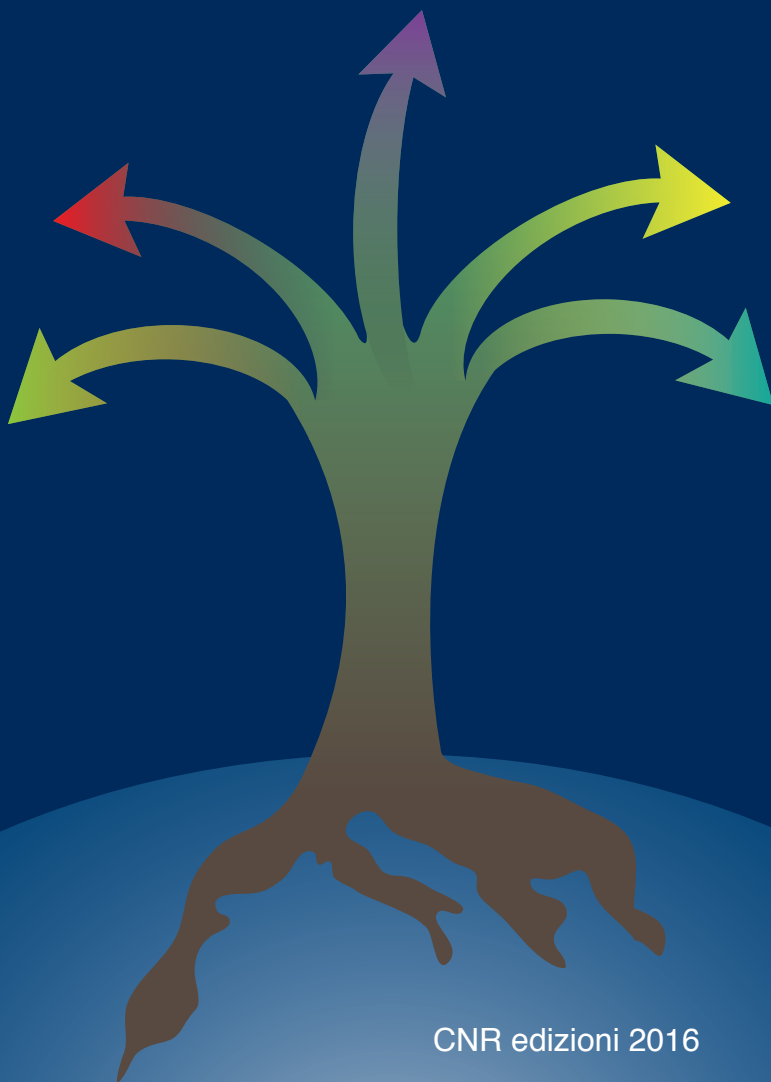


MIGRATION AND DEVELOPMENT

SOME REFLECTIONS ON CURRENT LEGAL QUESTIONS

Edited by Giovanni Carlo Bruno
Fulvio Maria Palombino
Daniele Amoroso



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PREFACE

*Giovanni Carlo Bruno
Fulvio Maria Palombino
Daniele Amoroso*

The 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals (SDGs) were adopted unanimously by the world leaders during the United Nations (UN) Summit on 25-27 September 2015, and they officially came into force on 1st January 2016.

The Agenda clearly recognizes the positive contribution made by migrants for inclusive growth and sustainable development, and, for the first time, migration is included in the global development framework. Sustainable Development Goal 10 – Reduce inequality within and among countries – aims, inter alia, at facilitating “orderly, safe, regular and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies”.

On 19 September 2016, at the UN Summit for Refugees and Migrants, the New York Declaration was adopted, a plan for addressing large movements of refugees and migrants. It is affirmed that “Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons” (para. 1)

On the link between migration and development, the UN Member States recognize that “Migrants can make positive and profound contributions to economical and social development in their host societies and to global wealth creation. They

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can help to respond to demographic trends, labour shortages and other challenges in host societies, and add fresh skills and dynamism to the latter's economy. We recognize the development benefits of migration to countries of origin, including though the development of diasporas in economic development and reconstruction" (para. 46). It goes on to affirm that all the aspects of migrations should be integrated into global, regional and national sustainable development plans, respecting the needs and the rights of the vulnerable people involved in migration flows.

When the call for papers for 'Migration and Development: some reflections on current legal issues' was published, we underlined that the attention of scholars, in the discussion concerning the increased migratory flows, focused more on the questions regarding admission and / or rejection of migrants on the territory of receiving countries than on the general topic of the contribution of migrants to the financial, social and cultural development of societies (of origin, transit, or destination).

The volume does not cover all the aspects of the multi-faceted, complex relation between migratory flows and development (of people, society, and countries). Our goal has been to open discussion among experts, scholars and policy-makers, on the problematic questions, outcomes, implications and achievements on this issue.

The first four contributions of the volume set the stage for the research by offering a general exposition on M&D-related legal issues. The volume opens, significantly enough, with a historical inquiry on the relation between migration, integration and development in the Mediterranean area. In her contribution ("Should Europe be Looking into Turkey's Byzantine Past to Discover its Own Future?"), Francesca Galgano, an expert of Roman Law, invites us to look at the Byzantine experience - where "the concepts of globalization and multiethnic society were reality" (p. 3) - to draw important lessons on the way the European Union (but the same is valid for other countries of destination) should cope with the manifold economic, cultural and social issues raised by migratory flows.

The contribution by Francesco Luigi Gatta ("The EU Development Policy and Its Impact on Migration") provides the reader with precious background by expounding on EU's M&D policies. As the author points out, the EU, not being "a military power", has to rely "on its diplomatic means, financial capacity and political influence in order to foster dialogue and cooperation with third countries" (p. 12). To this end, the EU set up a wide array of institutional and legal tools to promote development in

third countries. In the last decade, the EU's approach to development issues has been progressively widened so as to include also the M&D nexus. This has resulted in a number of practical actions and measures which are critically analysed by Gatta, who - while acknowledging the merits of recent reforms in EU policies - underscores the persisting preeminence of the "economic dimension" at the expense of "the human and social indicators of development, such as overall quality of life, primary education, health care, [and] employment" (p. 44).

The investigation by Stefano Montaldo ("Regular Migrants' Integration between European Law and National Legal Orders: a Key Condition for Individual and Social Development") supplements the previous contribution, by examining another crucial element in the M&D dynamics: integration. This is an area where EU and national policies "often lock swords and pursue different goals" (p. 49). Instead of promoting the positive attitude to integration fostered by EU institutions, in particular, Member States conceive of integration conditions as a "managerial" tool "for the selection of migrants deserving a chance" (ibid.) - a situation which may hinder the achievement of M&D objectives established at the EU level. On the basis of a careful analysis of EU legislation and case law, therefore, the author argues that national integration policies are to be deemed compatible with EU law "only if they facilitate integration", are proportionate and do not "undermine the effectiveness of relevant EU Directives" (p. 69).

In "Migration and Development: The Case of People Displaced by Development and States' Obligation to Respect Their Human Rights", Laura Messina casts a different light on the relation between migration and development. Here, in fact, migration is not seen - as is usual - as a driver for development, but as a negative consequence of development projects. On this assumption, Messina carries out a detailed examination of the protection afforded by international human rights law to development-displaced persons, having particular regard to "four core rights" (the right to property, the right to respect for private life and home, the right to adequate housing and the right to freedom of movement and choice of residence), as well as to the emerging "right not to be displaced" (p. 91).

Building on this background analysis, the ensuing papers are devoted to more specific legal issues. A first set of contributions is focused on migrant workers' rights. Notably, Fulvia Staiano ("The Undesirable Worker Fiction: Demand-Based Labour Migration Schemes and Migrant Workers' Socio-Economic Rights") offers a critical examination of labour migration schemes currently adopted in EU Mem-

ber States, by taking the Italian and Irish legal orders as case studies. As shown by the author, the inadequacy of these schemes ends up pushing migrant workers “into unregulated and informal employment” (p. 96), with inevitable repercussions on the enjoyment of the socio-economic rights protected at the international, EU, and domestic levels. Interestingly, her review of Italian and Irish case law highlights how domestic courts, while striving to afford adequate protection to irregular migrant workers, shy away from relying on supranational sources, and prefer to resort to “an extensive interpretation of [domestic] immigration law” (p. 116). This is caused by the overall lack, at the international and European levels, of hard-law sources - a gap that, Staiano concludes, needs to be filled.

While still lingering on workers’ rights, the piece by Beatrice Gornati (“Limits to the Implementation of International Law Instruments on Labour Migration: a Focus on ILO’s Praxis”) in some way zooms out, by providing a thorough description of the relevant standards laid down by the International Labour Organization, with particular regard to three core aspects, namely the protection of migrant workers, the employment of refugees, and the phenomenon of forced labour. This analysis leads the author to note that, although ILO’s has been particularly “prolific in recent years” (p. 144), the status of implementation of its (binding and non-binding) standards is far from satisfactory.

The second set of contributions concerns, on the other hand, the protection of asylum seekers. The adoption by the Danish Parliament of the much controversial “Jewellery Law” offers Salvatore Fabio Nicolosi the opportunity to reflect on domestic legislations envisaging the obligation of asylum seekers to contribute from their own assets and income to the cost of their reception (“Asylum Payers’: Questioning the Asylum Seekers’ Obligation to Contribute to the Costs of their Reception under International and European Law”). Nicolosi argues that this practice is not only highly problematic under international law (Refugee Convention, ECHR) and EU law (Reception Directive), but it is also questionable “from an economic perspective”, to the extent that it overlooks, first, “that refugees will more than likely use their own assets within the host State” and, second, that there is an unbridgeable gap between the economic value of asylum seekers’ assets and “the enormous costs that States face in order to maintain an efficient asylum system with adequate reception facilities” (p. 168).

Elena Gualco’s contribution focuses on the protection of a particular category of asylum seekers, namely unaccompanied minors (“Unaccompanied Minors Seek-

ing for Protection in the European Union: Will a Fair and Adequate Asylum System Ever See the Light?"). In Gualco's view, this choice is particularly suitable for an M&D analysis, since minors - unlike adult migrants - are expected to grow up, live and work in the country where they have found asylum, so contributing far more significantly to the latter's development (p. 177). Her research unveils the (many) shortcomings of the current Common European Asylum System and the overall inadequacy of the recent reform proposals set forth by the European Commission. According to the author, a real improvement could be achieved only through the adoption of a legal and institutional framework that ensures "the uniform accommodation of migrants" among Member States and common rules on the protection of asylum seekers' rights (p. 190).

The last two papers pinpoint two complementary, and equally worrisome, facets of EU policy on M&D, which appear to be paradigmatic of a general attitude of industrialized countries: on the one hand, the endeavour to attract highly qualified workers from less developed States, at the risk of further undermining the latter's economic growth; on the other hand, the "instrumentalization" of development cooperation to the control of migratory flows (mainly of unskilled workers) from non-industrialized countries.

In particular, Alessandro Rosanò provides an in-depth analysis of the Blue Card Directive, which affords a preferential treatment (e.g. in relation to family reunification) to non-EU highly skilled citizens wishing to work and live in the European Union ("Something Old, Something New, Something Balanced, Something Blue: the EU Blue Card Directive, Brain drain, and the Economic Development of the EU and the Sending Countries"). He brings to the limelight the fact that neither the Blue Card Directive nor the revision proposal put forth by the Juncker Commission contains sufficient safeguards against brain drain and suggests that a revised Directive should include a provision obliging Member States to reject an application for an EU Blue Card, whenever this is required to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin (p. 212).

Finally, Martina Guidi ("More Development of Third States and Less Migration towards the EU Member States: Is This a New Dual Aim of the EU Partnership and Cooperation Agreements?") describes how a broad notion of "development cooperation" (which encompasses also migration issues) has recently made its way in the practice of EU institutions, including the Court of Justice of the European Union. As the author points out, this shift in EU policy has been "leading to the devel-

opment aid serving migration control and readmission objectives” (p. 239) instead of pursuing the reduction and eradication of poverty in less developed countries. Against this trend, Guidi makes the case for avoiding “lane invasions” and keeping development cooperation and migration control separate (p. 241).

The present volume represents the first result of the scientific cooperation on the issue of Migration and Development between the Law Department of the University of Naples *Federico II* and the Institute for Research on Innovation and Services for Development (IRISS) of the National Research Council of Italy. We would therefore like to thank the Director of the Law Department, Prof. Lucio De Giovanni, and the Director of IRISS, Dr. Alfonso Morvillo, for setting up the institutional framework of this cooperation by signing a formal agreement between the two institutions.

We would also like to thank the colleagues who enthusiastically replied to the call for papers we launched on January 2016 and made the publication of this volume actually possible.

We are particularly grateful to Alessandra Viviani, Lucia Aleni, Francesca Capone, Flavia Rolando, and Javier Belda Iniesta, who reviewed the draft contributions and helped us to improve their (already high) quality.

Finally, a special thanks goes to Angela Petrillo for the graphic design of the covers, and to Fulvia Staiano for her valuable editorial assistance.

Napoli, 30 December 2016

I. SHOULD EUROPE BE LOOKING INTO TURKEY'S BYZANTINE PAST TO DISCOVER ITS OWN FUTURE?

*Francesca Galgano**

SUMMARY: 1. Introduction. – 2. Europe's Utopia was Born in Ancient Roman Times. – 3. Roman and Byzantine Empires were Successful in "Globalization". – 4. New Awareness of Citizenship Based on Ancient Mediterranean Community. – 5. Conclusions: History Could Teach Us About Europe's Future.

1. – Introduction

The recent Brexit-referendum, and the attempted Turkish coup together with the latest wave of refugees fleeing across the Mediterranean Sea, force everyone, especially European citizens, to pause for thought.

Europe is clearly no longer a mirage for those geographically – both physically and politically – decentralised countries, such as Estonia, Latvia or Lithuania, which, not so many years ago, all knocked on the EU's door, when the media exalted its advantages: the reality of freedom of movement for people, goods and capital and the single common currency... On the other hand, one can find Turkey –

* The author wishes to thank the two anonymous referees of this volume, for reading the manuscript and providing useful comments. However, errors and omissions in the article are the sole responsibility of the author.

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which for numerous years has been endeavouring to become a Member State, while its repeatedly refused admission has been due to the alleged non-compliance to European democratic standards, synthesized in the Charter of Fundamental Rights of the European Union, which was signed in Nice in 2000.

However it seems that the current situation is in turmoil. Europe appears to be dull, its cultural sparkle to have vanished along with its potential of attraction. In particular towards its closest neighboring countries, that previously coveted EU membership, and now no longer seem to be willing to be a part of the Union. Turkey¹ – more than ever in the light of the failed attempt to topple Erdogan’s regime – appears more eager to be incorporated into the Russian sphere of influence, showing disdain for the respect of the fundamental human rights more proper of European democracies whilst threatening to disregard, even, the most basic ones. Europe’s utopian bubble seems to have burst²!

