitization and depoliticization, underpin externalization of the EU’s borders, and address politics of resilience, deterrence, and defense.

In light of these considerations, the EU has restricted or even blocked the right to visit and the right to reside of migrants in a Member State due to the protection policies of EU public health and public security. During the COVID-19 era, the EU has frozen the reception policies and put the asylum applications in a pending status. To respond to the abovementioned issues, the NPMA constituted the conditions and criteria for effective migration governance. It suggested an independent monitoring mechanism to provide prohibition of arbitrary detention and collective expulsions, guarantee due process, respect the principle of non-refoulement, and ensure forced expulsions in a safe and dignified manner (Council of Europe 2020; European Commission 2020a, b; IOM 2020; UNHCR 2020). The NPMA contains new procedures to establish status swiftly on arrival (e.g., the pre-entry screening, border procedures), a common framework for solidarity and responsibility-sharing, mutual trust through robust EU governance and implementation monitoring, supporting children and the vulnerable people, prohibition on closed controlled centers and the detention of children, an effective
and common EU system for returns, a new common asylum and migration database, a robust crisis preparedness and response system, integrated border management, reaching full interoperability of IT systems, a common EU approach to search and rescue, reinforcing the fight against migrant smuggling, collaborating with the EU’s stakeholders, maximizing the impact of the EU’s mutually beneficial partnerships to strengthen migration governance, fostering collaboration on readmission and reintegration, developing legal pathways to the EU, attracting skills and talent to the EU through the TPP, and supporting integration for more inclusive societies (BMI 2020; CCBE 2020; European Commission 2020a, b; IOM 2020; UNHCR 2020).

Many critiques and concerns have been raised toward the NPMA by various stakeholders. In essence, the critiques highlight that the EU institutions and national authorities have conceived migration as a crisis, rather than as a structural and socio-economically impactful phenomenon. Herein, migrants, asylum seekers, and refugees have also been considered a danger and a potential security threat for the welfare order, competitiveness ecosystem, and economic stability of European societies. The EU securitization policies mainly deal with irregular migration through supporting police and military interventions at the EU’s border. Thus, the EU institutions and agencies have more interest in enforcing migration control mechanisms in the countries of origin/transit and signing readmission agreements to facilitate return procedures. A lack of “universal guidelines for return migration” has formed a governance void which especially influences host countries that have not ratified the 1951 Geneva Convention. For that reason, local actors have started arranging their own returns (van Riemsdijk et al. 2020, p. 11). There is a high concern that these mechanisms have the potential to enhance the risk of migrants being detained arbitrarily and experiencing torture/abuse. The EU institutions and agencies consider the control of the EU borders as a fundamental necessity for the protection of the Schengen acquis and the free movement of EU citizens (ASGI 2020; ETUC 2020). Furthermore, the NPMA does not remedy the main shortcoming of the current Dublin Regulation. It did not quote the UN-GCM (UN 2018) and the UN-GCR (UNHCR 2018) that address effective migration governance from a multilateral perspective.

Overall, ECRE, ASGI, RRE, RSA-ProAsyl, ETUC, PICUM, and many other stakeholders highlight that the NPMA ought to admit a “human rights–based approach” to migration and asylum. It should refrain from further externalizing EU migration and asylum responsibilities to third countries, favor transparent and equal collaboration with third countries, and increase the possibilities of regular entry and stay in the EU (ASGI 2020; ECRE 2020a, b; ETUC 2020; RRE 2020).

Human rights–based migration governance has been developed by considering the global rights–based migration governance, embedded in human rights, EU Treaty principles, and international norms (Pécoud 2021, p 103), such as the UDHR, the ECHR, the EUCFR, the EUFFs, IOM-MGIs, the UN-GCM (UN 2018), the UN-GCR (UNHCR 2018), and the UN Convention on the Rights of Migrant Workers and Members of Their Families. The “No human being is illegal” principle is relevant to the EUCFR because the Charter’s preamble comprises dignity, freedoms, equality, solidarity, citizens’ rights, and justice (EUR-Lex 2012).
To sum up, the “No human being is illegal” can be considered a crucial groundwork for enforcing the arguments and explanations of the human rights approach and human-centered migration perspective. It is highly recommended that the EUCFR ought to adopt the “No human being is illegal” as a principle of fundamental rights and freedoms. The adoption of the “No human being is illegal” principle by the EU legislation is likely to be an effective tool for enhancing the hospitality and migration governance mechanism in the EU. Thus, the “No human being is illegal” principle and moral principles specified in the “UN-GCR” and the “UN-GCM” should be included in the EUCFR. These can be conceived as universally valid foundations for ethics in the migration research field because the global compacts are structured on human rights and fundamental freedoms. They also present international cooperation frameworks that were asserted in the New York Declaration for Refugees and Migrants that acknowledges migrants and refugees might deal with issues in common (UN 2018, p. 1). At the institutional level, the principle includes the human rights law and the fundamental principles of the UN-GCR and UN-GCM.

