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EU MIGRATION POLICY, INTERNATIONAL LAW AND EXTERNAL RELATIONS: ARE INTERESTS DEFYING STANDARDS?

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Treatment of migrant workers in Europe has become a ‘high profile’ public and political issue. While foreign workers may be disdained by some politicians, policy makers and citizens, the non-protection of migrant workers risks a domestic and international perception of Europe as a land of human rights abuses. The challenge was symbolized eloquently by the words of a Nordic delegate to the 1st Global Forum on Migration and Development (GFMD) in Brussels in July 2007. Following statements by Latin American and African delegates reiterating the importance of protection of rights of migrants and the need for adoption of the International Convention on rights of migrant workers by host countries, she said: “Oh, those countries just kept harping on those issues. Don’t they understand that we are just not interested at all in that?”¹

However, as this article posits, Europe should be more concerned about protection of rights of migrants – and a rights-based migration policy regime – for reasons of its own future productivity, prosperity and democracy, as well as for good relations with much of the rest of the world.

This article offers an overview of the context shaping evolution of European Union migration policy. It notes progress but also deficiencies in incorporation of relevant international standards and ‘good practices’ in law and practice. It identifies certain pressures and constraints that may explain inadequacies in the extent community policy has addressed major policy challenges and incorporated international standards.

Points of reference for this review are the international legal standards and the negotiated policy frameworks on migration, in particular the International Conventions on migrant workers and the Multilateral Framework for Labour Migration elaborated under auspices of the ILO.

The starting point for this review is an assessment of migration today and its economic importance to Europe. The significance of migration in a globalized economy and its importance to Europe shape what is at stake. What happens in law and policy is derived to a large degree from this context and its interpretation.

· Presented in personal expert capacity; the observations and ideas expressed here do not necessarily reflect or engage the views of the ILO.

¹ Statement made by delegate in a conversation with this author during pause following opening plenary session, July, 2007.

1. Labour Migration is Essential for Europe

Migration today is essentially a labour issue. It serves as an instrument to adjust the skills, age and sectoral composition of national and regional labour markets. Migration provides responses to fast-changing needs for skills and personnel resulting from technological advances, changes in market conditions and industrial transformations. In countries of aging populations, migration offers a potential to replenish declining work forces as well as to inject younger workers, increasing dynamism, innovation and mobility in work forces.

The ILO estimates that some 105 million of the total 214 million people living outside their countries of birth or citizenship in 2010 are economically active, engaged in the world of work.² This involves most working-age adults, taking into account that the migrant population includes children and aged dependents. In several Western European countries, the foreign born proportion of the work force is ten percent or more, nearly 15% in Ireland, and some 40% in Luxembourg.³

Due to economic, demographic and technological changes, increasing numbers of jobs in industrialized economies simply cannot be filled by native-born workers. The ageing of native work forces, combined with declining populations, is an important factor. By current projections, the population of Germany may be 25% smaller in 2050 than in 2000. Latvia and Lithuania have already seen reductions of 10% of their populations since 1989 – due especially to emigration of working age adults. The fertility rate in Spain is about 1.2 children per woman, far below replacement. Rates in most of the EU are or soon will be at or below replacement. France is one of the few exceptions.

As the European Commission put it in its Communication on *A Common Immigration Policy for Europe*, “In a context of an ageing Europe, the potential contribution of immigration to EU economic performance is significant.” It further noted, “According to the latest population projections, by 2060, the working age population of the EU is projected to fall by almost 50 million even with continued net immigration similar to historical levels and by around 110 million without such immigration.” It went on to signal additional significance: “Such evolutions present risks for the sustainability of pensions, health and social protection systems and require increased public spending.”⁴

Some time ago, the International Labour Office ran a simulation using the methodology its actuarial section had used over the previous ten years to predict – quite accurately – the future performance of social security systems. This simulation carried forward calculations to the year 2050 based on presumed continuity of current trends in population aging and decline, retirement age, female workforce participation rates, immigration numbers, and modest economic growth and productivity rates. The simulation outcome suggested that 40 years from now, the standard of living of Western Europe, as measured by per capita income of gross national product, may be only 78% of what it is today. That is to say, 22% lower.⁵

² ILO. *A Rights Based Approach to Labour Migration*. ILO, Geneva, 2010.

³ EU. *Employment Report 2008 European Union*. DG Employment. Brussels. Issued 2009.

⁴ EC. *Communication, A Common Immigration Policy for Europe: Principles, actions and tools*. COM (2008) 359 Final. 17.6.2008.

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ILO. *Towards a Fair Deal for Migrant Workers in the Global Economy*. International Labour Conference 92nd Session June 2004.

The current projection for Europe is that while today the average social security dependency is two retired persons for every seven that are economically active, the ratio will rise to four per seven by 2050⁶: this means either doubling the contribution per working person or halving the income for retirees.

In the context of intensifying and continuously globalizing economic competition, labour remains a fundamental variable. Migrant labour and thus international labour mobility emerge as key to providing not only labour force in numbers and skills but also for ensuring the productivity and competitiveness of work forces.

2. Need for Protection

This shift in workforce demographics across Europe is not only significant but pervasive as well. Indeed, as a recent annual OECD report on migration trends highlights, Europe's needs for low and medium skilled migrants are as critical as for high skilled.⁷

However, at lower skilled levels, migrants are often seen as exploitable and expendable, a source of cheap, docile and flexible labour, apt for the 3-D – dirty, dangerous and degrading – jobs nationals are unavailable for and/or unwilling to take. The vulnerability of migrant workers makes them attractive for some employers because they can be underpaid, provided with little or no workplace safety and health protections, as well as hired and dismissed on a moments notice; further, union organizing can be impossible.