People seem to have easily forgotten that Europe, as “Utopia”, imposed itself immediately after the Second World War pushing countries decimated by catastrophic events towards a systematic reflection on an idea, already appeared in the works of Machiavelli and Voltaire. That “Utopia” insisted on building up a new awareness of European Citizenship that, thanks to the modern emerging democracies backed by peace and integration – would be able to contribute to the overcoming of each and every nationalistic and ethnic particularism. Nowadays we do take for granted the values and liberties which, however, our forefathers have so long fought for: this appears almost trivially blatant especially if we look at the

¹ Orhan Pamuk, Nobel prize awarded writer, spoke about it in 2012 during his Sonning Prize acceptance speech: he described to the audience his own impressions of neighbouring Europe as a child growing up in Istanbul, from where European countries seemed full of bright lights, new technology, progress and wellbeing, “a beacon of civilization”. In the years leading up to that speech, he had noticed with a certain melancholy, that Europe did not shine as it did before, especially in a moment in which Turkey was living an economic boom. It seemed that Istanbul was young and vibrant, in comparison with an older and more conservative Europe, where he had the foresight to imagine the barriers being erected to exclude who, according to its canons, did not fit in. He regretted, therefore, the lack of the French Revolution democratic values of *liberté, égalité, fraternité*, especially concerning religious creeds. It revealed itself to be an empty promise. In just a few years the situation appears today, completely reversed: Erdogan’s threats to fundamental human rights sounds as a challenge to Europe.

² Among recent entries, see ZIELONKA, *Is the EU Doomed?*, Oxford, 2014. Surely the times are gone of economic supremacy (that began in the sixteenth century) in which, by the early nineteenth century, Europe enjoyed in the global context, thanks to the combination of political and economic decisions undertaken by individual States with the possession of material resources. Today the voices of historians (such as Geert Mak) and many economists cry out to a future disintegration if there is not a rapid change of course.

extreme simplification in terms of free movement among the Member States, the use of passports stating *European Union* and a single currency.

This paper aims to draw attention on Europe's, and especially Turkey's past, in relation to the West during the Byzantine millennium after the so-called fall of the Roman Empire (5th century – 1453 A.D.).

2. – *Europe's Utopia was Born in Ancient Roman Times*

The Union of Europe (or States of Europe) is not a 20th century idea nor it was born in recent history: it comes from the ancient past³. First of all it was an idea dating back to the Roman Empire, both Western and, to some extent, Eastern throughout the Byzantine Millennium (500 A.D. until 1453 A.D.), during which the concepts of globalization and multiethnic society were reality. The Roman legal experience – as a matter of fact – unified the *globalized* citizens of the Empire, expressing the will of a population to produce a worldly order-enforcing system.

It is undeniable that the history of Europe is closely intertwined with that of its Eastern neighbours, such as Turkey, whose different religion is not likely to impinge on its affinity to a common cultural denominator⁴. Today's Turkish Islamic State began to take shape in the fourteenth century, more precisely starting from 1453 when Constantinople, the last Byzantine Empire stronghold (in the true sense of the word), yielded to Mehmed II's assault: hitherto the Eastern Byzantine Empire had been predominantly Christian.

It is not our task to assess Turkey's political entrance opportunities in Europe, but rather to reflect on its and our own past, when the European continent was able to dialogue with the (Middle) Eastern world.

Therefore, it would be first appropriate to distinguish the Byzantine world from the Ottoman Empire⁵, which connotes the historical events of the last few centuries. The Empire of the *Romaei*, as the inhabitants used to refer to themselves, inherited from the ancient Western Roman Empire a powerful cultural and legal background,

³ Herodotus already set out Europe, as an entity (although yet to be properly geographically defined) which was climatically, politically and economically independent from Asia.

⁴ See "*Laudato si'*", the second encyclical of Pope Francis. This encyclical has the subtitle "On Care For Our Common Home", in which he shares with the Patriarch Bartholomew their common duty to save the planet.

⁵ On the difficult relationship between modern Turkey and Europe, see ROGAN, *The Great War of the Middle East: The fall of the Ottomans*, New York, 2015.

which they were very proud of. The most significant of the Western cultural heritage came back to Europe through the Byzantine Empire: e.g. codes, daily uses (such as that of the fork) or techniques (such as silk manufacturing) even up to circulation of Plato and Aristotle's philosophical works. The Sultan himself, who eventually conquered Constantinople in 1453 A.D. – permanently incorporating it into the Ottoman Empire – was a profound enthusiast of the Western ideology, which he had studied in its original language. Exchanges of goods, dialogues among craftsmen, circulation of codes were common between East and West according to ancient Byzantine customs.

The late Roman history saw the birth of a Modern Europe concept emerging in the social consciousness of populations, with its own features: the spread of Christianity, the birth of national identities, the development of a high philosophical thought, which, thanks to Cassiodorus and Boethius, were preparatory first to the Humanism and later to the Renaissance. However, this did not mean that the process was alien to what was happening in the Eastern part of the Mediterranean sphere. A comparison between modern Turkey's and Western Media standards does not appear easy to make (e.g. see the different perspective regarding the alleged Armenian genocide); on the other hand, Turkey's human rights records have led to resistance pressures to Turkey's possible entrance, wielded by both Member States (see Austria) and States that were about to be accepted into the Union (such as Hungary, Serbia and Albania), which appear to see Turkey to still display visible traces of the Ottoman domination. Religious differences have done nothing but widen the gap, especially after the recent terrorist attacks carried out by Islamic fundamental groups against Western societies in their everyday life (Paris, London, Madrid to mention the most newsworthy), which have fuelled racism, discrimination and non-acceptance towards Islamism.

Thus, it is opportune to distinguish between what was the Byzantine Millennium and what followed, i.e. the Ottoman Empire.

3. – Roman and Byzantine Empires were Successful in “Globalization”

Some territories (according to ancient canons) geographically located on the “European” continent, such as the Adriatic coast, belonged for centuries to the Byzantines, who defended them, when necessary with the help of the Venetians and the Hungarians, against the Normans, the Franks and other so-called Barbarian (as any non-Romaea population) invaders.

The *Via Egnatia*, which led directly from Durres to Thessaloniki, and then onto Constantinople – a fundamental commercial and military artery that crossed the Balkans from East to West – was customarily crossed by pilgrims and merchants, joining the Byzantine Empire with the Italian regions abutting the Adriatic Sea and which still bear – in the toponymy, in the dialects, in the local declination of some legal institutions (i.e. marriage) – traces of strong Byzantine influence. This influence, however, has remained solid, even after the withdrawal of the Byzantines.

The physical boundaries were in short more fluid than the modern, conceptual ones, which were to become rigid once again in the deforming Eurocentric reconstructive perspective adopted in post-War Europe⁶. The sphere of Constantinople's influence over broad areas, such as the Balkans (Albania, Serbia, Dalmatia, Croatia, not to mention Russia and Bulgaria) was significant and no less incisive than that of the Western Roman Empire.

This depended also on the fact that the Byzantine *Basileia* (that is, the imperial absolute power) considered itself to be superior to all populations, including the Western Romans, as it had a divine mandate to govern the world: its empire was naturally multiethnic due to its composition of different languages and customs. Moreover a Byzantine ethnicity did not exist: this adjective (“*Byzantine*”) meant a cultural belonging, which was certainly not only of ancestry by birth.

The Byzantines practiced racism and intolerance towards certain populations, such as Slavs and Russians⁷: in this regard, it is enlightening to read the eleventh book of Emperor Maurice's *Stratēgikon*⁸, a manual of war written in the late sixth century, in which the author, after examining the composition of the army and military tactics, describes aspects of character of one's supposed enemies, to be able to adapt one's war strategies: Persians (“perverse, hypocritical and servile, but at the same time obedient and patriotic”); Scythians Avari (“the most treacherous and cunning”), Huns among the principal, all “superstitious, false, unfair ... treacherous.”

⁶ Modern Europeans physical and political boundaries were drawn up immediately after World War II, creating territorial areas (modern Nations) ethnically compact, but artificial. See on this topic, CINGOLANI, “L'Europa e la crisi delle identità”, Aspenia, 2015, p. 30 ff.

⁷ In particular see KEKAUMENOS, *Stratēgikon. Raccomandazioni e consigli di un galantuomo*, (SPADARO ed.), Alessandria, 1998 (Greek text with facing Italian translation), p. 65 ff., which gathers the precepts of military strategy aimed at the strategist, based on the anthropological character of his enemy.

⁸ EMPEROR MAURICE, *Stratēgikon. Manuale di arte militare dell'impero Romano d'Oriente*, (CASCARINO ed.), Rimini, 2006, p. 121 ff.

Undoubtedly worth mentioning is the strong hostility towards the Latins by Byzantines which was accented at the end of the *Comneni* dynasty, also as a reaction to the pro-Latin policy of Manuel I (1143-1180), when a cousin of his, Andronicus I Comnenus, usurped the throne, concocting a riot: this was motivated by nationalism against the West and against the trade privileges (such as immunity from custom taxes), granted especially to the Genoese and Pisans, who literally ended up being slaughtered by the rioting mob.

At the same time during the Fourth Crusade, for example, the Byzantines themselves endured looting and violence, with a particular racial fury, inflicted by the Latins who settled on the throne of Constantinople in 1204⁹, described in pages written by the historian Nicetas Choniates.

However the main oppression in relation to the Byzantines was enacted by the Arabians. Certainly their advancement, unstoppable from the seventh century onwards, was the main cause of oppression against them, as it eroded literally all of their Eastern territories (from Syria, Crete, and Cyprus to Egypt, Sicily, Spain, and Libya). Despite the fact that these territories had passed into the hands of the Arabians, the trade routes in the Mediterranean Sea still continued to function, and in some cases the peaceful coexistence went also beyond trade, as for Crete and Cyprus, with a singular sharing¹⁰ of government functions. In Persia, the Nestorian-Christian communities thrived for centuries dedicating themselves to the study of Scriptures in the famous school of Nisibis, near the boundary. Even after falling under the Islamic Empire, the Nestorian-Christians continued to retain widespread support, especially as they studied and translated many manuals (e.g. medicine, philosophy, astrology) from Syriac and ancient Greek languages.

Despite outbreaks of intolerance and lack of integration (that emerged in the final stages of the Millennium), the Byzantine society may well be defined inclusive: it welcomed the whole community of foreigners, regulating access through the con-

⁹ NICETAE CHONIATAE, *Historia*, (VAN DIETEN ed.), Berlin-New York, 1975, lib. VII.

¹⁰ After the Arabian expansion into Europe during the VII and VIII century, which was halted by Charles Martel (near Poitiers in 733), Christians and Muslims lived side by side: the Christian élite continued to manage ecclesiastic activities, even in Upper Egypt and today's Iraq, which eventually fell under the rule of Persia. Evidence of this can be seen in the life and work of John of Damascus, a Syrian monk who was born and raised in Damascus. After this region came under Arab-Muslim occupation in the late 7th century AD, the court retained its large complement of Christian civil servants, John's grandfather among them. With the passing of time, it became more and more difficult for Christians to retain their high level positions, although these restrictions were not applied at a lower and local administration.

trol of business activities and releasing some sort of residency permit, whose intent was to numerically handle the ethnic composition of the population of Constantinople and the Empire. In the so-called *Prefect book*, (Ἐπαρχικὸν βιβλίον written under Emperor Leo VI, between 911 and 912¹¹), commercial activities carried out in the city by the “corporations”, foreign traders and merchants were recorded, and so were those who had to declare such activities when leaving the Empire.

Immigration was considered as a resource¹² for a political war crisis or natural emergencies: in these cases foreigners were forcibly displaced in order to repopulate uninhabited or ravaged areas which had suffered from famine or war. These measures were usually motivated by the intention of strengthening financially or militarily some “issues” near the boundaries (e.g. with Bulgaria), while – perhaps – purging groups of heretics who were sent into a type of exile.

Entire populations such as the Armenians, even if Christianised since the fourth century, were always divided between the Western Byzantine boundary and the Oriental Persian one, which provided thousands of soldiers, famous for their heroic dedication. Foreigners such as Slavs, Bulgarians, Pechenegs, even Franks, and above all Armenians, Greeks, Varangians, and Latins, had become a necessary resource to swell the ranks of the Byzantine army¹³, decimated by the long-lasting wars. This problem became more and more impellent, from the eleventh century onwards, although some Emperors began to promise considerable privileges, granting to foreigners even a better arrangement in comparison with native soldiers of the same rank¹⁴. Kekaumenos shows traces of this, when he deeply criticized these decisions; as Nice-tas Choniates did with regard to policy choices by Manuel Komnenos¹⁵.

¹¹ For some details of this important document, see recently TROIANOS, *Οι Πηγές του Βυζαντινού Δικαίου*, 3rd ed., Athens, 2011.

¹² As Alexis Comnenus, who even resorted to recruiting nomadic people such as the Cumans, stationed to the north of the Danube, to where they returned after the victorious campaign against the Pechenegs.

¹³ The barbarian contingent was added, divided into *Federati* (erratic bands driven by their tribal chieftains, then classified and armed by the Roman officers) and *Symmachoi* (troops provided by allies). Ever-greater numbers hordes of real mercenaries (the so-called *Bucellarii*) arrived to join. See EMPEROR MAURICE, *cit. supra* note 8, p. 8 ff.

¹⁴ See NICETAE CHONIATAE, *cit. supra* note 9, lib. II, who considered excessive the economic gratification of the soldiers, especially Barbarians, that while enrolling in the army, were not assessed in their attitude to fight, nor in their technical preparation. This probably produced a lack of professionalism and discipline in battle and thus resulting in the fall of the *Romaei*'s army.

¹⁵ KEKAUMENOS, *cit. supra* note 7, e.g. at p. 124 ff.

4. – *New awareness of citizenship based on ancient Mediterranean community*

Its geographical location, situated in the Mediterranean basin, placed the Byzantine Empire within our (European) history: suspended in the middle of the Western world fragmented for centuries in Barbarian kingdoms and the Eastern Russian steppes, it was a sort of natural cushion which slowed down the advance of Islam, which began in the seventh century. In a certain sense shielding the Western Roman cultural heritage to which it belonged: this allowed the modern European nations to develop. A project launched in 2008 by the French President Sarkozy to create a Mediterranean Union, which subsequently has become the Union for the Mediterranean sea, seems today shipwrecked, along with the poor migrants from North Africa and Syria, especially in its ideological preface: this Mediterranean identity is not easily recognizable and registers a conflict that appears more and more irreconcilable.

The *koiné* represented by the Mediterranean Sea (which previously linked together the European and Byzantine worlds, and today the West with the Middle East), however, is a fact which cannot be ignored. The “idea” itself of a cultural belonging can be a salvation in dramatic events: Predrag Matvejević, author of the famous diary-novel *Mediterranean*, has often said he was “literally saved” by the “evanescent theme of the Mediterranean”¹⁶, during his seventeen years of asylum and exile, due to the Balkan wars. The diaphragm of the Mediterranean rendered closer certainly different (and in some cases) conflicting political realities, even managing to represent in the past few decades (when the system entered a crisis of the modern territorial jurisdictions) a kind of archetypical free zone.

In ancient Constantinople students were taught great Latin and Greek classics; the Fathers of the Church studied pagan philosophers’ writings. The great Arabian travellers, who grew up with the Greek *paideia*, spread the Eastern science of Indian, Chinese and Persian cartographers, astronomers and geographers. Moreover, Greek Orthodox Christianity was practiced long beyond the first Arabian conquest, tolerated by the Umayyads in the enormous territory of ancient Syria for example, and in the cultural centres which were found in the great monasteries.

¹⁶ MATVEJEVIĆ, *Mediterranean: A Cultural Landscape*, (HEIM transl.), Berkeley/Los Angeles/London, 1999.