**Conclusion: a Plea for Adopting the “No Human Being Is Illegal” Motto as a Fundamental Principle of the EUCFR**

This study offered an innovative attempt to bring philosophical debates on hospitality into dialog with both legal-political practices in the European context and the understanding of “No human being is illegal” as a principle of human rights activism. It outlined a neo-Kantian hospitality approach in the light of Kant’s TI and Apel’s TPA. The research indicated that neo-Kantian hospitality is manifested in a dualism and contradictory approach because Kant positioned his transcendental philosophy in between critical idealism and empirical realism (Allais 2015; Guyer and Horstmann 2021). Apel’s ethical considerations are contradictory to neo-Kantian hospitality and the EU’s welcome culture. In contrast to Kantian universal ethical consideration, Apel discussed the ethics of co-responsibility at multiple levels, such as local, regional, and national levels. Moreover, Apel puts the ethics of co-responsibility beyond inter-state relations and denotes individually and institutionally accountable co-responsibility.

The research interrogated why a human rights–based migration and asylum approach is necessary to deal with migration governance and EUFFs, effectively. It argues that there is a strong and significant interconnectedness between hospitality, human rights, and migration governance at the local level. It is submitted that heterarchical relations strengthen the migration governance mechanism at multiple levels and enhance the collaborations, co-responsibilities, and partnerships among state actors, non-state actors, stakeholders, and networks in home and host countries (Aliu and Aliu 2020).

The third principle among the triumvirate of conditions needed in Kant’s Perpetual Peace is the rights between the individual (visitor) and the state, and often it is there that we read into Kant’s work a (perhaps at times anachronistic) support for the refugee. But as several scholars have noted, the benevolence of his legal theory is contradicted by Kant’s anthropology which is less forgiving towards the
non-European “other” (Strawson and Allais 2018; Bernasconi 2002, 2003; Gani 2017). The neo-Kantian hospitality was not envisaged for the non-European voyager coming to Europe, and therefore offers a limited epistemology for hospitality in Europe (Gani 2017; Huseyinzadegan 2019). In this context, it is via the EU that the subsidiary contributions can be centered and given a more robust role in welcoming refugees, asylum seekers, and migrants. The EU institutions and agencies ought to enhance the moral legitimacy of non-state actors in areas that cover human rights activism, co-responsibility, and collaboration.

The EU still fundamentally constructed an inside/outside distinction because it is an exclusive club. An alternative resolution of the universality and political community was offered by the principle of state sovereignty while retaining the same spatial differentiation between inside and outside. Under the conditions of cosmopolitanism, modernity, and Enlightenment, the universal reason may be attained internally so that the space among states might become an extension rather than a negation of the rational political community attained within the state (Walker, 1993, 2006).

A partnership approach in the politics of subsidiarity can be implemented at the local level, efficiently. However, it is vital to contain the non-state actors, including the third sector and non-profit organizations. The subsidiarity principle has a significant influence on hospitality, migration governance, and convergence of the EU Member States’ priorities and strategic interests which are related to migration and asylum policies. Undoubtedly, the effectiveness in hospitality and migration governance can be reinforced by the instrumentalization of a partnership and consensus-based subsidiarity approach.

As a global concern and challenge, the exploitation of de-centered and de-nationalized people encapsulates the marginalization and ghettoization of regular/irregular migrants. There is a huge rupture between regular/irregular migrants and their home states. Thus, hospitality should enforce the migrants’ belongings, cohesion, mutual respect, cultural interactions, and adjustments in civil society at the local level. From this viewpoint, hospitality should be embedded in a migrant reception and refugee welcome system that attaches considerable attention to “a permanent vision of residence (the right of residence)” rather than a “pragmatic temporary vision of visitation (the right of visitation).”