Indeed, migrant workers tend to be concentrated in sectors and activities where labour standards are weak and/or where enforcement of existing standards is lax or non-existent. The consequence is that migrant workers face lacunae of real protection of health and safety. In Western Europe, foreign workers face occupational injury and death rates twice as high as those for nationals. More generally, employment for many is associated with underpayment or non-payment of wages, physical abuse, sexual harassment and violence against women workers, as well as denial and repression of freedom of association and trade union rights.

The ILO estimates that, globally, some ten to twenty percent of international migrant workers are in irregular situations: without legal authorization for residence and/or employment, or undocumented. A recently established on-line database project on irregular migration in the European Union corroborates this general global *guesstimate* with detailed country by country estimates indicating that migrants in irregular situations number between 2.8 and 6 million, giving a range of 11% to 23% of total migrant stocks across the EU.⁸

Report VI. P. 37-38. Available on line at:

<http://www.ilo.org/public/english/standards/reim/ilc/ilc92/pdf/rep-vi.pdf>

⁶ UN Population Division

⁷ OECD. 2007. *Gaining from Migration: Towards a New Mobility System*, Jeff Dayton-Johnson, Louka T. Katseli, Gregory Maniatis, Rainer Mumz and Demetrios Papademetriou (Development Centre).

⁸ CLANDESTINO *Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe*

Migrants in irregular situations are even more vulnerable to exploitation and abuse. The presence of unauthorized migrants seems all too often tolerated by authorities in certain circumstances – such as in sectors or areas where national workers are unavailable, where the state has an interest in sustaining enterprises or economic activity that would otherwise be unsustainable if prevailing wages were paid and/or conditions of work enforced, or even, it would seem, where it hopes to prevent upward pressures on or indeed push down local wages and protections. The absence of legal recognition heightens the exploitability and lowers the costs of migrant labour, in some cases arguably allowing marginally competitive activity to remain in business.

The flow of low-skilled migrants is channelled by clandestine means precisely because of the non-existence of legal migration categories that would allow for their legal entry in destination countries. Once they are in host countries, they remain confined to jobs in unstructured or informal sectors, in irregular work and under exploitative conditions of employment.⁹ In contrast, ILO research underlines that legal labour migration channels contribute to both reducing trafficking and the smuggling of migrants.

Historical experience shows that regulation providing protection for migrant workers cannot be left alone to market mechanisms. When highly competitive and now globalized market pressures are brought to bear in the absence of protections and appropriate regulation, migration is usually characterized by abuse and exploitation of migrant workers, marginalization and social exclusion of migrant and immigrant origin populations, fear of loss of jobs blamed on immigration, increasing anti-immigrant sentiments and, ultimately, communal violence.

3. International Norms and Jurisprudence

The development experience of Western industrialized countries showed that reducing exploitation and ensuring equality of treatment were essential elements for building prosperity, social cohesion and democratic governance of societies. As a result, a set of international regulatory standards was elaborated specifically addressing protection of foreign migrants workers and migration for employment. The need to provide for protection of workers outside their own countries was explicitly raised in the Treaty of Versailles that ended World War I (and established the Constitution of ILO) and the first international treaty on migrant workers was drawn up in the 1930s.

Standards applying to protection of migrants and to international cooperation on migration have been elaborated in five categories of international law:

- 1) International Human Rights law, notably the eight fundamental human rights instruments, comprising the two Covenants respectively on Political and Civil rights and on Economic social and Cultural Rights, along with the six international conventions addressing specific groups and situations: victims of racial discrimination, victims of torture, women, children, migrant workers, and persons with disabilities;

Research project funded by the European Commission, DG RTD, FP6, 2007-2009. For more information, visit <http://clandestino.eliamep.gr> (country reports and research briefs), and <http://irregular-migration.hwwi.net> (database).

⁹ Abella, M.I., "Mondialisation, marchés du travail et mobilité", in *Migrations et avenir*, CIEMI, Paris, Vol. 14, No. 79, January-February 2002.

- 2) International Labour Standards, in effect all of them, except where – rarely – foreign workers are exempted;
- 3) Refugee and asylum law, namely the 1951 Convention and the 1967 Protocol on the Status of Refugees;
- 4) Consular Relations, namely the Vienna Convention on subject;
- 5) International Criminal Law, particularly the Protocols on Trafficking in persons and smuggling of migrants of the International Convention on Transnational Organized Crime.

Three fundamental notions characterize the protections in international law for migrant workers and members of their families:

- Equality of treatment and non-discrimination between regular migrant/immigrant workers and nationals in the realm of employment and work;
- Universal human rights apply to all migrants, regardless of status;
- The broad array of International Labour Standards providing for protection in treatment and conditions at work and social protection apply to all workers.

Certain principles and rights at work are deemed to be fundamental for the protection of human rights for all workers, including migrant workers, by the ILO and its member States. They concern freedom of association and the right to collective bargaining, freedom from forced labour and child labour and non-discrimination in employment and occupation, spelled out in eight ILO Conventions.¹⁰ Moreover, the 1998 ILO Declaration on Fundamental Principles and Rights at Work established that all ILO members (which include all EU member States) have an obligation to “respect and to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”¹¹

International Labour Standards in the areas of occupational safety and health, conditions of work, protection of wages and labour inspection, employment policy, maternity protection, the regulation of private and public employment agencies, as well as those covering sectors employing a large number of migrant workers have been identified by ILO – and by national jurisprudence in many European countries – as similarly applicable to the protection of *decent work* conditions for all migrant workers.

This notion was explicitly upheld in an international court several years ago. In 2003, the Interamerican Court on Human Rights “...decides unanimously, that...the migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them those of labor character. A migrant, by taking up a work relation, acquires rights by being a worker, that must be recognized and guaranteed, independent of his regular or irregular situation en the State of employment. These rights are a consequence of the labor relationship.”¹²

¹⁰ C87 Freedom of Association and Protection of the Right to Organise Convention (1948), C98 Right to Organise and Collective Bargaining Convention (1949), C29 Forced Labour Convention (1930), C105 Abolition of Forced Labour Convention (1957), C100 Equal Remuneration Convention (1951), C111 Discrimination (Employment and Occupation) Convention (1958), C138 Minimum Age Convention (1973), C182 Worst Forms of Child Labour Convention (1999).