The late Christian-Roman law continued to be then applied in the territories, which had already fallen under Arabian domination: the so-called Syro-Roman Book – an oriental compilation, written in Greek between the fifth and sixth centuries, perhaps for didactic purposes – was translated also into Syriac (in the eighth century) and then in Arabic (in the tenth century) and used as a compilation of rules of conduct, which referred to private law relationships within the Christian community submitted to Islamic control.

In particular, responsibility was granted to the Patriarch of Constantinople, even in judicial proceedings of his own people, as long as there were no points of disagreement between the Christian religion and the “then” Islamic Law.

The *Πρόχειρος νόμος*¹⁷ was translated from Greek to Arabic to be then applied by the Melkite community in Alexandria during the eleventh and twelfth centuries, as it was recognised as their own personal and official religious law, especially in family matters.

5. – *Conclusions: History Could Teach Us About Europe's Future*

Diffidence, inability to recognize roots¹⁸ that are commonly felt, inability to share also cultural values and, as of late, recurrence of racial intolerance, too: all of these appear to connote today's European Union. What people expected from the end of the dualism caused by the Cold War seems to have been lost in a very distant past. Immediately after the fall of the Berlin Wall in 1989, European citizens had the vision of new opportunities for dialogue. The “Alliance of Civilizations” of 1995, evoked by Zapatero in 2005, at the Barcelona process on the Mediterranean, “turning the Mediterranean basin into an area of dialogue, exchange and cooperation guaranteeing peace, stability and prosperity” – today sounds hollow¹⁹.

Compared to its original issue in 1985, the current Schengen Agreement crisis

¹⁷ See *Ὁ Πρόχειρος νόμος*, (VON LIGENTHAL cur.), in ZEPOS and ZEPOS (eds.), *Ius Graecoromanum*, vol. II, rist. Aalen, 1962, p. 108 ff.

¹⁸ Regarding the debate on Europe's common roots see also GALGANO, *Significato di un gesto. Il battesimo di Agostino e le origini dell'Europa moderna*, in *Scritti in onore di Michele Scudiero*, vol. II, Napoli, 2008, p. 999 ff.

¹⁹ Founding act of a comprehensive partnership between the European Union and twelve countries of the southern Mediterranean basin, among which features also Turkey. The partnership should have had the purpose of “making the Mediterranean Sea a common area of peace, stability and prosperity through the reinforcement of political and security dialogue, economic and financial cooperation, social and cultural development”.

shows the fragility of a shipwrecked project due to radical and unpredictable changes. The inability to structure a strong European identity, which should not – and this is the most critical point – refuse nationalistic autonomy, nor its citizens’ identities. The Western European universalistic model has certainly revealed defects, which might have the possibility of being corrected if there were constructive dialogue among different cultures, enhancing and not denying the differences as well as protecting identities of each population in their everyday life. Even if the transnational global market model is still strong, the idea of nation-state that demands its own autonomy in its decision-making, appears once again “protagonist”, especially in the guarantees of fundamental freedom.

For an historian it becomes very clear that the road to a “United” Europe lies primarily in the knowledge of its past. Erich Auerbach, who had lived in Istanbul for many years, at the end of his life stated that “European civilization is near the limit of its existence; its own history, limited to it, seems closed; its unity seems already about to go under, working on another and wider unity ... it seems that the time has come where we must grope for grasping yet again that historical unity with a view to its living existence and living consciousness”²⁰.

Certainly, what is happening undermines the European identity as a whole and that of each individual Member State, which appear still trustees of democratic values and altruism, but having no qualms about raising new barriers, ideological or physical, revealing intolerance for the ideas expressed by Islam. It seems clear, even more so in the present climate that a European identity cannot exist solely in terms of economics.

After the last great era of universal unification with the fall of the Western Roman Empire, it appears now preliminary to any project to profoundly update the idea of integration with respect to its original mode, which goes back a long way. It would be desirable indeed that the European social model should recognize and then convey the need to promote meaningful integration, nourished by tolerance toward diversity expressing the cultures of other countries and especially real solidarity, established on values and ideas in which people could recognize themselves as European citizens. The most delicate task to rebuild unity would in actual fact be

²⁰ AUERBACH, *Literatursprache und Publikum in der lateinischen Spätantike und im Mittelalter*, Bern, 1958, here cited from the Italian edition, that I myself have translated (*Lingua letteraria e pubblico nella tarda antichità latina e nel Medioevo*, Milan, 1960, p. 14).

first and foremost the intellectual values and ideas, as well as (or even beforehand) political or institutional reforms, having to prospect new mandatory methods of integration for foreigners, who do not evaluate only objective criteria of race and blood (*ius sanguinis* or *solis*), but rather subjective cultural sharing²¹.

²¹ Europe is the subject of philosophical reflection between current political and historical reconstruction in the recent publication by ESPOSITO, *Da fuori. Una filosofia per l'Europa*, Turin, 2016.

II. THE EU DEVELOPMENT POLICY AND ITS IMPACT ON MIGRATION

*Francesco Luigi Gatta**

SUMMARY: 1. Introduction. – 2. The EU Development Policy in General. – 2.1. Evolution of EU Development Policy. – 2.2. The Current Legal Framework at the Basis of the EU Development Policy. – 2.3. Institutional Framework. – 3. Migration and Development Policy. – 3.1. The Migration–Development Nexus. – 3.2. The Conceptualization of Migration and Development Policy at the EU Level. – 3.3. Practical Actions and Measures to Address Migration and Development. – 3.4. The most Recent European Approach to Migration and Development. – 4. Concluding Remarks.

1. – Introduction

During the past decades the European Union (“EU”) has progressively gained a leading role with regard to development policy and commitment to eradicate poverty worldwide. Reaching this role of protagonist on the international scene has been possible through the exercise of the EU’s “soft power”: as it is not a military power – at least in an unitary and monolithic sense – the EU can count on its dip-

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lomatic means, financial capacity and political influence in order to foster dialogue and cooperation with third countries.

The EU, indeed, by taking this leading role has responded, so to say, to a sort of natural vocation: a propensity to spread its influence, mediation and assistance to other countries that has been cultivated and developed through the decades, especially with regard to development cooperation and humanitarian aid. This idea was already present in Robert Schuman's vision of Europe: in his famous declaration, delivered on 9 May 1950¹, one of the "founding fathers" of the European construction, in addition to the suggestion to pool resources in order to avoid conflicts and to foster prosperity and cooperation, affirmed:

"This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent".

Today, more than sixty years later, the EU is deeply committed in development cooperation policies, being the world's largest aid donor and the focal point of an extensive network of connections and political influences all over the world². These are the results of a gained awareness about the crucial relevance of the various development actions and policies in terms of their positive impact on different socio-economic aspects in third countries. The importance of EU's development, cooperation and aid policies seems to be clearly understood and supported by European citizens themselves, who have proved to be conscious and aware of the EU's role in this framework.

This is confirmed by the recent statistical data collected and analyzed by the European Commission through the Eurobarometer³. Indeed, according to the statis-

¹ Nowadays, every 9 May, we celebrate Europe Day because of this declaration, which lays the foundations for the peace and unity that we can now enjoy in the European Union and which is considered as the first step into the European integration process.

² The EU – together with its Member States – is the biggest global donor of official development aid. According to official statistics, the EU's contribution in 2014 amounted to over 58 billion euros. For more detailed information and data, see European Commission, "2015 Annual Report on the European Union's Development and External Assistance Policies and their Implementation in 2014", 24 November 2015, available at: <http://ec.europa.eu/europeaid/sites/devco/files/2015-annual-report-web_en.pdf>.

³ European Commission, "The European Year for Development – Citizens' View on Development,

tics, the average Europeans believe that development policy should be one of the EU's main priorities (69%), given that – in their opinion – development policy itself is in the EU's own interest (80%)⁴. Moreover, interestingly, data also show that a vast majority of European citizens (73%) think that development represents a way to tackle irregular migration and this is particularly remarkable, considering that 2015 was a critical year with the escalating refugee crisis and the huge migratory pressure against the EU's territory.

These data, therefore, suggest the growing awareness about the relationship between development and migration and their capacity to potentially influence each other. The decisive point, indeed, is the consideration of the migratory phenomenon not in negative terms as a threat but, on the contrary, as a powerful development vehicle and as a positive opportunity. In this sense, the promotion of an orderly, safe and responsible mobility of people represents an important goal that could lead to positive results in both the countries of origin and destination.

This is the fundamental idea that characterizes the recent and current debate on migration and development. Indeed, the interaction between these two elements has been recognized as a matter of interest at the international level, becoming gradually a crucial issue to be discussed within relevant initiatives and consultative processes, including the ones launched within the United Nations (“UN”) context⁵. The migration and development interrelation, moreover, is at the basis of the activity of different international players involved in the area of migration and migrants' human rights protection, including, for example, the International Organisation for Migration (“IOM”). According to its Constitution, indeed, “migration may stimu-

Cooperation and Aid”, February 2016, Special Eurobarometer 441, available at: http://ec.europa.eu/europeaid/sites/devco/files/sp441-devco-report-final_en.pdf.

⁴ Id..

⁵ The migration and development nexus has been part of the UN General Assembly's discussions since the second half of the 1990s. Later on, starting from the early 2000s and especially under the impulse of the then UN-Secretary General Kofi Annan, the inter-linkage between migration and development has been subject to a number of specific initiatives, including the decisions to establish the Global Commission on International Migration in 2005 and to organize a High-Level Dialogue on International Migration and Development in 2006. Other initiatives include the appointment of a Special Representative of the Secretary General for Migration and the creation of the Global Forum on Migration and Development aiming, *inter alia*, specifically at investigating and promoting the dialogue on the migration-development nexus.

late the creation of new economic opportunities in receiving countries and [...] a relationship exists between migration and the economic, social and cultural conditions in developing countries”⁶.

However, if, on the one hand, the migration and development nexus has been positively acknowledged at the international level, with a number of initiatives, studies and discussions, it is also true, on the other hand, that the different approaches and views have made it difficult to convene to an effective form of cooperation and action. As a consequence, various forms of dialogue and collaboration have been launched at the regional and/or inter-regional level, involving a smaller number of participants and focusing the cooperative process on more specific issues and targets.

Among the different regional contexts, the European one, under the impulse and the guidance of the EU’s institutions, has proven to be particularly adequate and suitable for the cooperation in the field of development policies specifically linked with migration. Considering also the peculiar history of certain European countries and their traditional aptitude to relate themselves with third country nationals and their respective countries of origin, the EU framework offers a significant example of the growing attention devoted to the migration and development nexus and of the different concrete actions taken in order to promote the beneficial effects of this relationship.

This paper intends to address the EU’s migration and development policy, in particular by analyzing the different strategies and actions put in place by the European institutions and the Member states in order to foster the potential positive synergy between migration and development. In order to do so, the work is divided in two main parts: the first one aims at presenting the EU development policy in general, particularly clarifying the relevant guiding principles and the legal-institutional framework in which the EU has built and elaborated its development policy during the years. The second part focuses specifically on the migration and development nexus as it has been managed by the EU, in particular through the analysis of the strategies, the practical measures and the various key initiatives aimed at promoting the coherence between the two policy areas.

⁶ Preamble of the IOM’s Constitution. Full text is available on the Organisation’s official website, at: <https://www.iom.int/constitution>.

2. – The EU Development Policy in General

2.1. – Evolution of EU Development Policy

The origins of the EU development policy are strictly related to the historical experience of the European colonialism. Indeed, Europe's relations with developing countries were progressively established and later expanded upon the basis of previous colonial connections. In particular, the specific issue of the relationships with third countries emerged already in the context of the second post-war reconstruction and in the framework of the legal-political process of the European integration. The decade following the end of the Second World War was characterized by tension, conflicts and a growing pressure coming from the colonies in search of independence and autonomy⁷. This delicate period, in particular, showed to European States the need to reshape the existing relations with their colonies, especially highlighting the necessity to move towards a new approach.

This was, in fact, one of the questions on the table in the framework of the negotiations and discussions on the way to the adoption of the Treaty of Rome, which established the European Economic Community ("EEC") and set the first basis for the relations between Member States and third countries⁸. The Treaty, in particular, dedicated a specific series of dispositions (Part IV, Articles 131-136) to the relationship between the Member States and the "non-European countries and territories which have special relations" with them. The guiding principle at the basis of these relations was Europe's commitment to responsibly support and promote the growth and the development of these countries.

Already in the Preamble of the Treaty of Rome, indeed, the Contracting Parties agreed "to confirm the solidarity which binds Europe and the overseas countries and ... to ensure the development of their prosperity". This fundamental objective was fur-

⁷ The period between 1953 and 1956 was particularly delicate with the outbreak of the Algerian war in 1954 and other episodes of tensions between France, Tunisia and Morocco on the one hand, and between Belgium and Congo on the other. The following years also were particularly complex with regard to the relations between European and African countries. Between 1956 and 1960, in particular, there was a considerable redefinition of the political geography of the African continent, with twenty-three countries of sub-Saharan area gaining independence and becoming new States and autonomous actors on the international scene.

⁸ For an overview of the different positions expressed by the European States during the negotiations for the Treaty of Rome, see MOLD, *EU Development Policy in a Changing World. Challenges for the 21st Century*, Amsterdam, 2007, para. 2.

ther reaffirmed in the first part of the Treaty, which referred to the essential principles that shall rule and guide the Community's action. According to Article 3, indeed, one of the main tasks was "the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development" (Article 3(k)). In order to achieve these objectives, the discipline introduced by the Treaty was based essentially on three main principles: association, non-discrimination in trade access for all the Member States and solidarity with regard to the collective share of burdens of the financial assistance to the third associated countries.

The principle of association – as opposed to the one of assimilation – created the essential basis for a connection between the EEC (and not just the single colonizer States) and the overseas countries and territories⁹. Indeed, according to Article 131, "the purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole"; also clarifying that "association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire".

The principle of non-discriminatory trade access constituted the second relevant element of the legal framework of the relations with the non-European countries. In this sense, it played a central role in the establishment of a sort of a free trade area between the EEC and the former colonies, with advantages for all the participants under the same treatment rule¹⁰. Lastly, the Treaty of Rome also introduced the principle of solidarity with regard to the financial assistance to be provided to third associated countries, stating that "the Member States shall contribute to the investments required for the progressive development of these countries and territories" (Article 132(3)). For this purpose, in particular, a common instrument was introduced in order to manage and share, in a collective and supportive way, the burdens of the assistance in favour of third countries: the European Development Fund ("EDF")¹¹.

⁹ The principle of association was realized and put into effect through a series of association agreements between the Community and third countries. The first Convention associating French-speaking overseas countries and territories was signed on 25 March 1957 for a period of five years.

¹⁰ For this purpose the Treaty set a series of dispositions regulating some relevant aspects of the trade relations between Member States and associated Overseas countries, including the right of establishment of companies and firms (Art. 132), customs and duties on imports and industrial production of goods (Arts. 133 and 134 respectively), freedom of movement of workers (Art. 135).

¹¹ Although the contributions coming from European Member States in favour of associated third

The Treaty of Rome, ultimately, introduced the first common provisions in order to guide and rule the relations between Member States and other specific countries, associated on the basis of pre-existing links and historical connections, in this sense, “Europeanising the former exclusive relations between colonisers and colonised”¹². Therefore, this policy can be seen and considered as the first phase of a European common approach to development and assistance in favour of third countries. At a later time, however, with the progression of the European integration process and the growing political and economic weight gained by the Community, this approach based on Europe’s colonial history was progressively abandoned.