The “No human being is illegal” principle and hospitality offer crucial pathways to put a diagnosis of societal concerns/bias and revoke inhospitality statements, decisions, and discourses at the local level of cosmopolitics. The co-responsibility of individuals and institutions is vital for their human rights initiatives. In structuring this bridge, strengthening the EU institutions and their stakeholders, and increasing their influence, competence, legitimacy, and effectiveness are directly proportional to the strategy of Europeanization and enforcement of the EU law. The EU institutions and stakeholders that are related to and operating in migration governance can implement more peaceful policies and strategies and attain more human rights–based objectives. Likewise, enhancing solidarity and close cooperation between and beyond the EU institutions and stakeholders can enforce the EU partnerships, capacity, and consensus-building structures. The co-responsibility can be an effective guide for human rights–based migration governance and cosmopolitics. Considering the UN-GCR and the
UN-GCM, only if refugees are considered migrants, social inclusiveness, solidarity, human dignity, and non-discrimination can be guaranteed by the universally valid norms and rational foundation for ethics. Mutual trust and legitimacy of the EU asylum and migration policy can be followed only if international human rights and refugee protection commitments (e.g., the ERPP, the ERRP), EU Treaty principles, and IOM-MGIs are put at the forefront (Carrera 2020; Habermas 1974).

Migrants’ rights are human rights! Refugees’ rights are human rights! Asylum seekers’ rights are human rights! (Aliu and Aliu 2019; Boucher and Gördemann 2020; Pijnenburg and Rijken 2018; UNHCR 2018). For future studies, it is worth implying that European human rights law and the EUCFR (ECRE 2017a, b, c; EUR-Lex 2012) ought to incorporate the “No human being is illegal” principle (Hernández 2008; Long Island Wins 2016). The “non-refoulement” principle is a peremptory norm in international law; however, the principle merely encapsulates the asylum seekers and refugees, and not all people with irregular status. While in practice the EU and the Member States abrogate the norm, the Kantian universal cosmopolitan rights can be more persuasive than a customary norm, codified in treaty obligations, from which there can be no derogation. Thus, the EUCFR can adopt the “No human being is illegal” principle—which contains both regular and irregular migrants—for an interpretation of state obligations, and the principle can be included in the legal arguments and negotiation processes of European human rights law. However, unlike the negotiation processes of the UN-GCM and UN-GCR, the negotiations and consultation processes of the “No human being is illegal” principle should involve individual/institutional human rights activists, peace activists, and judicial activists (ECRE 2017a, b, c; Maple et al. 2020). The components of EUCFR ought to be embedded in the “No human being is illegal” principle and it can be used as a powerful tool to implement better protection standards in the EU asylum acquis (ECRE 2017a, b, c, 2020a, b, c; EUR-Lex 2012). The study strongly recommends that the NPMA ought to practically comply with a human rights–based migration and asylum approach and apply the domains of IOM-MGIs, coherently. In a COVID-19 era, it can fix the laws, norms, foundations, freedoms, and practices of refugees and migrants for the embeddedness of the “No human being is illegal” principle in migration and refugee studies literature.

**Abbreviations**

ASGI: The Association for Juridical Studies on Immigration; BMI: The Federal Republic of Germany, Ministry of the Interior, Building, and Community; CCBE: The Council of Bars and Law Societies of Europe; COVID-19: Coronavirus disease pandemic; CSOs: Civil society organizations; ECHR: The European Convention on Human Rights; ECRE: European Council on Refugees and Exiles; ERPP: European Refugee Protection Program; ERRP: European Refugee Resettlement Program; ETUC: The European Trade Union Confederation; EUCFR: The EU Charter of Fundamental Rights; EUFFs: The EU Fundamental Freedoms; IOM-MGIs: International Organization for Migration, Migration Governance Indicators; NPMA: The New Pact on Migration and Asylum; PICUM: Platform for International Cooperation on Undocumented Migrants; RRE: Refugee Rights Europe; RSA-ProAsyl: Refugee Support Aegean; TI: Transcendental idealism; TPA: Transcendental pragmatic approach; TPP: Talent partnership program; UDHR: Universal Declaration on Human Rights; UN: The United Nations; UN-GCM: The United Nations Global Compact for Safe, Orderly and Regular Migration; UN-GCR: The United Nations Global Compact on Refugees; UNHCR: United Nations High Commissioner for Refugees; WBCs: Western Balkan Countries
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**Declarations**

**Conflict of Interest**

The authors declare no competing interests.

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