¹¹ ILO Declaration on Fundamental Principles and Rights at Work, 1998: para.2

¹² Corte Interamericana de Derechos Humanos: *Condición Jurídica y Derechos de los Migrantes Indocumentados*. Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003.

Three specific international instruments explicitly define the application of human and labour rights to migrant workers: ILO Convention 97 on Migration for Employment (of 1949), ILO Convention 143 on migrant workers (Supplementary Provisions) (of 1975), and the 1990 International Convention on the Protection of All Migrant Workers and Members of Their Families (ICRMW). These three instruments comprise an *international charter on migration*, providing together a broad and comprehensive framework covering most issues of treatment of migrants. These are not just instruments on rights, they contain provisions to encourage and guide intergovernmental consultation, information sharing and cooperation on nearly all aspects of international migration.

82 countries – nearly two thirds of the some 130 countries for which international migration is an important feature – have ratified at least one of these three complementary conventions. Eleven member States of the EU have ratified one or both of the ILO Conventions on migrant workers, among them most of the larger migrant destination countries: Belgium, France, Germany, Italy, the Netherlands, Norway, Slovenia, Spain, Sweden, Portugal and the UK. Several others have utilized these international standards in elaborating relevant national law.

The ICRMW has 43 ratifications plus 15 additional signatories as of August 2010. Ratifying States will have already incorporated its content into national legislation, while signatory states are generally also bound by its content. National studies conducted in a number of EU member states have found that national legislation of most of these States is already entirely or largely in conformity with the content of the ICRMW; these studies generally concluded that resistance to or difficulties in ratification are primarily for political, not legal, reasons.

4. The European Context

4.a. European Law and Policy

With these elements as context, contradictions appear evident in the state of evolution of EU law and policy on migration. Migration – and regulation to deal with it – is manifestly essential to assure the present and future well-being, if not economic survival, of the Community and its member states. The elaboration of explicit policy and legislation is, however, fraught with tension given the nature of migration and its susceptibility to conflicts of interests.

There has been laudable progress, but the process appears driven by domestic political posturing and by short-term economic interests, to the extent that neither long-term economic and social implications nor external dimensions are adequately considered.

Firstly, *transposition* of the international normative framework demonstrably essential to regulation of migration as well as protection of workers remains woefully inadequate.

On the one hand, fundamental standards of non-discrimination and equality of treatment for regular migrant workers have been prominently and unequivocally incorporated in the content of EC Communications and in relevant EU Directives, notably the “race equality directive” of 2000.¹³ These principles are fundamental to all international human rights instruments, and particularly to ILO Conventions 97 and 143 on migration for employment.

¹³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

However, little other reference is made to *transposition* or application of a broader set of rights established for migrant workers in international standards. Nor are the relevant international standards themselves referred to, with one notable but specific exception. The EC Communications on the Global Approach and on Common Immigration Policy for Europe explicitly call on the EU and its member States to, as the latter puts it: “Step up action at the regional and international level, so as to ensure that the international instruments applicable in the area of migrant smuggling and human trafficking are effectively implemented...”¹⁴ A Communication on the global approach goes further to call for ratification by all concerned States of the Protocols on Trafficking in Persons and on Smuggling of Migrants to the International Convention on Transnational Organized Crime.¹⁵ Public pronouncements of EC officials and representatives of member states do likewise.

In contrast, references to the international instruments elaborating migrant workers rights seem conspicuous by their absence in Council Communications and other documents issued by the Commission and its concerned Directorate Generals.

Non-reference to the international standards on rights of migrant workers seems especially notable in the ongoing – and now long delayed – elaboration of a directive that would explicitly define a common set of rights to all third-country workers in regular situations in Member States but not yet entitled to long-term residence status.¹⁶ The proposed directive would also introduce a single application procedure along with a single residence/work permit. As observers Nicola Famigni and René Platevoert point out, “The proposal is the most important of the (EU migration) Policy Plan’s package, because it addresses the problem of migrant labour force exploitation. Regulating the social and economic rights of migrant workers means reducing unfair competition between Member States and ensuring decent working conditions. Whether or not this objective will be met is a matter of political will.”¹⁷ It is equally a matter of incorporating existing international instruments and the experience of the supervisory mechanisms for these instruments: absence of explicit reference in the proposal risks undermining consistency in European law and practice with standards and jurisprudence in international law.

This lack of reference risks defining European instruments with legal enforceability that diverges from – and goes significantly below – international standards. This concern is reinforced by contemporary political discourse in member States and in EU forums that excludes reference to these international standards. Statements by officials of certain member states, expressing

¹⁴ Council Decisions [2006/618/EC](#) and 2006/619/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime. OJ L 262 of 22.9.2006

¹⁵ Council Communication 2007: The Global Approach to Migration (GAM). European Council COM (2007) 247 final, 16 May 2007.

¹⁶ (Proposed) Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for the third-country workers legally residing in a Member State. COM(2007)638 final

¹⁷ Nicola Flamigni, René Platevoert: “EU Policy on Labour Migration: Implications for Migrants’ Rights” in European Social Watch Report 2009 at: http://www.socialwatch.eu/wcm/eu_policy.html Accessed 18-8-2010

opposition to adoption of standards on migrant workers, compounds this concern. Some such calls have specifically urged ‘renegotiation’ of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).¹⁸

Nonetheless, it is noteworthy that the European Parliament has adopted no less than 16 resolutions since 2001 – often by consensus – containing explicit calls for ratification of this same Convention by EU member States.¹⁹

Secondly, the EU has been manifestly constrained from elaborating common policy on migration that goes beyond certain high skilled categories. The focus of community policy formulation on only high skilled, intra-company transfers and trainees while excluding addressing low-skilled and indeed medium skilled migrants leaves a huge and untenable gap in the Community’s ability to deal with and regulate a large part of migration – that of low and middle skilled migration, where the needs for rights protection, regulation and cooperation are far more demanding than for high skilled migration and inter-company transfers.