Indeed, unlike the initial phase, the new European approach was no longer specifically limited to the (ex) colonies and only built upon previous, historical and traditional connections but, on the contrary, it typified itself for a much broader dimension and character. In this sense, the extension and the strengthening of the European presence at the international level in the field of cooperation and development were to be understood in the light of the increased economic and political power of the Community, which now aspired to a stronger role.

The progression of the European development policy, however, gained relevance not only from a geographical point of view and, hence, in terms of worldwide expansion and engagement with other countries besides the previous colonies. Indeed, during the 1970s and 1980s the European development policy advanced and improved also – and especially – from a qualitative perspective, increasing its degree of specialization, developing the interaction between the competent institutions, intensifying the dialogue and the capacity to adopt proper actions and strategies, harmonizing national practices and fostering the cooperation between Member States through the exchange of information, mutual assistance and a common planning and analysis process.

countries were arranged separately and outside the Community budget, they were centrally administered by the Community’s institutions. The Fund, introduced with the Treaty of Rome, was launched and made operative in 1959, providing technical and financial assistance for the period of six years (1959 – 1964). The EDF was later reformed and strengthened, becoming the main instrument for providing Community aid for development cooperation in the African, Caribbean and Pacific States and Overseas countries and territories. The current EDF (the 11th since its creation) covers the period 2014 – 2020 and amounts to 30.5 billion euros.

¹² See MOLD, *cit. supra* note 8, p. 33 and FRISCH, *The European Union’s Development Policy. A Personal View of 50 Years of Development Policy*, European Centre for Development Policy Management, Maastricht, 2008, Policy Management Report 51, para 1.2.

In parallel, the European development policy evolved and grew also from a quantitative point of view: the weight of the economic assistance was significantly increased, the budget and the resources destined to development programmes raised exponentially together with a proliferation and a diversification of the various financial means made available for development and aid purposes. Moreover, the European Investment Bank (“EIB”) was authorized to intervene with loans and other financial instruments in order to integrate and complete the actions of the EDF. The tools of the economic assistance, in particular, became structured on the basis of different parameters, including the geographical area of destination of the resources, the particular regional characteristics and peculiarities, given thematic targets and specific needs and goals¹³.

The European development policy, therefore, advanced and kept evolving in accordance with the general provisions contained in the Treaty of Rome and through the creation of a diffused network of contractual cooperation. The Community, indeed, according to Article 238 of the Treaty¹⁴, concluded several *ad hoc* international agreements covering aspects like trade, industrial, financial and technical cooperation and assistance¹⁵. Although development policy became, step by step, a solid and relevant component of the Community’s external activity, an essential step towards a better-defined and shaped common policy was made only with the “Dutch treaties” adopted during the 1990s. These texts, indeed, introduced a more organized and structured discipline, laying down a specific legal framework, identifying the general principles and the main objectives to be achieved and, therefore, creating a proper

¹³ One of the main sectors in which the Community operated in this period was the food aid, which represented the first form of assistance not linked to specific countries. In particular, after having signed the International Food Aid Convention in 1967, the Community during the years progressively increased its commitment to worldwide cooperation in this sector, with the food aid accounting for a substantial proportion (some 25%) of the Community’s total aid up to the 1980s.

¹⁴ Art. 238(1) of the Treaty of Rome states: “The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures”.

¹⁵ Several international agreements establishing financial, technical and trade cooperation between the EEC and the associated countries were signed and periodically renewed. These, among others, include: the Yaoundé Conventions (the first signed on 20 July 1963 and valid for the period 1964 – 1969, the second signed on 29 July 1969 and valid for the period 1971-1975), the Arusha Agreement (signed on 24 September 1969), the Lomé Conventions (the first one signed on 28 February 1975 and later succeeded by others entered into force in 1980, 1985 and 1990).

constitutional basis for a common European development and cooperation policy¹⁶.

The Treaty of Maastricht, in particular, on the one hand, finally provided this policy with a specific legal basis and discipline (Title XVII, Articles 130(u)-130(y))¹⁷ and, on the other, with the regulation of the Common Foreign and Security policy (“CFSP”), it also clarified the need for a coherent integration of the development policy within the EU’s external relationships and actions¹⁸. That meant, in other terms, the consideration of development policy not as an isolated and separate sector but, on the contrary, as a cross-cutting task, which produces intersections and interactions with other relevant areas. As direct consequence, therefore, the Treaty expressed awareness about the necessity to coordinate and harmonize the measures taken in the various related sectors in order to make them comply, as far as possible, with the basic goals and principles of the development policy.

In this regard, specifically, the objectives of the EU’s development policy were enshrined in Article 130(u), which, before enunciating the essential goals to be achieved, clarified that both Member States and the Community have to commit themselves in this regard and added also that the policy of the latter, in particular, is complementary to the national ones. Moreover, Community and Member States’ actions shall comply and “take account” of the objectives agreed at the international level, in the UN context or within other competent international organizations (Article 130(u)(3)). Once again, therefore, the accent was put on coherence and coordination, to be pursued among the European actions and relevant policies, but also between the various actors involved both inside and outside the EU’s context¹⁹.

The objectives of the European development policy established by the Treaty were: a) the promotion of sustainable economic and social development of the de-

¹⁶ On this specific subject, among others, in particular see HOEBINK, *The Treaty of Maastricht and Europe’s Development Co-operation*, Amsterdam, 2005 also available online at: <<http://ecdpm.org/wp-content/uploads/2013/11/2004-Treaty-Maastricht-Europe-Development-Cooperation.pdf>>.

¹⁷ Later, with the Treaty of Amsterdam, Title XX, Arts. 177-180.

¹⁸ Art. C(2) of the Treaty states: “The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies”. Whereas development and cooperation were inserted within the so-called “first pillar”, being hence part of the Community’s policies and responsibilities, the CFSP fell under the so-called “second pillar”, characterized by the intergovernmental method.

¹⁹ Article 130(x) further insisted on this point by stating: “The Community and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organizations and during international conferences. They may undertake joint action”.

veloping countries; b) their smooth and gradual integration into the world economy; c) the campaign against poverty. These specific goals, moreover, had to be understood and pursued in light of an overall guiding principle, which defined the Community's mission: contributing to "the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedom" (Article 130(u)(2)).

Besides the establishment of a proper legal basis for the development policy and the definition of its main objectives, equally relevant was the recognition of certain general principles and their formal translation into an explicit and legal discipline. In this sense, the Treaty set the basic principles that shall guide and rule all the development policies and actions put into practice by the Community and the Member States. These were the so-called "four Cs": Cooperation, Complementarity, Coherence and Consistency.

With regard to the first one, as already highlighted, the Treaty insisted particularly on it, witnessing the reached awareness about the necessity to coordinate and organize the development policy and its connections with other relevant sectors. Cooperation, in particular, can assume different forms in practice, being possible at various levels (national, regional/inter-regional, global), involving different players (Member States and national authorities, European institutions, international organizations, private actors, etc.) and regarding more inter-linked sectors (e.g. agriculture, migration, employment, etc.) and contents (strategies, specific actions, projects). Finally coordination can be achieved, or strengthened in its intensity, through different forms such as consultation processes, dialogue, collaboration agreements and so on.

The principle of complementarity explained itself with the consideration of the development cooperation policy as a shared competence between the Community and the Member States. Therefore, both shall cooperate in order to achieve the common objectives. In this sense, the European institutions have pointed out the importance of an increased level of cooperation on different occasions²⁰, especially

²⁰ See Communication from Commission to the Council and the European Parliament on complementarity between the development policies and actions of the Union and the Member States, [COM(95) 160 final], 3 May 1995; Council Resolution on complementarity between the development policies and actions of the Union and the Member States, Brussels, 1 June 1995; Communication from the Commission to the Council and the European Parliament on Complementarity between Community and Member State Policies on Development Cooperation, 6 May 1999, [COM(1999) 218]; Resolution of the Council

highlighting the necessity for the Community and the Member States to act together through common approaches and strategies.

In doing so, according to the “other C” represented by the principle of coherence, European institutions and Member States shall also guarantee and pursue coherence in their action, which means an obligation to consider the impact and the potential repercussions of their other policies on the objectives of the common development policy. Coherence in development policy is possible, therefore, only through a common effort in order, on the one hand, to organize and harmonize the plurality of policies and programmes and, on the other, to coordinate all the actors involved at the different levels of intervention.

Finally, the principle of consistency, enunciated in Article C of the Maastricht Treaty, implied that all the EU’s various external policies should not contradict one another. Moreover, they should also be treated on an equal footing and no single policy area should be pursued at the expense of another. The “four Cs” principles were inter-related and came very close to one another, being equally relevant for the achievement of the objectives set by the Treaty. They represented, however, just a general framework to guide the action of the EU and of the Member States. The common development policy, indeed, in order to be tangibly and effectively implemented, needed concrete measures, which would be progressively elaborated and put in practice by the European institutions in the years following the Treaty of Amsterdam.

2.2. – The Current Legal Framework at the Basis of the EU Development Policy

After the significant innovations introduced by the Treaties of Maastricht and Amsterdam in the 1990s, the European development policy was able to progress further and define its shape and characteristics. However, the new provisions, although surely relevant, characterized themselves for general, abstract and programmatic features, laying down more general principles and objectives rather than specific implementing tools. In this sense, the necessity for more effective action in order to translate these objectives and principles into tangible results was felt and expressed by the European institutions already during the 1990s.

Once the general legal framework was settled, indeed, the institutions began to intensify their activity in order to make the common development policy more ef-

fective and incisive. The European Commission, already in a Communication realized in 1992²¹, expressed its views on the new discipline introduced by the Treaty of Maastricht, pointing out the possible shortcomings and the future steps to be done. Similarly, the Council, in a Declaration released later in the same year²², called for more “effectiveness in achieving objectives”, underlining that “first and foremost, coordination must be implemented between the Commission and the Member States, in order to obtain a genuine convergence of the efforts of each in terms of dialogue, objectives and instruments”²³.

On this premise, along with the process of internal legal and institutional adjustment, the EU intensified the dialogue on development policies also at the global level, taking an active part into the debates and the various international initiatives, especially in the framework of the global goals identified and agreed with the Millennium Declaration²⁴. Moreover – as it will be highlighted in the second section with specific regard to migration – the EU increased the process of specialization of its development policy in relation to the different areas of intervention, trying to coherently combine them with one another²⁵.

²¹ Communication from the Commission to the Council and the European Parliament on development cooperation policy in the run-up to 2000, [SEC (92) 915 final], 15 May 1992.

²² Declaration of the Council and of representatives of governments of Member States meeting in the Council on aspects of development, Brussels, 18 November 1992.

²³ *Ibid.*, para. D, point 23.

²⁴ The Millennium Declaration (General Assembly, United Nations Millennium Declaration, UN Doc. A/RES/55/2, 2000) was adopted on occasion of the Millennium Summit, held from 6 to 8 September 2000 at the UN Headquarters in New York. With the mentioned document, the international community committed itself to a global mission aimed at definitely reducing extreme poverty worldwide, in particular, through the achievement of eight Millennium Development Goals (“MDGs”), namely: eradicating poverty and hunger in the world, achieving universal primary education, strengthening gender equality, reducing child mortality, improving maternal health, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability, developing a global partnership for development. In this framework the EU made specific commitments to achieve these goals. In this regard, in particular, see the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Speeding up progress towards the Millennium Development Goals – The European Union’s contribution, [COM(2005) 132 final], of 12 April 2005. For the European contribution to global sustainable development and other forms of collaboration and dialogue at the international level, see also the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Towards a global partnership for sustainable development, [COM(2002) 82 final], 21 February 2002.

²⁵ Particularly significant in this process was the European Consensus on Development, a policy statement of 2006 made jointly by the three main European institutions (Commission, Parliament and Council) in order to identify shared values, goals, principles, commitments and strategies to be imple-

In this search of the right mix of strategies, tools and resources in order to be effective and efficient in the fight against poverty in the context of sustainable development policy, the Treaty of Lisbon – signed in 2007 and entered into force in 2009 – has given an important contribution. The new discipline (Articles 208-211) is contained in the first chapter of a specific title (Title III “Cooperation with third countries and humanitarian aid”), which is one component of the part five of the Treaty on the Functioning of the European Union (“TFEU”) dedicated to the Union’s external action²⁶.

Above all, the reform does not really touch the provisions on development cooperation, which, in substance, have not been changed since Maastricht; however the Lisbon Treaty gives greater coherence and relevance to the EU’s external action, organizing and putting in order its various aspects and components. Among them, development cooperation gains more visibility, being considered as an independent and specific policy of the external dimension of the European activity.

In other words, the Lisbon Treaty takes into account and reflects the policy reality that the EU’s external activity has developed along different but parallel tracks, as a result of several years of experience of Community life and interaction with the rest of the world. In light of this homogeneous and uniform conception, all the various elements falling within the “umbrella” of the EU’s external action (including, therefore, development cooperation) shall be implemented in accordance with the same common principles and objectives, indeed:

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of

mented by the EU and the national governments of the Member States. The statement presents a shared vision to guide the EU’s activities in the field of development cooperation, which includes basic goals such as the reduction of worldwide poverty, the promotion of democratic values and the sustainable development. For the full text of the statement, see Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled “The European Consensus” (OJ C 46 of 24.2.2006).

²⁶ Part V of the TFEU on the Union’s external action is structured as follows: Title I – General provisions on the Union’s external action; Title II – Common commercial policy; Title III – Cooperation with third countries and humanitarian aid; Title IV – Restrictive measures; Title V – International agreements; Title VI – The Union’s relations with international organizations and third countries; Title VII – Solidarity clause.

human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”²⁷.

Furthermore, among the specific goals to be achieved in the context of the European external action, the Union shall also “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”²⁸. Therefore, eradicating poverty – which is the essential goal of development policies – becomes now an overall objective of the EU’s external action in general, with the consequence that all its components shall coherently aim at pursuing it. The “four Cs” principles, moreover, are maintained and confirmed²⁹. In particular, regarding complementarity and cooperation, the new text appears to be more balanced in relation to the interaction between the Union and the Member States: according to the first paragraph of Article 208 TFEU, their respective policies “complement and reinforce one another”, whereas, before, the task of the Community was to complement the policy of the Member States³⁰.

Ultimately, rather than the strictly normative and formal profile, which remains substantially confirmed, the Lisbon reform involves more the institutional framework. The real innovations, indeed, are more institutional in nature, having the objective to guarantee a concrete effect of the development policy and the other areas of EU’s external action. Indeed, in order to obtain tangible results, it becomes crucial to create an efficient institutional and administrative structure, which can translate the principles of EU development policy into practice.

2.3. – Institutional Framework

The EU’s concrete presence on the international scene is guaranteed through a very complex and articulated institutional system, which actively involves a num-

²⁷ Art. 21(1) of the Treaty on the European Union (“TEU”).

²⁸ Art. 21(2) (d) TEU.

²⁹ In this regard see VAN REISEN, “Coherence and Consistency in the EU’s External Policies: Negotiations towards an External Action Service”, European External Policy Advisors, December 2007, Briefing Paper 7, available at: <http://www.eepa.be/wcm/dmdocuments/EEPA_Briefing_Paper_7.pdf>.

³⁰ With regard to the respective competences, Art. 4(4) TFEU clarifies that “[i]n the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs”.

ber of bodies and organisms. These are organized in a manner that should enable the effective implementation of the various programmes, policies and strategies both at the European and at the international level. For this purpose, first of all, the main European institutions are involved in development policy.

The European Parliament has a significant role in this sense, especially after the increase of its competences and powers in the law-making process and in the control over the budget³¹. Indeed, the fact of sharing these relevant competences with the Council, places both institutions on an equal footing, consequently making development one of the very few foreign policy areas in which Parliament holds such significant powers. Furthermore, in addition to these relevant competences in the fields of regulation, budget and expenditure scrutiny, the Parliament plays an active role with regard to development policy, both *ex ante* and *ex post*.

On the one hand, indeed, the Parliament – which can count on a specific Committee on Development – stimulates the debate and the analysis of the priorities and of the most significant political issues, promoting initiatives and fostering the dialogue with relevant partners both at the intra- and the extra-EU level. In this regard, in particular, the Africa Caribbean Pacific – European Union Joint Parliamentary Assembly represents a positive example of productive dialogue and cooperation: by bringing together regularly the elected representatives of the European Parliament and the ones of the African, Caribbean and Pacific States (“ACP countries”), it fosters a cooperative interaction between the parties involved and produces their joint commitments in order to promote the fundamental objectives of the development policy³².

³¹ The Treaty of Lisbon establishes the European Parliament and the Council as the joint budgetary authority of the EU. In the field of international cooperation, in particular, the Parliament’s Development Committee follows budgetary deliberations and makes concrete suggestions concerning the budget lines falling within its remit. However, the Parliament has no formal budgetary powers over the EDF, as the overall amount and distribution are negotiated at intergovernmental level between the Council and the Commission, with only advisory input from the Parliament.

³² The ACP-EU Joint Parliamentary Assembly is a democratic, parliamentary institution, which aims to promote and defend common values of the humanity, including peace, democracy, human rights protection and sustainable development. The Assembly gathers 78 representatives of the ACP states and 78 of the European Parliament, meeting alternately in an ACP country and an EU country, whereas plenary sessions take place twice a year. Under the direction of two co-presidents elected by the Assembly, the works are carried out within three standing committees, established in 2003: the Committee on Political Affairs, the Committee on Economic Development, Finance and Trade and the Committee on Social Affairs and the Environment. Tasks and activities of the ACP-EU Joint Parliamentary Assembly include,

On the other hand, the European Parliament also carries out an important control and monitoring role over policy implementation. Although, historically, its control over the implementation of development policy has been relatively scarce, the Parliament has gained a more relevant position, obtaining the right to question the Commission and even object to implementing decisions whenever it finds that proposals promote causes other than development and/or if it considers that the Commission is exceeding its jurisdiction. Control is also carried out through other forms, including the careful examination of periodical reports and documents regarding multiannual programmes and actions, and the regular discussion of policies and strategies with the Commission, in both formal and informal settings.

The Council, on its side, is also a relevant presence in the framework of the European development policy. First of all, it shares with the Parliament the competence in the legislative process and in the budgetary control; moreover, it has also a relevant role in policy implementation: indeed, according to Article 209 TFEU, the Council and the Parliament “acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy”. Finally, especially in the Foreign Affairs setting, the Council has a crucial role in the context of the EU’s external relations and in the management of development matters, also having competence to make international and association agreements with third countries.

The third main institution – the European Commission – plays also a vital role in the context of the EU development policy. It has, indeed, a decisive position in the definition of the various policies according to the main priorities and needs, programming both general and sectorial actions and strategies and carefully monitoring their implementation. In order to do so, the Commission can count on a specific and proper internal administrative structure. In this regard, the Directorate-General for International Cooperation and Development (“DG DEVCO”) is a key player, having the responsibility to design and elaborate the European development and international cooperation policy in close cooperation with the Member States. DG DEVCO, in this sense, fosters the interaction and collaboration between the EU and the national governments in the framework of the multiannual program-

inter alia, organization of fact-finding missions, draft of periodic reports, collection and analysis of data, convening of meetings with economic and social partners, including Non Governmental Organizations (“NGOs”) and other international organizations.

ming of the external aid instruments and in order to define form and entity of national assistance³³.

The results of this planning and preparatory activity are then projected outside the EU in the framework of the relations with several other international players. DG DEVCO, therefore, ensures also the external representation of the EU in the field of development cooperation, fostering the dialogue with a number of relevant subjects, including competent international organizations, non-state actors and donors, third countries. Dialogue and interaction at international level are carried out in order to better formulate the different thematic development policies in accordance with the specific needs of the beneficiaries partner countries: the form and the entity of the development assistance provided, indeed, vary depending on the geographical area it covers.

A crucial element of the EU development policy – as already pointed out – is the coherence between the various thematic areas, which have an impact on external action. Indeed, many of the EU's foreign programmes are organized by different divisions of the European Commission. Therefore, in order to facilitate and help ensure a consistent approach, the DG DEVCO works closely with other Commission services³⁴ and, especially, with the European External Action Service ("EEAS").

The EEAS, in particular, introduced with the Treaty of Lisbon³⁵ and headed by the High Representative of the Union for Foreign Affairs and Security Policy, has a key task in ensuring that all the different activities that the EU performs abroad are consistent in order to guarantee a comprehensive approach for the EU's foreign

³³ For a better and more detailed insight of the tasks and competences of the DG DEVCO, see European Commission, Directorate-General for International Cooperation and Development, Main missions of DEVCO Directorates & Units, December 2015, available at: <http://ec.europa.eu/europeaid/sites/devco/files/mission-statement-december-2015_en.pdf>.

³⁴ These include, for example, the Directorate-General for Neighbourhood and Enlargement Negotiations ("DG NEAR"), the Directorate-General for Climate Action ("DG CLIMA"), the Directorate-general for Migration and Home Affairs ("DG HOME"), and the Directorate-General for European Civil Protection and Humanitarian Aid Operations ("DG ECHO").

³⁵ Established with the Treaty of Lisbon, the EEAS was officially launched and became operative on 1 January 2011 on the basis of the Council Decision, of 26 July 2010, establishing the organization and functioning of the European External Action Service (2010/427/EU). With regard to the internal organizational structure, the EEAS, in particular, has five departments covering different areas of the world: Asia-Pacific, Africa, Europe and Central Asia, the Greater Middle East and the Americas. Separate departments, moreover, cover global and multilateral issues (including development), response to crises, administrative and financial matters.

policy. For this purpose, it is essential to establish, carry on and maintain an efficient system of political relations at the international level; the EEAS does so by conducting negotiations in accordance with a given mandate, maintaining political dialogue, administering development aid, overseeing and serving EU interests and building cultural contacts.

In the framework of its tasks and mandate, the EEAS is responsible for the running of a very articulated diplomatic system, consisting of about 140 EU Delegations, services and offices, which operate and represent the Union all over the world³⁶. These delegations, in particular, being directly “on the ground”, play a key role in the implementation of the EU’s foreign policies, especially through the analysis and the report on the policies and their progressive developments.

The institutional framework is completed by a number of other European bodies and organisms, which are also involved, with various forms and titles, in development policy. These include, among others, the European Investment Bank (“EIB”) and the European Court of Auditors (“ECA”). The latter, being the audit authority of the EU’s finances, verifies and examines the proper use of resources and the budgetary management of the different EU’s policies, including therefore – and in particular, as the Court’s 2016 work programme highlights³⁷ – development policy. In this regard, in particular, a special focus is put on the EDF and on the other thematic funds and financial means specifically devoted to development cooperation programmes.

The EIB, as the EU’s bank owned by Member States, plays a relevant role in the implementation of EU policies. Working and interacting closely with the European institutions, it provides financial expertise for sustainable investments, which contribute to furthering EU policy objectives. Although its major focus of intervention is on Europe, the EIB also sustains the EU’s external activity, including cooperation development policies, through loans and other financial means in favour of the partner countries³⁸.

³⁶ The EU can count on 139 delegations, offices and services, which are spread all around the world. These are organized and structured in a complex way, including bilateral delegations (responsible for EU relations with a single country or a particular group of countries), regional delegations, multilateral delegations (responsible for the interaction with international organizations and other international actors) and representation offices.

³⁷ According to the ECA’s work programme for 2016, audit control over development policy is considered as one of the “high priority tasks”. See European Court of Auditors, 2016 Work Programme, p. 3, available at: <http://www.eca.europa.eu/Lists/ECADocuments/WP2016/WP2016_EN.pdf>.

³⁸ Although the vast majority (about 90 %) of the lending is attributed to promoters in the EU coun-

Finally, the European institutional machinery involved in development issues and policies is connected and interlinked with several other players and stakeholders outside the EU. These include private actors and donors, civil society and NGOs, international organizations such as the UN, the World Bank (“WB”) and others.

3. – Migration and Development Policy

3.1. – The Migration–Development Nexus

Migration and development (“M&D”) currently represent a peculiar relevant area of research and policy-making, which has progressively gained prominent importance during the years. The M&D discourse, in particular, has begun to attract international attention in the 1990s, becoming a significant topic of discussion between national governments³⁹. The topic has steadily gained more and more relevance also on the agenda of international organizations such as the IOM and the UN, which, through their initiatives and activities, have given the debate on M&D an important momentum⁴⁰.

tries in order to support the continued integration of the Union, the EIB’s activity takes place also outside the Union. In this sense, EIB lending is governed by a series of mandates from the EU in support of European development and cooperation policies in partner countries located all over the world.

³⁹ The International Conference on Population and Development, held in Cairo in 1994, represents a milestone in the definition of the M&D policy at the global level. Gathering together 179 governments, the conference resulted in the adoption of a 20-year Comprehensive Programme of Action containing common strategies and visions on international migration, including a specific focus on the linkage between international migration and development (Chapter X of the Programme). The agreed recommendations contained in the Programme encourage the cooperation and the dialogue between countries of origin and destination of the migratory flows in order to foster and maximise the potential positive effects of migration.

⁴⁰ For some UN initiatives in the framework of M&D, see *supra* note 5. Particularly relevant is also the 2030 Agenda for Sustainable Development (United Nations, General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution A/RES/70/1, Seventieth session, 25 September 2015). The Agenda, built on the previous established Millennium Development Goals, sets 17 Sustainable Development Goals in order to mobilize efforts to end all forms of poverty, fight inequalities and manage various issues including, *inter alia*, climate change, health, education, sustainable growth and development. In this framework, the M&D linkage is also taken into account, indeed, according to point no. 29 of the Agenda:

“We recognize the positive contribution of migrants for inclusive growth and sustainable development. We also recognize that international migration is a multi-dimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. We will cooperate internationally to ensure safe, orderly and regular

The starting point of the reflections and debates is the existing linkage between migration and development and the crucial question concerns the way they can influence one another. In this sense, the discussions within the research community and among the policymakers have evolved, following different theories, orientations and tendencies. In general, opinions regarding the M&D nexus have fluctuated between a positive (migration, potentially, can produce a positive impact on development) and a negative consideration (growing migration is a clear manifestation of development failure), alternating – to use a sharp metaphorical image – like a pendulum between positive/optimistic and negative/pessimistic views⁴¹.

In the recent years, however, the positive orientation appears to be prevalent, based on the fundamental assumption that migration – under the condition of its efficient and proper management – can determine a beneficial interaction with development, potentially contributing to favourable and positive outcomes both for the countries of origin and destination of the migratory flows. This belief is clearly and strongly present in the UN's approach, as recently confirmed in the International Migration Report 2015 released by the Department of Economic and Social Affairs of the United Nations Secretariat. According to the mentioned document, indeed, “when supported by appropriate policies, migration can contribute to inclusive and sustainable economic growth and development in both home and host communities”⁴². Therefore, the Organization:

“recognises the positive contribution of migrants for inclusive growth and sustainable development. It further recognises that international migration is a multi-dimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. International cooperation is critical to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants and refugees”⁴³.

The focus on the M&D nexus has contributed to the evolution of the various

migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons”.

⁴¹ See DE HAAS, “The Migration and Development Pendulum: A Critical View on Research and Policy”, *International Migration*, 2012, p. 8 ff.

⁴² United Nations, Department of Economic and Social Affairs, Population Division, *International Migration Report 2015: Highlights (ST/ESA/SER.A/375)*, 2016, p. 2.

⁴³ *Ibid.*

policies and approaches adopted in order to tackle migration issues. In particular, the awareness about the potential positive impact of migration has led to a new room for cooperation between States, fostering collaborative processes at different levels (bilateral, regional, global) and widening the circle of participants in the dialogue, including various non-State actors, civil society and migrant associations, private investors, international organizations and local authorities.

Migration, in other terms, has become a crosscutting issue, which is able to produce repercussions on different areas. Therefore, national and supranational authorities, having understood that the phenomenon can no longer be managed alone, have started to launch or reinforce their migration policies, acting together and developing new processes of cooperation. The intense contacts between migration policies and other inter-related sectors, together with the increased number of players involved, has brought to the concept of policy coherence, that is to say, the necessity to manage, organize and coordinate the various actions in a consistent and effective way. This concept, in particular, is strongly present in the framework of the EU policy.

3.2. – The Conceptualization of Migration and Development Policy at the EU Level

European countries have progressively gained awareness about the opportunity (better, the necessity) to establish a collaborative dialogue with countries of origin and transit of migratory flows, understanding all the shortcomings of an individual and limited approach. The importance of a multilateral and comprehensive approach to migration, together with the need to extend the consultative processes in order to encompass crucial aspects like development and cooperation policies, emerged for the first time during the 1990s.

Indeed, the first significant and official reference to the M&D nexus dates back to the European Council held in Tampere (Finland), on 15-16 October 1999. After the substantial treaty reform and the entry into force of the new legal-institutional framework – which, as already said⁴⁴, brought considerable changes to the European architecture also with regard to migration policy – Member States proceeded to cast the first stone on the way to the establishment of a European common migration policy. In this sense, as clearly emerged from the conclusions of the Tampere European Council, the connection and the interaction between migration and development

⁴⁴ See *supra*, para. 2.1.

were identified as one of the crucial elements of the European common policy⁴⁵.

The basic idea, in particular, was that the common policy should address the root causes of the migratory phenomenon in order to reduce the pressure of the flows towards Europe. For this purpose, action should be taken in order to manage the so-called “push factors” (such as extreme poverty, war and political instability), which give impulse to considerable migratory movements towards EU Member States.

This overall approach was supported by common consent by all European institutions: on the occasion of the European Council of Seville in 2002, indeed, it was reaffirmed that “closer economic cooperation, trade expansion, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned and thereby reducing the underlying causes of migration flows”⁴⁶. This need to promote the social and economic development of the regions from which migrants originate was reiterated also by the Council at the end of the same year⁴⁷.

This general vision was also shared by the Commission, which, in its Communication of 2002 entitled “Integrating Migration Issues into the European Union’s Relation with Third Countries”, addressed migration as “a major strategic priority for the European Union”⁴⁸, confirming that “development policy also tries to prevent and reduce forced migration”⁴⁹. Furthermore, in the mentioned document, the Commission tried for the first time to analyze and clarify the links between migration and development, suggesting a number of key initiatives in order to promote the coherence between the two policy areas.

⁴⁵ See Tampere European Council, 15-16 October 1999, Presidency Conclusions, in particular point 10, which states:

“The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights (...) Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development”.

⁴⁶ Seville European Council, 21-22 June 2002, Presidency Conclusions, point 33.

⁴⁷ Council of the European Union, Draft Council conclusions on intensified cooperation on the management of migration flows with third countries, 13894/02, 14 November 2002, para. 8.