The Commission had clairvoyantly recognized the need for a comprehensive policy framework, with provisions for regulation, protection and Community cooperation addressing the entire range of skills, labour market needs and migration circumstances. However, its proposals to elaborate such a regime – explicitly addressing regulation of lower skilled migration – were shot down by a number of member states in 2002. However in December 2005, the European Commission adopted a *Policy Plan on Legal Migration*²⁰ was adopted; it established a sectoral approach towards elaborating Directives on high skilled workers, intra-corporate transferees, remunerated trainees and seasonal workers. So far only the so-called Blue-Card directive²¹ has been adopted, setting conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. The recently adopted EU Stockholm programme and action plan foresees action on proposed directives on intra-corporate transferees and seasonal workers. The latter would be a first –but unlikely easy to achieve-- step in addressing more vulnerable migrant worker categories.

Thirdly, major policy emphasis on migration is focused on restriction, control and repression. Budget terms alone are telling. The original expenditure commitment allocations for the EU Framework Programme on Solidarity and Management of Migration Flows were set at € 5.866 billion for the 2007 to 2013 period. A large portion comprised the External Borders Fund at €2.135 billion and € 749 million for the European Return Fund, about half of the total at € 2.884

¹⁸ In the view of this author, such calls are now legally untenable as well as politically suspect, given that the ICRMW has 43 ratifications plus 15 additional signatories. Ratifying States will have already incorporated its content into national legislation, while signatory states are generally also bound by its existing content. Furthermore, national studies conducted in a number of EU member states have found that national legislation of most of these States is already entirely or largely in conformity with the content of the ICRMW; these studies generally concluded that resistance to or difficulties in ratification are primarily for political, not legal, reasons.

¹⁹ See for example: European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008. INI/2007/2145 (paragraph 158)

²⁰ Communication from the Council COM(2005) 669 of 21 December 2005 on a Policy Plan on Legal Migration

²¹ Council Directive 2009/50/EC of 25 May on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009, L 155/17

billion.²² (The other major components are the European Refugee Fund and the Integration Fund.) In contrast, the total allocations for migration cooperation and support for third countries under the Thematic Programme for Cooperation on Migration and Asylum are €380 million for the same 2007 to 2013 period (plus €20 million for emergencies), an amount equivalent to only 13% of allocations for migration-related border enforcement and return operations.²³

Two recent EU Directives in particular reinforce an explicitly repressive and punitive approach to controlling a vulnerable and already unprotected group within the work force: migrant workers without legal authorizations for residence and/or employment. The “Return Directive” establishes a punitive regime of detention and expulsion for “illegal migrants²⁴.” This regime reinforces association of migration –certainly irregular migration – with criminality, in particular by reinforcing a shift from administrative sanctions to criminal penalties for immigration rule transgressions.

The Return Directive reinforces the denial of legal protection –and association with ‘illegality’-- by manifesting that an important group of vulnerable workers not only has neither rights nor bargaining power, but that they are criminalized by definition and are subject to extended detention without due process. This approach is particularly troubling given that many of these workers did not leave their homelands entirely voluntarily but nonetheless are often welcomed and needed by employers. ILO evidence shows that migrants in irregular situations generally obtain jobs within two weeks of arrival on average.

The employer sanctions directive targets for repression one particular group of workers often involved in undeclared work or unauthorized employment by circumstances of vulnerability.²⁵ However, inspections where controls are effected on workers in irregular situations result in sanctions on employers only in a small minority of cases. On the other hand, they simply do not address either the causes or the dimensions of informal economic activity and undeclared work in Europe. This phenomena represents up to 20% of GDP in some countries and employs far more citizen and legally residing foreigners than persons in irregular situations.

Structurally, the lodging of a predominant part of Community policy responsibilities for migration over the last decade in the Directorate General for Justice, Liberty and Security rather than in the Directorate General addressing employment can also be said to reflect – and support – a control-based approach rather than a labour regulation approach to what is primarily a phenomena of internationalised labour mobility.

4. b. Jurisprudence

²² Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and Management of Migration Flows for the period 2007-2013. COM(2005) 123 final/2 of 2 May 2005. Pages 193-95

²³ EU webpage “Migration and Asylum in External Relations”

http://ec.europa.eu/external_relations/migration/index_en.htm Accessed 18 August 2010

²⁴ Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008, On common standards and procedures in Member States for returning illegally staying third-country nationals

²⁵ Directive of the European Parliament and of the Council. 2007/0094 (COD) of 16. 5.2007, Providing for sanctions against employers of illegally staying third country nationals. Brussels, COM (2007) 249 final

A fourth dimension of evolving tension with a ‘rights based approach’ is posed by several recent rulings of the European Court of Justice regarding labour issues and migration, albeit intracommunity labour mobility. These rulings in the *Viking*, *Laval*, *Rüffert* and *Commission v. Luxembourg* cases explicitly illustrate a trend to subordinate labour protections to protection of ‘free market’ competition. As Decisions applying to intracommunity labour migration, they can be expected to have some implications for treatment of third-country immigration.

These decisions explicitly constrain the applicability of labour protections in countries where work takes place for workers employed or posted to those countries from other member states by national or foreign enterprises.