⁴⁸ Communication from the Commission to the Council and the European Parliament – “Integrating Migration Issues into the European Union’s Relation with Third Countries” [COM(2002) 703 final], 3 December 2002, p. 4.

⁴⁹ *Ibid.*, p. 21.

Besides general recommendations and guidelines, such as taking an active part in the global debate on M&D, exchanging information and data or identifying best practices to be applied at the EU level, the Commission addressed some concrete aspects of the M&D nexus, especially with regard to work-related issues: migrant remittances⁵⁰, the question of the so-called “brain drain” and the circulation of skilled labours, highlighting, in particular, “the important developmental potential” of these elements⁵¹. These matters, however, were treated with a general approach, more in programmatic and descriptive terms, rather than with specific measures or actions to be taken. This suggested still a sort of on-going process of conceptualization of the M&D nexus, aimed at investigating the reciprocal influence of the two policies and at examining their characteristics and implications, in order to identify the right ways to effectively address and coordinate them.

This can be considered, in other words, as an initial phase of preliminary study and analysis, necessary for the EU and its Member States to identify the main priorities and to draw up appropriate programmes and strategies. The main focus, moreover, appeared to be put more on the intention to contrast and reduce the migratory pressure, rather than fostering the potential positive synergy between migration and development. The Commission itself, in the mentioned Communication, admitted that “migration is a new field of action for the Community cooperation and development programmes”⁵² and it also considered that the M&D nexus, being “a relatively new trend”⁵³, needed to be carefully elaborated in order to set the proper measures to address it.

3.3. – Practical Actions and Measures to Address Migration and Development

In parallel with the progressive definition of the EU policy, the issue of M&D remained high on the global policy agenda. Several initiatives and consultative

⁵⁰ In the definition given by the Commission itself in a later Communication, remittances are broadly intended as “all financial transfers from migrants to beneficiaries in their countries of origin”. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – “Migration and Development: some concrete orientations” [COM(2005) 390 final], 1 September 2005, note 7.

⁵¹ Communication from the Commission to the Council and the European Parliament – “Integrating Migration Issues into the European Union’s Relation with Third Countries” [COM(2002) 703 final], 3 December 2002, p. 15.

⁵² *Ibid.*, p. 18.

⁵³ *Ibid.*, p. 4.

processes were carried out, with the M&D nexus representing one of the central issues of the debate at the international level: the topic, for example, was carefully examined by the Global Commission on international migration (“GCIM”) in its report released in October 2005⁵⁴, and the UN General Assembly planned to hold a “High Level Dialogue on Migration and Development”.

In this framework of active debate, the effective and real European engagement with M&D issues started in 2005, with the definition of certain specific priorities and areas of intervention. The European Parliament, initially, addressed the M&D issues and the need to elaborate a common policy in the public hearing “Migration, integration and development: towards a European policy?” held in March 2005⁵⁵. Besides discussions and dialogue, however, two following documents set concrete actions to be taken: the Global Approach to Migration (“GAM”)⁵⁶ and the Commission’s Communication “Migration and Development: some concrete orientations”⁵⁷.

With the mentioned Communication, the Commission intended “to make a first contribution to the global debate on the links between migration and development”⁵⁸, and, in this regard, it proved to have a pretty clear awareness of the intense relationship between mobility of people and socio-economic development. Migration was recognized as an integral part of development processes, therefore, the main objective appeared to be the optimization of its potential positive impact on the countries involved in the migratory movements. The Commission, hence, identified a series of practical orientations “for improving the impact of migration on development”⁵⁹, which were included in the context of four main priority areas: re-

⁵⁴ Global Commission on International Migration, Report “Migration in an Interconnected World: New Directions for Actions”, October 2005, available at: <http://www.queensu.ca/samp/migrationresources/reports/gcim-complete-report-2005.pdf>.

⁵⁵ See European Parliament, Committee on Civil Liberties, Justice and Home Affairs and Committee on Development, Public Hearing: “Migration, integration and development: towards a European policy?”, 14-15 March 2005 (OJ\559814EN.doc).

⁵⁶ Council of the European Union, Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean, 15744/05, 13 December 2005.

⁵⁷ Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – “Migration and Development: Some concrete orientations” [COM(2005) 390 final], 1 September 2005.

⁵⁸ *Ibid.*, p. 11.

⁵⁹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – “Migration and Development: Some concrete orientations” [COM(2005) 390 final], 1 September 2005, p. 3.

mittances, diaspora, circular migration and brain circulation, and brain drain.

With regard to remittances, the Commission gave strong consideration to the migrants' economic contributions and to the flows of financial resources they generate, especially considering them as a positive and strong vehicle for development in the countries of origin. This represents, therefore, an essential area of intervention, indeed, as stated also by the IOM, "remittances represent the most direct link between migration and development"⁶⁰. On the basis of this premise, one of the crucial challenges associated with remittances is how to maximize their potential development impact for countries of origin, countries of destination and for individual migrants themselves. For this purpose, the Commission identified two specific areas of policy intervention in order to give greater value to remittances, namely making the economic transfers cheaper, faster and safer and enhancing their development impact in recipient countries.

With regard to the first mentioned policy action, the Commission identified essential and precise measures to be taken in order to improve and facilitate the migrants' financial transfers. First of all, the collection of data and information was vital. The Commission, indeed, primarily clarified the need to study and understand the phenomenon of the remittances, especially with regard to aspects such as the entity of the flows, their directions and destinations, the financial channels and the other means used for the transfers.

Furthermore, another identified action consisted in the creation of a transparent, uniform and clear legal framework. Indeed, the diversity and the not homogenous character of the regulations on remittance services considerably hamper the possibility to make money transfers and all the related operations. The Commission, therefore, highlighted the need to build a proper financial and economic infrastructure, based on clear and harmonized rules and invoked, for this purpose, the involvement of relevant stakeholders such as the World Bank or the EIB.

With regard to the second action to be taken in relation to remittances in order to improve their positive impact in migrants' countries of origin, the Commission envisaged a series of specific solutions, including financial intermediation in the

⁶⁰ International Organisation for Migration, *IOM and Remittances*, 2009, p. 1. On the topic of remittances in general, see also International Organisation for Migration, "Migration, Diaspora and Development", *Focus on Migration*, no. 2, 18th edition, July 2012, available at: <https://diaspora.iom.int/sites/default/files/publication/pdf/focus-on-migration.pdf>.

developing countries, partnership and cooperation between micro-finance and mainstream financial institutions, systems of collective remittances and co-funding schemes to be put into place initially through pilot projects.

The second priority area of intervention identified by the Commission's Communication was "diasporas as actors of home country development". Although there is not a single and legally accepted definition, the concept of "diaspora", in general, implies the basic idea of populations or groups of people, living abroad in one place, while still maintaining relations with their homelands⁶¹. In this sense, diasporas can assume different characters from country to country, generating diverse and specific realities (people settled in a host country on a permanent basis or just for a period of time, labour migrants, dual citizens, particular ethnic diasporas, second-generation groups becoming citizens of the host country, etc.). The basic and common idea, however, is that these connections that people maintain individually or collectively with their homelands can have an important development potential, in particular involving areas such as business creation, trade links, investments, remittances, skills circulations, exchange of experiences and even impacts on social and cultural roles of men and women in the home society.

The Commission, sharing the view on the positive role of diasporas, primarily highlighted the necessity to map the existing connections, identify the already active organizations and associations, and then creating specific databases where members of diasporas can register themselves in order to facilitate better links and contacts. Moreover, particular initiatives and actions shall be encouraged also and in particular with regard to young people, by organizing youth exchange schemes focused on migrant communities.

The further issue of circular migration and brain circulation was tackled by the Commission in line with the previous orientation expressed in its Green Paper on

⁶¹ According to the IOM's Glossary on Migration, "Diasporas are broadly defined as individuals and members or networks, associations and communities, who have left their country of origin, but maintain links with their homelands. This concept covers more settled expatriate communities, migrant workers based abroad temporarily, expatriates with the nationality of the host country, dual nationals, and second-/third-generation migrants". International Organisation for Migration, Glossary on Migration, 2011, International Migration Law no. 25. On the topic of diasporas see also International Organisation for Migration, Migration Policy Institute, "Developing a Road Map for Engaging Diasporas in Development: A Handbook for Policymakers and Practitioners in Home and Host Countries", 2012, available at: http://publications.iom.int/system/files/pdf/diaspora_handbook_en_for_web_28may2013.pdf.

Economic Migration⁶² released at the beginning of 2005 and later addressed again in another specific Communication of 2007⁶³. The main challenge is represented by the cooperation with third countries and by the adoption of proper measures in order to facilitate legal migration, movement and circulation of experiences, skills and qualified brains, together with the cultural and socio-economic integration of migrant workers returning back in their home society. By fostering transfers of relevant skills and competences to third countries and by encouraging their reintegration into the local society and economy, circular migration can contribute positively to development.

With this purpose, specific measures and initiatives were presented in the Commission's Communication in order to stimulate the brain circulation, including temporary employment, seasonal work, assisted return programmes, mobility partnerships and short-term visa policies. Further and complementary actions were identified in a system of transferability of social security rights, in the recognition of qualifications and – particularly relying on communication technologies – in the creation of networking and information platforms for foreign researchers or other professionals, in order to keep or improve their contacts and connections.

The last main intervention area for EU M&D policy dealt with the need of mitigating the adverse effect of brain drain. The Commission admitted that “there is no uniform and simple policy response to this formidable challenge”⁶⁴, also pointing out that, given that the impact of the phenomenon of the brain drain varies from country to country, “policy responses therefore need to be tailored to the specific needs and challenges of each affected country”⁶⁵.

For this purpose the Commission found essential, above all, to establish partnerships and forms of cooperation with third countries in order to proceed to the necessary preliminary assessments of the country's or region's specific problems and needs. In this sense, in the Commission's vision, collaboration should be di-

⁶² European Commission, Green Paper on an EU Approach to Managing Economic Migration [COM(2005) 811 final], 11 January 2005.

⁶³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on “Circular Migration and Mobility Partnerships between European Union and Third Countries” [COM(2007) 248 final], 16 May 2007.

⁶⁴ Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions – “Migration and Development: Some concrete orientations” [COM(2005) 390 final], 1 September 2005, p. 8.

⁶⁵ *Ibid.*

rectly established between subjects such as universities, scientific institutions and research centres, hospitals, associations of professionals and technicians. This would help to study the phenomenon and its potential repercussions, improving the knowledge of the specific situations of labour markets in terms of shortages/excesses of skills in order to, ultimately, identify the correct response. At other levels, on the one hand, the Commission encouraged EU Member States to develop mechanisms to limit active recruitment in cases where it would have significantly negative repercussions for targeted developing countries and, on the other, suggested a global approach to recruitment policies, with discussions and debates to be carried out in international fora.

These orientations presented by the Commission in its Communication of 2005 were shared and reaffirmed by the Council in the GAM, released at the end of the same year. The document – as its title tells – presented the EU’s global approach to migration, setting out policies and strategies to be followed in the various areas related to migration, including the fight against illegal migration and human trafficking, borders control and maritime surveillance, protection of refugees and asylum seekers, cooperation with third countries in light of the promotion of the M&D nexus.

In this regard, in particular, the GAM insisted on the valorization of remittances, on the one hand, reiterating the need to improve data collection on remittance flows and, on the other, recommending the rapid creation of cheaper and more easily available remittance services. Furthermore, more efforts were invoked to support African States to facilitate members of diasporas to contribute to their home countries and to mitigate the impact of brain drain and skill losses in vulnerable sectors.

In general, the actions and strategies put forward by the European institutions in this period seemed to be characterized by a prevailing focus on the economical aspects of development. The predominant interest, in contrast with the previous orientation, was no longer prevention, containment or reduction of migratory pressure but, on the contrary, the optimization of the potential positive impact of migration in relation with economic development. As it has been very well said, the EU seemed to have progressively shifted from a “More Development for Less Migration” logic to a logic of “Better Migration for More Development”⁶⁶.

⁶⁶ See PASTORE, “More Development for less Migration” or “better Migration for more Development”? Shifting Priorities in the European Debate”, *Migraction Europa Special Issue*, Cespi, December 2003, p. 3.

The basic idea, in other terms, was that migration can be an effective and powerful development mechanism, which can bring to positive outcomes such as higher productivity, better allocation of production factors, more qualified employment and economic growth and, definitely, to significant advantages for all, in accordance to a “triple wins” logic: for the countries of origin, the receiving host societies and the migrants themselves⁶⁷.

This overall approach was confirmed by the European institutions during the years following the adoption of the GAM. The European Parliament, for example, in a Resolution of 2007, referring to the relations between the EU and the third countries of the Mediterranean area, affirmed that “sustainable development must be at the heart of the Euro-Mediterranean partnership”⁶⁸, also highlighting the importance of the synergies and connections between migration, markets and workers. The Commission also, in a Communication of 2006 on the status of implementation of the GAM, shared this view, reiterating that, in the framework of the EU’s M&D agenda, “the prime challenge is to tackle the main push factors for migration: poverty and the lack of job opportunities”⁶⁹.

Ultimately, during this years of definition of the EU’s M&D policy, the focus was mainly put on the economic dimension of the development process, with an accent put more or even exclusively on economic aspects rather than on a human understanding of the phenomenon, therefore, basically ignoring social and cultural elements. Moreover, despite the idea of mutual advantages and the “triple wins” concept, the attention was mainly attracted by countries of origin and their situations whereas, on the contrary, the receiving countries received much less consideration in terms of positive effects of the M&D nexus. This approach, however, was reviewed in 2011.

⁶⁷ The reference to the “triple wins” was present in the Declaration of the UN Secretary General Kofi Annan delivered on the occasion of the High-Level Dialogue of the General Assembly on International Migration and Development, held in New York on 14 September 2006. The full text of the declaration is available at: <<http://www.un.org/migration/sg-speech.html>>.

⁶⁸ European Parliament Resolution of 15 March 2007 on Euro-Mediterranean Relations (P6_TA(2007)0075), letter C.

⁶⁹ The accent was put once again on the objective “to further enhance the impact of remittances on development policies” and, therefore, on the identification of proper solutions such as data collection, cooperation with institutions like the WB and the EIB and the use of specific financial services. See Communication from the Commission to the Council and the European Parliament – The Global Approach to Migration one year on: Towards a comprehensive European migration policy [COM(2006) 735 final], 30 November 2006, p. 5.

3.4. – *The Most Recent European Approach to Migration and Development*

The GAM has been revised in 2011, becoming the Global Approach to Migration and Mobility (“GAMM”)⁷⁰. On the explicit premise that “migration is now firmly at the top of the European Union’s political agenda”⁷¹, the Commission lays down a renewed policy framework to strengthen dialogue and cooperation on migration issues with key strategic partners, defining clear priorities embedded in the EU’s overall external action. Among the identified priorities, in particular, the agenda includes also the policy area of development cooperation and the M&D nexus, which are readdressed with new ideas and orientations⁷².

The GAMM, in particular, puts forward a renewed approach to the M&D nexus, broadening its understanding and extending the EU’s approach through the inclusion of the component of mobility, which encompasses also other phenomena and types of movement such as forced migration and short-term or non permanent forms of mobility. Another significant new element is the acknowledgment of the importance of the inter- and intra-regional migratory flows, which opens and widens the focus beyond the EU area and attracts the attention also on internal and regional migration, with a specific accent on the issue of regional labour mobility.

The basic idea, indeed, is that development processes often rely on mobility, which stimulates and produces circular movements and transfers of social, financial and human capital. At the same time, development fosters mobility, providing resources and opportunities for people to migrate. Built on these premises, the overall approach appears to be more balanced, the focus, indeed, is not only on the economic dimension of the M&D link but also other relevant elements related to development are taken into account. These include, in particular, the repercussions and the social “costs” of migration in home countries with special regard to certain areas, such as environment and climate change, agriculture and rural population,

⁷⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The Global Approach to Migration and Mobility, [COM(2011) 743 final], 18 November 2011 and its accompanying document Commission Staff Working Paper – Migration and Development, [SEC(2011) 1335 final], 18 November 2011.

⁷¹ *Ibid.*, p. 2.

⁷² The GAMM addresses four priority topics, namely: organizing and facilitating legal migration and mobility; preventing and reducing irregular migration and trafficking in human beings; promoting international protection and asylum; maximizing the development impact of migration and mobility.

health, education, housing and so on⁷³.

The Commission puts the accent on these profiles also in its Agenda for Change⁷⁴, where a more migrant-centred approach is promoted and highlighted as a necessary new key element of the revised European M&D policy. The issue of migrants' rights, therefore, makes explicitly its way in the M&D discourse: migration and individuals are considered not purely and primarily as economic elements but relevance is also given to their human rights and needs, especially in light of the consideration of the social consequences of migration⁷⁵.

The increased consideration of the social dimension of development is another central element of the new approach. Indeed, more emphasis is put on the social aspects related to the M&D nexus, with a greater attention devoted to relevant elements both for the countries of origin (family ties, children care, labour force, education, etc.) and for those of destination (employment, social security, professional formation, portability and recognition of titles and qualifications, social services, etc.). Particular consideration is also given to the issue of the socio-economic integration of migrants into the host societies and to the measures and tools to be used for this purpose⁷⁶. With regard to the integration of third-country nationals, moreover, their active involvement in the social and cultural life of the host societies is seen as a key factor. Therefore, besides measures aimed at fostering an effective integration into the labour market or the recognitions of relevant qualifications, the new M&D approach particularly intends to enhance the role of diasporas, promoting the dialogue between migrant groups and the local authorities.

The widening of the new European M&D approach implies a multidimensional

⁷³ The GAMM affirms (p. 19) that “successful mainstreaming of migration in development thinking requires making it an integral part of a whole range of sectorial policies”; therefore bridges are built between migration and a number of other areas, broadening the understanding of the M&D nexus.

⁷⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Increasing the impact of EU Development Policy: an Agenda for Change, [COM(2011) 637 final], 13 October 2011.

⁷⁵ The Commission Staff Working Paper accompanying the GAMM, in particular, puts special emphasis on vulnerable subjects involved in the migratory phenomenon, including unaccompanied minors, asylum seekers, victims of trafficking or violence, women and internally displaced persons.

⁷⁶ The issue of the integration of migrants in the receiving countries, with a particular focus on their socio-cultural rights, is specifically addressed in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – European Agenda for the Integration of Third-Country Nationals [COM(2011) 455 final], 20 July 2011.

focus, with several crosscutting elements and intersections between international and domestic policies. The concept of policy coherence, therefore, is crucial, as highlighted by the Commission in its Communication of 2013 “Maximising the Development Impact of Migration”⁷⁷ as well as in the report on the implementation of the GAMM realized in 2014⁷⁸. The importance of a multifocal approach of the development policy with regard to migration has been further confirmed in the recent European Agenda on Migration, put forward by the Commission in 2015⁷⁹.

4. – Concluding Remarks

Although the M&D nexus has been positively acknowledged and, by common consent, the potential positive interaction between the two policies has been affirmed and recognized, sometimes the presence of different and conflicting visions on the exact nature of this inter-linkage and on the specific priorities have hampered policy coherence in the field of development cooperation. Moreover, the M&D nexus has been understood mainly in economic terms, putting the accent on migrants as resources or factors for productivity, therefore, focusing on traditional themes such as remittances, diasporas, circular migration and brain drain, but substantially ignoring other important elements.

The revision of the GAM and its widening into the GAMM has led to a positive change in the understanding of the M&D, in particular, by considering also the social dimension of development and related sectors such as education, health, employment, agriculture and so on. However, despite the launch of positive cooperation initiatives with third countries, the main goal seems to make M&D policy as an instrument to reduce poverty and to increase economic growth. The economic dimension, in other words, appears to be still preeminent, with less consideration of the human and social indicators of development, such as overall quality of life,

⁷⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Maximising the Development Impact of Migration. The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus [COM(2013) 292 final], 21 May 2013.

⁷⁸ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Report on the implementation of the Global Approach to Migration and Mobility 2012-2013 [COM(2014) 96 final], 21 February 2014.

⁷⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, [COM(2015) 240 final], 13 May 2015.

primary education, health care, employment and so on.

In addition to that, in the EU, especially with the crucial issues of the refugee crisis, development cooperation policy is subordinated to migration interests, the migration itself currently being considered more as a challenge or even as a threat, rather than an opportunity. On the contrary, a migrant-centred approach should be guaranteed and enhanced, with more attention on human rights, especially with regard to the most vulnerable categories of migrants such as unaccompanied minors, asylum seekers and victims of trafficking.

The emphasis on border control and security – witnessed especially by the huge increase of the European resources destined to these sectors – risks to seriously undermine the achievement of the EU's relevant development objectives. Therefore, a rethinking of the priorities would be desirable, particularly in order to improve the positive synergy between migration and development and, above all, to guarantee the safeguard and the respect of the migrants' fundamental human rights.

III.

REGULAR MIGRANTS' INTEGRATION BETWEEN EUROPEAN LAW AND NATIONAL LEGAL ORDERS: A KEY CONDITION FOR INDIVIDUAL AND SOCIAL DEVELOPMENT

*Stefano Montaldo**

SUMMARY: 1. Introduction: the Strategic Importance of Regular Migrants' Integration in the EU. – 2. Integration Policies and Vertical Division of Competences: EU and Member States Locking Swords. – 3. Integration of Regular Migrants and EU Soft-Law and Policy Initiatives: Between Incentives and Conditionality. – 4. Integration Conditionality in EU Secondary Law: Fostering Social Cohesion or Immigration Control? – 4.1. The Objectives of EU Secondary Law on Regular Migration and the Clauses on Integration Conditionality. – 4.2. Integration Conditions and Measures: the Risk of Deviating from the Objective of Facilitating Integration. – 4.3. Meaning and Implications of Integration Conditions and Measures. – 4.4. The Court of Justice and the Criteria for the Compatibility of Integration Conditions and Measures with EU Law. – 5. Integration Policies as an Overriding Reason in the Public Interest Justifying Derogations from EU Law. – 6. Concluding Remarks.

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1. – Introduction: the Strategic Importance of Regular Migrants' Integration in the EU

Migration policies are often seen as “dramatic stories of consolidation of power”, where opposing values and interests inevitably collide¹. Consequently, the narratives of and on migration flows are often imbued with “political messianism”², which fosters a defensive and identitarian approach to the phenomenon³. A survey carried out in 2015 by Eurobarometer highlighted that, after a 14-point increase since autumn 2014⁴, immigration has become the main concern in the Member States and candidate countries. It is perceived as far more alarming than terrorism, public order, public finances and the economic situation of the EU in general⁵.

However, the hiatus “we/the others” smoothes over the complexity of the challenges that the EU and its Member States are confronted with. While the public debate is pressed by the urgency of irregular migration and daily functioning of the Common European Asylum System, a long-term issue faces the Member States, namely social and economic integration of third-country nationals regularly settled in Europe. More than 20 million regular third-country nationals are estimated to reside in the Member States. That means 4% of the EU’s overall population. In addition, statistics show a clear trend towards the increase and stabilization of their presence⁶. This remark is mirrored by the fact that family reasons are the main vehicle for regular migration towards Europe. In 2014, they were the main grounds for issuing a residence permit in 18 Member States, whereas in 7 countries they accounted for more than 50% of all first permits issued⁷. Eurostat surveys also con-

¹ MCNAMARA, *The Politics of Everyday Europe: Constructing Authority in the European Union*, Oxford, 2015, p. 125.

² WEILER, “Deciphering the Political and Legal DNA of European Integration”, in DICKSON and ELEFTHERIADIS (eds.), *Philosophical Foundations of European Union Law*, Oxford, 2012, p. 137 ff.

³ RODOTÀ, *Il diritto di avere diritti*, Roma/Bari, 2012, p. 4.

⁴ Eurobarometer standard 81, Spring 2014, available at: http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_first_en.pdf.

⁵ Eurobarometer standard 83, Spring 2015, available at: http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_first_en.pdf.

⁶ Eurostat migration and migrant population statistics 2016, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

⁷ Eurostat residence permit statistics, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics. 680,025 permits were issued for family reasons, while 572,414 and 476,817 were respectively grounded on paid work and study purposes. The statistics concerning the previous years confirm this trend.

firm that more than 7.5 million long-term residents are settled in the EU and that their number steadily increases over time⁸.

Even the recent massive inflow of international protection seekers raises concerns on the integration of individuals involved. On one hand, besides providing for their immediate needs, the Member States will be faced with the long-term challenge of their social inclusion. In this perspective and in order to facilitate the integration process, the programmes on relocation of asylum seekers allow the States of relocation to express preferences on the applicants' qualifications and characteristics. Member States can take into account factors such as language skills or family, cultural and social ties, in order to maximize international protection seekers' chances of future social and economic inclusion⁹. On the other hand, recent measures on relocation and resettlement have unveiled the deficiencies and absence of comprehensive strategies in Member States with less experience of receiving migrants and related integration issues¹⁰.

Integration strategies for regular migrants are, therefore, a common denominator within the various branches of migration policy. They are also essential to the full effectiveness of any policy initiative in this domain, at both EU and national levels¹¹. The acts adopted by the EU in this field recognize that legal migration

⁸ See long-term residents statistics by citizenship on 31 December of each year, available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_reslong&lang=en. The number of long-term residents has continuously and gradually increased from 1.2 millions in 2008 to more than 7.5 in 2015.

⁹ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L239 of 15 September 2015, p.146, recital 28; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 248 of 24 September 2015, p. 80, recital 34. However, some Member States have expressed long or constraining lists of preferences for the profile of the applicants to be relocated, thereby negatively affecting the system of relocation. See Commission's reports on relocation and resettlement: [COM (2016) 165 final], 16 March 2016; [COM (2016) 222 final], 12 April 2016; and [COM(2016)360 final], 18 May 2016.

¹⁰ Communication from the Commission, [COM(2016) 377 final], 7 June 2016, Action plan on the integration of third country nationals. The European Parliament has called for full participation and early integration of all third country nationals, including refugees as well: see European Parliament Resolution 2015/2095/INI of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration.

¹¹ It has been underlined that the core factors influencing integration policies are utility and security: CARMEL, "European Union migration governance: utility, security and integration", in CARMEL, CERAMI and PAPADOPOULOS (eds.), *Migration and welfare in the new Europe. Social protection and the challenges of integration*, Bristol, 2011, p. 49 ff.

plays an important role in enhancing a knowledge-based economy in Europe, advancing economic development¹². In fact, integration exceeds the individual dimension and becomes a pre-condition for social inclusion and cohesion, a decisive factor for the economic development of host societies as a whole, especially in times of economic crisis and demographic decrease¹³. In this context, recent surveys concerning indicators of immigration integration show that third country nationals have greater difficulties than EU citizens in terms of access to education, employment and social inclusion outcomes such as decent housing¹⁴. Additionally, compared to host country nationals, they are more at risk of social exclusion and poverty, even when they are in employment¹⁵.

As pointed out by the European Commission, a failure to release the potential of regular migrants “would represent a massive waste of resources”, both for the individuals concerned and for the host societies¹⁶. Research demonstrates that investing in early integration in both the education system and labour market has significant social and economic impact, which ranges from easier access to essential services to a positive fiscal net contribution¹⁷. In the words of the Commission, integration policies can contribute to making Europe “a more prosperous, cohesive

¹² See for instance the Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16 of 23 January 2004, p. 44, recital 4.

¹³ PONZO et al., “Is the Economic Crisis in Southern Europe Turning into a Migrant Integration Crisis?”, *Politiche Sociali*, 2015, p. 59 ff. See also the Eurostat births and fertility statistics from 1961 to 2014, which confirm the negative trend of EU’s population growth, available at: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Fertility_statistics>.

¹⁴ See Eurostat migrants’ integration statistics 2016, available at: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Migrant_integration_statistics_-_overview> and the indicators of immigration integration 2015 developed by the Organization for Economic Cooperation and Development, available at: <<http://www.oecd.org/els/mig/Indicators-of-Immigrant-Integration-2015.pdf>>.

¹⁵ In 2014, 49% of third-country nationals were at risk of poverty or social exclusion, compared with 22% among host-country nationals. 18.2 % of the young non-EU-born population faced severe material deprivation. Third-country nationals were more likely to live in an overcrowded household than the native-born population.

¹⁶ European Commission, Directorate General for Economic and Financial Affairs, Institutional Paper 33 of 26 July 2016, *An Economic Take on the Refugee Crisis: A Macroeconomic Assessment of the EU*, available at: <http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip033_en.pdf>.

¹⁷ Organization for Economic Cooperation and Development, “The Fiscal Impact of Immigration in OECD Countries”, in *International Migration Outlook*, 2013, p. 125, available at: <http://www.globalmigrationgroup.org/sites/default/files/Liebig_and_Mo_2013.pdf>. See also KING and LULLE, “Research on Migration. Facing Realities and Maximizing Opportunities. A Policy Review”, European Commission Research and Innovation Paper of June 2016, available at: <https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/ki-04-15-841_en_n.pdf>.

and inclusive society”¹⁸. Regular migrants’ integration is seen as a two-ways process of accommodation, whereby both the third-country nationals and host societies can benefit from the social and economic inclusion of incomers. Despite the absence of a clear definition of the concept of integration, a minimum common denominator is represented by the enhancement of the opportunities of removing material and immaterial barriers to access to labour market and essential public services in the host State. Such minimum goal is in fact a necessary pre-condition of the full enjoyment of fundamental individual rights and for a gradual increase of the – personal and collective – quality of life. This is precisely the meaning of integration this paper builds upon, since the fulfillment of basic integration requirements can prove essential to foster social and economic development.

In the complex European scenario, EU and national integration policies are deeply intertwined but often lock swords and pursue different goals. The European legal order promotes a positive attitude towards integration issues, whereas the Member States often perceive them as “managerial” tools for the selection of migrants deserving a chance. This background has favoured the gradual emergence of various forms of integration conditionality, both in national legislations and EU secondary law. Language and civic education exams, job training and residence conditions are the most common examples. At first sight, these measures are intended to endow the migrants with the necessary tools for a successful integration process. However, the failure to fulfill such integration requirements may result in a restriction of the rights provided by either EU or national law, such as family reunification or certain social assistance benefits. Therefore, the coherence of these conditions with the objective of facilitating regular migrant integration is often questionable, as well as their compatibility with the general principles of non-discrimination and proportionality.