A Report adopted by the Committee on Employment and Social Affairs of the European Parliament, in view of these ECJ decisions, “consider(s) that the exercise of fundamental rights, as recognized in Member states, ILO Conventions, and the EU Charter of Fundamental Rights, including the right to negotiate, conclude and enforce collective agreements and the rights to take industrial action, should not be put at risk.”

Overall, these developments demonstrate an inadequate *transposition* of relevant international standards for effective respect of human and labour rights protections in Community migration policy.

A less generous interpretation is that this lack of adoption of protection and regulation standards suggests a trend towards consolidating a regime of non-application of law protecting human and labour rights – *une espace de non-droit* – for a substantial and growing part of European work forces in order to secure its status of cheap, flexible and unprotected labour.

Whether or not an exclusionary and ultimately exploitative outcome is by design, the explicit non-protection for a group of people – of workers – in Europe ultimately poses a serious challenge to the rule of law, to democratic governance and to social cohesion. Such a consolidation risks formalizing an explicitly divided society characterised by a socially marginalized, legally unprotected and often racially differentiated labouring class serving a population whose relative freedom and whose benefits deriving from the arrangement are justified by reinforcement of historic ethnic, national and “European” identities. Some 35% of German and Swedish jobs were characterised as “bon marché” – low cost and presumably low protection – in an article in the *Financial Times*. This line of demarcation seems often based on differentiation between foreign/minority status or origins versus what are considered historic national identities.

Recent manifestations of discontent and sometimes-violent protests along with police repression in communities of immigrant origin across Europe highlight the potential threat to social cohesion arising from exclusion and its consequences. Imposition of a regime of repressive control on movement, on recognition and on access to and conditions of work may subdue marginalized populations for a time. However, it is certainly at the cost of the ethos and practice of democracy that presume universal and inalienable application of human rights, non-discrimination and equality of opportunity and treatment.

4.c. External implications

The focus of Community policy on high skilled labour while excluding lower skilled workers leaves an untenable gap in the Community's ability to support protection of a large part of migration to Europe. It also poses a huge challenge regarding external perceptions and practice. The dichotomy implies particular Community interest in "cherry picking:" recruiting the best and brightest from third countries. On the other side, this can and does imply contributing to "brain drain."

Brain drain is recognized as an uncompensated expropriation of resources by many countries of origin: the training of highly skilled in less developed countries generally represents very substantial State expenditures in higher education – resources lost when those trained are recruited or enticed to go abroad to work.

At the same time, an apparently one-sided focus on high skilled migrants appears to disdain the labour that many partner countries have to offer in abundance. The absence of concrete measures for protection of lower skilled foreign workers underlies a widespread perception that the EU continues to confine workers from third countries to an exploited and unprotected servile status.

The lack of attention to providing legal opportunities for access to lower skilled workers combined with the emphasis on control and containment measures is read as a dismissal of attention to partner needs in a unilateral rush to assure Europe's needs in conditions it determines.

This is neither practical nor advisable in the long run. Clearly, the EC has recognized that a more comprehensive approach is required, as a matter of enlightened self-interest; whether those who make relevant decisions in member states have done so is another question.

4.d. External dimension: cooperation with third countries.

As asserted in EC Communications on a "global policy approach," EU cooperation with third countries on migration is explicitly about partnerships. This would include support for migration policy development by partners as well as vis-a-vis the EU.

However, ambiguities in purpose and results are also evident in the external dimensions of EU migration policy approaches. Tensions appear between what may seem to be short-term, unilateral self-interest on the one hand contrasted and an *enlightened* approach necessary to secure long-term cooperation in regulating mobility of and access to skills and labour for mutual benefit.

These tensions are amply reflected in two significant and interlocked areas of the "Global Approach explicated in EC Communications²⁶ as well as in EU financing and actual cooperation.

²⁶ See for example: Communication from the Commission to the Council and the European Parliament COM(2006) 735 of 30 November 2006: The Global Approach to Migration one year on: Towards a comprehensive European migration policy; also: Council of the European Union, Presidency Note to the European Council No.15744/05 ASIM 66 RELEX 761, 13 December 2005: Global approach to migration: Priority actions focusing on Africa and the Mediterranean

The first and major constraint is the large emphasis on control, interception, and containment of migration, exercised in strengthened border control and surveillance. EU budget allocations and cooperation activities focused on migration control-related activities predominate over the attention focused on cooperation to improve regulation and administration of migration in third countries.

It appears to be a question of emphasis by the powerful partner on control over freedom of movement, right to leave and to return, translated into imposition of explicit measures of containment, of dissuading departures and of readmitting involuntary returnees on the governments of individual state partners.

A second constraint is that the framework of relationships is established on the basis of a unitary EU on behalf of a block of states with individual partner States on the other side. It is a hugely asymmetrical relationship of very unequal powers and abilities to impose conditions and defend interests.

Another question is whether EU external policy is appropriately contributing to labour mobility serving as instruments for development in partner countries and regions. As the EU's own experience amply demonstrates, facilitating labour and skills circulation in regional economic integration spaces is key to economic progress by ensuring availability of sufficient labour and skills – as well as capital – where and when needed.

Free or at least freer circulation of persons has in fact long been recognized as a vital pillar to regional integration and economic development in established economic cooperation spaces in Africa: ECOWAS (Economic Community of West African States), EAC (East Africa Community), and SADC (Southern Africa Development Community) in particular. ECOWAS established legal Protocols on free circulation, free establishment and access to labour markets some 30 years ago. SADC is revising an earlier arrangement, and EAC member countries are currently negotiating a protocol on circulation, establishment and labour market access of citizens of member states throughout the community.

Visa-free circulation of persons is also established in CIS (Commonwealth of Independent States –ex-USSR), and free circulation of persons for employment has been part of Andean Community regulations and is being incorporated in MERCOSUR in South America. Freer labour circulation among member countries is currently the subject of negotiations in the Association of South East Asian Nations (ASEAN).

However, political push and financial support to strengthen border controls at the country level in these regional initiatives objectively seeks to constrain circulation. Strengthening borders de facto impedes circulation of goods and persons – first of all, simply by the time and cost of checkpoints, frequent document controls and the involvement of a multiplicity of agencies each of which establishes its own control posts on transit routes and around borders. Furthermore, where corruption cannot be controlled, local officers may and often do extract additional and ultimately costly payments from individuals and goods carriers circulating within such regions. Implementation of ECOWAS protocols has been effectively stalled for years; recent initiatives to reactivate these are now directly confronted by ethos and practice of strengthened borders and barriers among the same member countries committed to liberalizing circulation in their common market space.

Additionally, regarding cooperation, the EU global policy approach explicitly defines cooperation on migration in terms of dialogue and partnerships between the EU on the one side, and individual countries, not regional entities, on the other. There is reference to cooperation with regional entities in the global policy framework, but only regarding strengthening anti-trafficking measures – a control approach issue.

In this framework, the ability of counterparts to articulate and obtain concessions to their self-defined interests is simply minimized. The risk, intentional or not, is the imposition of terms of cooperation and policy formulations that unilaterally advance the interests of the powerful Union, while potentially overruling and undermining the legitimate distinct interests of individual – and certainly not similarly powerful – countries on the other side.

The lack of counterpart intergovernmental entities with equivalent representivity and collective negotiating authority to negotiate is an evident limitation. However, there are intergovernmental bodies with substantial *acquis* in collective legislation and policy, and competence on migration, in West Africa and East Africa – namely the Economic Community of West African States (ECOWAS) with 15 member countries and the East African Community (EAC) with five, both of which were substantially inspired by the European Union. There is also a less consolidated Union of the Arab Maghreb. A sincere and potentially effective contribution to development – including on migration governance – might well be to propose those regional entities as negotiating platforms. Complementary support to enhance the competency and capacity of those institutions – for example on migration and labour circulation which are within their competencies – would be a meaningful support. The technical cooperation support currently being provided to ECOWAS on migration matters by Spain and Switzerland and establishment of a joint EU-ECOWAS working group on migration may be important steps in this direction.

4.e. Message and impact

The expression of an ambiguous attitude towards international standards compounds the political impact of the policy measures limited to high skilled migration. The reluctance to admit standards, combined with attention solely on facilitating high skilled migration, sends a message: nationals of partner countries are devalued, they may be officially mistreated, and their exploitation and abuse is not only tolerated, but it is in effect condoned.

Compounding this is a rather unequivocal message of the so-called “Return Directive” adopted in 2008. The terms of the directive are widely perceived to effectively criminalize migrants – migrant workers – coming from countries in the South: those who provide cheap and flexible labour and a considerable number of whom end up in irregular situations. The Directive’s stipulation on prolonged detention, allowably in criminal facilities, is unambiguous.

If an intention of this EU policy measure was to encourage political unity elsewhere, it succeeded remarkably well at the time. The announcement of approval of the return directive by the European Parliament prompted nearly all heads of State of Latin America to come to agreement overnight to unanimously condemn the directive.

4.f. The economic factor (?)

Perhaps the most important dimension underlying the reluctance to implement international standards on protection of migrant workers is economic interest.

European governments have remained adamant about protecting their labour markets. At the same time, increasing dependence on immigrant labour occurs in a context of wider deregulation of labour markets and working conditions. Deregulation itself is posed as a means to lower costs and constraints associated with regulation.

More broadly, the internationalization of labour mobility takes place in a context of limited implementation of the existing regulatory regime for legal and social protection of foreign workers. This context has given rise to a generalized advocacy in international migration policy forums for ‘new’ and ‘practical’ approaches to managing international migration, approaches that often explicitly dismiss the relevancy of existing international standards.

At the essence, the questions of integration and equality of treatment of foreigners raise two fundamental challenges for Europe, for its identity and for its relationship with the very diversity it requires to meet its labour and economic needs.

The demand for and arrival of migrants confronts European countries with a fundamental challenge to historical identities and national ideologies based on mono-cultural, mono-racial, mono-religious definitions of belonging. The reality of who is present is already different and diverse. But current public discourse and communications media imagery suggest that European States, politicians, legal structures and practices have not accepted diversity as a reality and a norm.

A second unresolved question is what notion Europeans have of the ‘other’ and what degree of inclusion they are willing to accept for immigrant populations. Will foreign workers be admitted to do the “3-D” work with only limited protections, limited recognition, and limited time, expected to go away again before they affect or acquire any stake in European society? The current emphasis given to expanding temporary migration schemes and so-called circular migration seems to reflect this line.

Meanwhile, the global financial crisis is only exacerbating concerns with labour migration, the treatment of migrant workers, and the challenges of integration.

But migration policy is also subject to political factors: politicians act always facing the next election, which may be in a few months but is rarely more than a year or so away. This puts their consideration of migration policy in direct tension with making what may be less popular policy choices to address the challenges of the next ten or twenty years.

Mixed competences on policy is a result of the unwillingness to address the intersection among costs/mobility/rights; the political basis is not there to find Community consensus.

Meanwhile, ECJ decisions coincide – whether intentionally or not – with a desire to further constrain organizing and collective bargaining and to replace social dialogue as the basis of industrial relations, with enforced constraints on any ability of workers to defend *acquis* and to co-define decent remuneration and conditions at work, by putting foreign workers into increasingly exceptional regimes, whether internal or external, where rights and conditions are explicitly lower.

4.g. Impact of the crisis

A discussion on migration policy at this time simply cannot avoid referring to the global financial crisis. It is all the more significant as the crisis has evolved into a deepening global employment crisis. This employment crisis also has a huge impact on labour mobility and labour migration, both in itself and in perceptions of migration and migrants. This impact and these perceptions only intensify the pressures on and challenges for “getting it right” on migration policy.

It is often said that migrants – like other ethnic minority workers – are the last hired and first fired. This is certainly the case today.

The global crisis has provoked a serious slowdown in world economic activity. Nowhere has this been more evident to many people than in their jobs and their earnings. Enterprises across Europe and elsewhere are not hiring new staff; major lay-offs continue unabated. Some companies have resorted to short-time arrangements, such as reduced hours and pay for personnel remaining on the payroll or putting workers on part-time employment or unpaid leave. The experiences of recovery from previous international economic crises suggest that return to pre-crisis employment levels this time around may take four to five years.

According to the most recent Global Employment Trends reports (GET) issued by the ILO, a dramatic increase already took place in the number of people sent into the ranks of the unemployed, the working poor, or those put in vulnerable employment. The May 2009 GET update estimated an increase in global unemployment in 2009 compared to 2007 by up to 50 million.²⁷ The 2010 GET Report noted that “increases in vulnerable employment and working poverty are even more alarming, and are likely to affect larger numbers of workers, particularly in view of the decent work deficits that were already evident prior to the economic crisis. On current estimates, vulnerable employment is likely to have increased by more than 40 million workers, and may have increased by more than 100 million workers between 2008 and 2009.”²⁸

Migrants tend to be among the workers most hit by economic downturns for several reasons. Migrant labour is often used as a cyclical buffer, like other macroeconomic policies aimed at maximizing growth and minimizing unemployment. For migrants, this means they are often the last to be hired and the first to be fired and that their employment relationships are frequently non-standard and in poorly regulated sectors or activities.

In times of economic insecurity, migrants easily become scapegoats; xenophobic sentiments and discrimination against migrant workers rise. This alone presents one of the most formidable challenges for social peace and cohesion, and therefore for governance, in hard times.

Data compiled by ILO confirms a number of premises about the impact on migrant workers:

²⁷ ILO Global Employment Trends Update May 2009.
http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_114102.pdf Accessed 18-8-2010

²⁸ ILO Global Employment Trends. January 2010. page 42. At:
http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_120471.pdf Accessed 18-8-2010

- 1) Migrants and persons of foreign origin are hard hit; they are disproportionately among those laid off or rendered unemployed.
- 2) Migrants remaining employed have often been affected by reductions in pay, working time, and worsening working conditions.
- 3) Migrant workers have less access to social safety net support. This is especially true for migrants in irregular situations.
- 4) However, many migrant workers are not returning home unless forcibly expelled. This is the case even when they are offered financial incentives to voluntarily depart. Simply put, conditions at home are even worse. While migrants may eventually find some kind of work in host countries, there are simply no opportunities at all at home. The return of some EU workers to their home countries has been an exception and reflects the fact that, typically, employment situations in some EU countries deteriorated less than in others.
- 5) Migrant workers are thus compelled to take whatever work they can find. They accept even more substandard pay and abusive conditions than before. This fact presents an immediate policy challenge for stabilization of labour markets and working conditions.
- 6) Scapegoating of migrants and xenophobic violence against foreigners are on the rise throughout the world. These are expressed in increased murders and lynchings of migrants in some places, in generalized expressions of anti-foreigner sentiment, in hostile political discourse, in calls for exclusion of migrants from access to labour markets and even emergency social protection, and more generally in incidents of conflict between foreigners and 'nationals.'
- 7) Many countries have reduced quotas or intake of foreign workers; some countries have embarked on deliberate policies of exclusion and expulsion of migrant workers.
- 8) Migrant remittances have declined.
- 9) The further deteriorated situations in home countries make whatever remittances migrants can send an even more crucial lifeline for their families and local communities.
- 10) What employment opportunities existed earlier for those remaining at home are also evaporating, meaning even fewer options for persons returning from abroad. This also makes the return of migrant workers a greater threat to labour market stability and social stability at home.

The crisis risks being a vehicle for further precariousness in employment and deregulation in practice of working conditions for many.

However, it is incontestable that – given a long-term labour market – demographic and technological trends as well as immigrant labour and skills will be as essential for recovery from the crisis as they have already shown themselves to be for European productivity and economic progress in recent years.

4.h. Fundamental questions

Three strategic questions can be formulated regarding implications for Europe's future of this contention between 'rights and interests':

- 1) Towards what understanding of the rule of law and international standards are these developments in EU migration policy proceeding?
- 2) Towards what regime for European society do current policies directions lead: a consolidated land of equality of treatment and basic social well-being for all, or a two tiered society clearly and explicitly divided between a *high tech* highly paid social economy and a *bon marché* economy based on a low paid, unprotected and marginalized work force?
- 3) What relations will predominate with the developing world: a perception of uncompensated skills and labour resource extraction, or elaboration of real partnerships for shared development based on mutual respect and accommodating each side's interests and approaches?

5. (Alternative approaches) Policy suggestions

This discussion poses the question of how to address migration policy to ensure adequate response to future skills and labour needs in Europe while at the same time maintaining social cohesion and well-being.

The long development experience of industrialized countries shows that ensuring functional labour markets while upholding social cohesion requires deliberate policy attention and a comprehensive set of regulatory measures and institutions to achieve. The similarly long experience with migration shows that deliberate policy attention and regulation is required to "manage" labour migration.

Policy and action addressing migration and integration need to cover an array of areas and institutions. These include administration of immigration, legal protection measures, labour market regulation, labour inspection, social security, and much more. In short, a range of measures are needed to prevent abusive practices and promote decent and productive work for women and men migrants in conditions of freedom, equity, security, and human dignity. This is all the more so in these disruptive times of crisis.

The International Labour Organization has developed guidance for development, strengthening, implementation and evaluation of national, regional and international labour migration policies and practices. This guidance for the implementation of international norms is contained in the *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*.²⁹

Based on this knowledge and experience, and taking into account the global economic and employment crisis, this author suggests several particular action lines as elements of *the way*

²⁹ ILO. *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Geneva, International Labour Office, 2006.

forward for addressing some of the challenges illustrated in this article. This adequating European Union policy:

Restoring primacy of a standards-based, regulatory approach should be the first line of action. This requires:

1. Insisting on explicit reference to and incorporation of the main international standards on migration – as well as applicability of International Labour Standards – in elaborating policy and guidelines on migration by the European Union, and most certainly in any European definition of fundamental rights of migrants;
2. Promoting ratification of and effective implementation by all European countries of ILO Conventions 97 and 143 on Migrant Workers;
3. Paying attention to formulating a policy regime addressing low and medium skilled migration. While admissions numbers and categories may remain a prerogative of States, guidance on minimum standards, application of labour law, development of common approaches to recognition of qualifications, access to social security coverage and other concerns could be helpfully spelled out;
4. Recommending increased capacity of national labour inspection administrations to monitor sectors and workplaces where migrant workers are concentrated, to shore up decent treatment in the face of pressures to increase exploitation, as an area of particular concern meriting immediate attention;
5. Encouraging substantive consultation and cooperation with the social partner organizations – trade unions, employer organizations as well as civil society – which is essential towards obtaining elaboration and implementation of effective EU migration policy.

Discrimination/Integration

6. Focusing with particular attention on supporting and advocating the implementation of the already established community agenda to prevent discrimination and ensure social cohesion. This agenda was well articulated in the EU “race equality directive” of 2000.³⁰ It is more broadly elaborated in the recommendations from the Durban World Conference Against Racism and Xenophobia;
7. Reviewing with a renewed focus implementation of the EU equality directive of 2000 and advocating for full and effective national action on all components (recent reviews have noted that a number of EU member countries are not yet in full compliance).
8. A useful supportive measure would be extending the ILO discrimination situation testing to other EU member countries as an essential tool to assess the situation and needs and, with its results, to encourage and shape effective remedies by government and by social partners.

³⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Crisis Response Measures

Action is imperative to prevent the impacts of the crisis on migrants from destabilizing labour markets, working conditions, respect for human rights and social cohesion in migrant employment countries. Immediate lines of crisis response would usefully include, in broad terms:

9. Explicitly avoiding scapegoating of migrants, particularly by preventing forced expulsions or repatriations of migrant workers that implicitly or explicitly target migrant workers as responsible for jobs loss and rising unemployment;
10. Emphatically repressing racist violence and xenophobia against foreigners, and prosecuting perpetrators of violent acts.

A Global Approach supporting partners own policy and capacity

Regarding the external dimension, consideration should be given to:

11. Prioritizing external support on supporting partner countries and regional integration entities to develop needed policy, legislation and administration of migration –based on their own definition of needs and approaches
12. Explicitly supporting labour mobility in partner regions, particularly within regional integration processes such as in EAC, ECOWAS and SADC in Africa and the Andean Community and MERCOSUR in South America.

6. Conclusions

Europe's future productivity, prosperity and well-being – as well as its good relations with much of the rest of the world – may well be bound up with securing the protection of rights of migrants and a rights-based migration policy regime.

Migration is clearly one ingredient in the mix of remedies to ensure that, over the next 40 years, the standard of living of Western Europe does not decline significantly. Increasing numbers of jobs will not be filled by native-born workers, and other remedies will not compensate on their own for the decline of the workforce in numbers and skills evolution

However, many migrant workers are and will remain in jobs and worksites with little protection for decent work conditions. Migrants in irregular situations are even more vulnerable to exploitation and abuse. Given that market forces alone will not prevent abuse and guarantee decent work for all, explicit and strong protections rooted in law are essential to protection of migrant workers.

Currently, little reference is made to *transposition* or application in Europe of the rights established for migrant workers in international standards. The absence of explicit reference to

existing international instruments and the experience of the supervisory mechanisms for these instruments leaves a serious hole in the application of rule of law in Europe..

The focus of Community policy on only high skilled, intra-company transfers and trainees while excluding low skilled and medium skilled migrants leaves an untenable gap in the Community's ability to regulate and protect a large and otherwise vulnerable part of migration.

Whether or not an exclusionary and ultimately exploitative outcome is intended, the explicit non-protection for a substantial group of people in Europe poses a serious challenge to the rule of law, to democratic governance and to social cohesion.

Consolidation of this trend risks formalizing an explicitly divided society characterised by a socially marginalized, legally unprotected and often racially differentiated labouring class serving a population whose relative freedom and whose benefits deriving from the arrangement are justified by reinforcement of historic ethnic, national and "European" identities.

The dichotomy projects a collective Community interest in "cherry picking:" recruiting the best and brightest from third countries, in other words, exacerbating brain drain. At the same time, the one-sided focus disdains the labour resources many partner countries have abundantly on offer. It underlies the now widespread perception that the EU will continue to relegate workers from third countries to an exploited and unprotected servile status.

A sincere and potentially effective contribution to development – including on migration governance – should propose regional intergovernmental entities as negotiating partners. Intergovernmental bodies with substantial *acquis* in collective legislation and policy, and competence on migration exist in West Africa and East Africa – namely the Economic Community of West African States (ECOWAS) and the East African Community (EAC), both inspired by the European Union. Complementary support to enhance the competency and capacity of those institutions – for example on migration and labour circulation which are within their competencies, would be a meaningful support.

This article remains a work in progress, subject to further inputs and constructively critical comments. This discussion is intended to contribute to obtaining a comprehensive, viable and sustainable response by the European Union to labour migration and its consequences. Increasing immigration and increased diversity are key to ensuring productivity and competitiveness. However, these expectations, and social cohesion, will only be realized with a sustainable, rights based approach.

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