In this context, this paper analyses the European Union’s approach to integration challenges regarding regular migrants and to integration conditionality, in particular. The next paragraph focuses on the role the EU is entitled to play in this domain and the objectives it pursues, in light of the vertical division of competences with the Member States. Paragraph 3 analyses European policy initiatives and soft-law instruments concerning integration requirements, while paragraph 4 considers hard-law conditionality measures and Court of Justice case law concerning

¹⁸ Communication [COM(2016) 377 final], *cit. supra* note 10, p. 2.

their interpretation. Lastly, paragraph 5 analyses to what extent integration policies can be qualified as an overriding reason in the public interest, capable of justifying derogations from EU law.

The paper supports the view that integration conditionality is an effective tool for fostering social cohesion and economic development. However, the resort to conditionality measures must be carefully assessed in light of the objectives pursued by the Treaties and EU legal order general principles. In fact, conditionality must not amount to a leeway allowing for forms of control over (and selection of) migration flows.

2. – Integration Policies and the Vertical Division of Competences: EU and Member States Locking Swords

Migration policy is a domain of shared competence between the EU and the Member States. However, the EU has gradually expanded its influence over time, so that limited aspects of this field are now left to national sovereignty¹⁹. Integration policy can be listed among these sectors, since the Member States have always tried to maintain a prominent role. Even before the Maastricht Treaty, the Court of Justice ruled out any attempt by the Community to encroach on this Member States' secret garden. In *Germany and others v. Commission*²⁰, the Court acknowledged that EC labour and social policies could have a spillover effect on the legal regime of third-country nationals, concerning their approach to the employment market and working conditions. However, it pointed out their "extremely tenuous" link with integration²¹ and the Community was prevented from adopting any binding rule in this domain.

On the occasion of the 1997 Amsterdam reform of the Treaties, the Commission urged the States to endow the EC with greater powers. It deemed integration issues a necessary complement of the rising EC migration policy. The negotiations

¹⁹ For instance, the granting and withdrawing of the national citizenship is left to the Member States. However, these competences have to be exercised paying due respect for the general principles of the EU legal order and ensuring the full effectiveness of the rights deriving from the EU citizenship, which the Court describes as the fundamental status of the individual in the EU. Case C-135/08, *Rottmann*, ECR, 2010, I-1449, paras. 43-46.

²⁰ Joined Cases 281/85, 283/85, 285/85 and 287/85, *Germany and others v. Commission*, ECR, 1987, 3203, para. 22.

²¹ See *Germany and others v. Commission*, *cit. supra*, note 20, paras. 23-24.

apparently dismissed the Commission's expectations. In fact, Article 63(3) of the Treaty establishing the European Community ("TEC") limited the Community's competence on regular migration to the adoption of directives concerning the conditions of entry and residence in the Member States. However, paragraph 4 further provided that these measures could not "prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements". These nebulous clauses were soon subject to diverging interpretations. On one hand, they were considered wide enough to enable the EU to adopt secondary acts concerning social and economic integration of regular migrants. On the other hand, they were seen as keys locking the Member States' exclusive competence on integration policies²².

The uncertainty caused by the "opposing driving forces underlying migration policy"²³ led to a solution of compromise. In light of these legal bases, the Community adopted a series of secondary acts concerning regular migration, which list third-country nationals' integration into host societies among their main objectives²⁴. Integration of third-country nationals regularly residing in the Member States is deemed a key element in promoting economic development and social cohesion, which are further fundamental objectives of the EU²⁵. On the other hand, the States prevented the Community from adopting binding rules specifically and solely focused on integration policy. Since Article 63 TEC did not make any reference to this domain, any Community initiative would have breached the principle of conferral of competences.

The wording of the Treaty left many questions unanswered. Therefore, the Member States took the opportunity of the Lisbon Treaty negotiations to call for a more precise codification of the limits imposed to the intervention of the EU²⁶.

²² GEDDES, *Immigration and European Integration. Beyond Fortress Europe?*, Manchester, 2008, p. 178.

²³ CORNELISSE, "What's wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders", *Community Market Law Review*, 2015, p. 741 ff.

²⁴ See for instance Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3 October 2003, p. 251, recitals 3 and 4. This fundamental purpose has been acknowledged by the Court of Justice as well. See Case C-502/10, *Singh*, ECR, 2012, I-636, para. 45.

²⁵ Art. 3 of the Treaty on the European Union ("TEU").

²⁶ This trend also applies to other competences of the EU. The importance given to the principle of conferral of competences by the Member States during the negotiations of the Lisbon has been described as an "obsession". See ROSSI, "Does the Lisbon Treaty Provide a Clearer Separation of Competences Between EU and Member States?", in BIONDI, ECKOUT and RIPLEY (eds.), *The EU Law after Lisbon*, Ox-

Former Article 63 TEC underwent a significant reform and became Article 79 of the Treaty on the Functioning of the European Union (“TFEU”), which is currently the main legal basis for any European initiative concerning regular and irregular migration. Paragraph 4 now directly refers to integration, as it allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to “establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonization of the laws and regulations of the Member States”²⁷. It follows that integration policy is an example of complementary competence, in light of Article 6 TFEU. This means that the EU is entitled to support, coordinate or supplement the actions of the Member States, but it can neither impose the direction of national policy choices nor modify existing national legislations²⁸.

Consequently, the Member States develop their own integration policies and the legal scenario is highly fragmented²⁹. This is a major problem, since the challenge of integration exceeds national borders and is common to all Member States. Different approaches to a common concern can hamper the effectiveness of national policies. Moreover, as integration is one of the objectives of EU migration policy and is closely connected to further aims pursued by the Treaties, the full effectiveness of European law is at stake as well³⁰.

These are the reasons why, despite locking swords on the text of the relevant primary legal bases, Member States and the EU have committed themselves to developing coherent strategies on the subject. In 1999, the Tampere European Council led to the launch of the first multiannual programme on a comprehensive approach to the Area of Freedom, Security and Justice³¹. With a view to paving the

ford, 2012, p. 85; CRAIG, “Competence: Clarity, Conferral, Containment and Consideration”, *ELR*, 2004, p. 333.

²⁷ Another Treaty provision of a certain – indirect but remarkable – importance for the integration of third country nationals is Art. 19(2) TFEU, according to which the European legislators can adopt measures to support national efforts to counter sex, racial, ethnical and religious discriminations.

²⁸ SCHÜTZE, *An Introduction to European Law*, Cambridge, 2012, p. 82.

²⁹ PAPADOPOULOS, “Immigration and the variety of migrant integration regimes in the European Union”, in CARMEL, CERAMI and PAPADOPOULOS (eds.), *cit. supra* note 11, p. 23 ff.

³⁰ PORCHIA, “L’effettività del diritto dell’Unione tra tutela del singolo e salvaguardia dell’ordinamento”, in LEANZA et al. (eds.), *Scritti in onore di Giuseppe Tesaurò*, Napoli, 2014, p. 2311 ff.

³¹ Tampere European Council of 15-16 October 1999, Presidency Conclusions, SN 200/99.

way for a European policy on immigration and integration, the European Council identified four main priorities. The so-called Tampere milestones included: the extension of the scope of application the principle of equality to regular non-EU migrants; the development of a more vigorous integration policy for third country nationals; the establishment of a status as near as possible to EU citizenship for long-term residents; the approximation of national legislation concerning the conditions for admission and residence.

The programme received wide support across the political arena and civil society, but its implementation soon proved to be difficult, due to the opposition of some Member States³². In order to avoid intergovernmental stumbling blocks, a twofold strategy was agreed. First, the coordination of national integration policies would have been ensured by a series of soft-law instruments supervised by the Commission. In parallel, the Council was asked to adopt binding rules concerning the legal regime of regular migrants, taking the Tampere milestones into due account.

3. – Integration of Regular Migrants and EU Soft-Law and Policy Initiatives: Between Incentives and Conditionality

In 2002, the Justice and Home Affairs (“JHA”) Council urged the national authorities to improve the exchange of information and identify best practices, thereby allowing for future cross-fertilization of national legal orders. That spur represented the first step of an EU framework on integration, a comprehensive set of policy initiatives and soft-law instruments³³ coordinated and monitored by the Commission³⁴. The first output was the establishment of a network of national contact points, tasked with the duties to promote information exchange and disseminate best practices³⁵. The discussion platform for EU integration policies has been

³² Reservations on the outcomes of the Tampere Programme were limited to the undemocratic nature of the related decision-making processes, which were to a large extent inspired by an intergovernmental approach. See BUNYAN, “The Story of Tampere: an Undemocratic Process Excluding Civil Society”, available at: <<http://www.statewatch.org/news/2008/aug/tampere.pdf>>.

³³ Scholars have highlighted the innovative model of governance the framework is based on. It has been described as a quasi-Open Method of Coordination. CARRERA, “Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion”, in AZOULAI and DE VRIES (eds.), *EU Migration Law. Legal Complexities and Political Rationale*, Oxford, 2014, p. 149 ff., p. 161.

³⁴ PAPAGIANNI, *Institutional and Policy Dynamics of EU Migration Law*, Leiden-Boston, 2006, pp. 176-180.

³⁵ The meetings of the network are chaired by the Commission and national representatives are se-

widely criticized, due to the lack of a true political commitment on the part of the Member States³⁶. Civil society organizations have represented the silent engine of the network, so far. In particular, they have played a key role in the preparation and drafting of the Handbook on integration for policy makers and practitioners³⁷. The Handbook gathers studies, best practices and national legal solutions to the challenge of integrating third country nationals. In the same vein, the Commission has set up a European integration forum and a European website on integration, both aimed at strengthening the network between the various actors, such as civil society organizations, national experts, ministries and NGOs³⁸.

The 2004 Hague Program, the second multiannual program for the AFSJ, called for a clearer definition of the principles guiding the European agenda on integration. In response to this request, the JHA Council of 19 November 2004 unanimously adopted the Common Basic Principles for Immigrant Integration Policy³⁹, non-binding guidelines intended to orient Member States policies⁴⁰. According to the Basic Principles, integration is a two-way process of accommodation, which requires the engagement of both the host society and the migrant. Education and employment are among the key aspects of the integration process, as they make the migrants' contribution to the host society visible and facilitate access to public institutions and interaction with EU citizens. The Basic Principles also pay close attention to conditionality of integration, as a means of facilitating social inclusion.

lected by each Member State, including UK, Denmark and Ireland. Norway participates in the capacity of observer.

³⁶ BLOCK and BONJOUR, "Fortress Europe or Europe of rights? The Europeanisation of family integration policies in France, Germany and the Netherlands", *European Journal of Migration and Law*, 2013, p. 203 ff.

³⁷ European Commission, Directorate General Justice, Freedom and Security, Handbook on Integration for Policy-Makers and Practitioners, available at: <http://ec.europa.eu/dgs/home-affairs/e-library/docs/handbook_integration/doc1_12892_168517401_en.pdf>.

³⁸ The website on integration is: <<https://ec.europa.eu/migrant-integration>>.

³⁹ The text of the Principles is available at: <http://www.eesc.europa.eu/resources/docs/common-basic-principles_en.pdf>.

⁴⁰ It is important to remark that the EU has also planned specific financial support in favour of national integration policies. See, for instance, Council Decision 2007/435/EC of 25 June 2007, establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the general programme "Solidarity and management of migration flows", OJ L 168 of 28 June 2007, p. 18. See also the Commission's Communication on the results achieved and on qualitative and quantitative aspects of implementation of the European Fund for the Integration of third-country nationals for the period 2007-2009 [COM(2011) 847 final], 5 December 2011.

In fact, Principle 2 points out that integration implies respecting the EU's basic values⁴¹. Moreover, Principle 4 clarifies that "basic knowledge of the host society's language, history, and institutions is indispensable to integration" and that "enabling immigrants to acquire this basic knowledge is essential to successful integration"⁴². In particular, according to Principle 9, this basic knowledge allows migrants to take an active part in the democratic and decision-making processes at local level, thereby influencing the direction of integration policies⁴³.

Conditionality of integration is, therefore, a major concern in the process of mutual accommodation, as it is intended to provide migrants with the necessary tools for easier interaction in the host society. Its importance was confirmed by the first integration agenda of 2005⁴⁴, where the Commission acknowledged that integration conditionality takes various shapes at national level and is often represented by language and civic education exams. From this point of view, the agenda emphasized two innovative aspects. First, the Commission underlined the essential role of the host country, required to make every necessary effort to encourage and support the third-country nationals' integration. In particular, national authorities were urged to arrange and disseminate training materials and organize language and civic education courses, even in the migrants' countries of origin, so as to fill the "knowledge divide" that migrants often suffer from. Secondly, and interestingly, the Commission highlighted that civic integration exams should also include questions on the foundations of the European Union and the integration process.

The 2009-2014 Stockholm Program once again listed integration among the priorities of EU migration policy, with a view to strengthening the chances of so-

⁴¹ This is particularly interesting, since Art. 2 TEU clarifies the main values the EU is founded on: the process of integration must take into due account the values shared by the Member States at European level.

⁴² The Basic Principles also build on the Presidency Conclusions of the Thessaloniki European Council of 19 and 20 June 2003. See, in particular, para. 28: "The European Council deems it necessary to elaborate a comprehensive and multidimensional policy on the integration of legally residing third country nationals who, according to and in order to implement the conclusions of the European Council of Tampere, should be granted rights and obligations comparable to those of EU citizens".

⁴³ BONJOUR and VINK, "When Europeanisation backfires: the normalisation of European migration policies", *Acta Politica*, 2013, p. 389 ff.

⁴⁴ Communication from the Commission – "A common agenda for integration. Framework for the integration of third-country nationals in the European Union", [COM(2005) 389 final], 1 September 2005.

cial inclusion of regular migrants and enhance public security⁴⁵. In this context, the Commission proposed the preparation of European modules for migrant integration, a set of “building blocks” which Member States may draw upon when planning their own integration policies⁴⁶. In fact, the modules collect experiences at national level and identify joint practices on the main aspects of the integration process. They provide national authorities with quality standards and negotiated recommendations based on existing evidence of the best approaches. From this point of view, specific attention is paid to the indicators, targets and best practices concerning language or civic education courses and exams. In fact, Module 1 stresses that basic knowledge of the receiving society’s language, history and institutions is indispensable to integration⁴⁷.

Lastly, following the current massive inflows of migrants and the challenges brought by resettlement of refugee programmes, the Commission has recently issued a new action plan concerning the integration of third-country nationals⁴⁸. Since providing support to migrants at the earliest stage possible paves the way for successful integration, the Commission calls for increased attention for pre-departure and pre-arrival measures, involving both migrants and receiving societies. In this vein, language and job-related training are deemed a priority, as they facilitate access to better job opportunities. Moreover, the action plan underlines the long-term benefits for both migrants and receiving societies of the acquisition of language skills, which enhances migrants’ autonomy in contemporary complex societies⁴⁹. In the Commission’s view, investments on early integration measures are a powerful lever with a positive impact in the long run, in terms of increased social cohesion and economic development.

⁴⁵ Council of the European Union, Stockholm Programme of 3 March 2010, an open and secure Europe serving and protecting citizens.

⁴⁶ The final report was published in April 2014 and is available at: <<https://ec.europa.eu/migrant-integration/index.cfm?action=media.download&uuid=FC5F04DC-E798-1B57-7A5A978B8370D5AF>>.

⁴⁷ The final report on the modules was adopted on 3 April 2014 and can be downloaded via the EU website on integration at: <<https://ec.europa.eu/migrant-integration/librarydoc/european-modules-on-migrant-integration---final-report>>.

⁴⁸ Communication [COM(2016) 377 final], *cit. supra* note 10.

⁴⁹ This reflects the sociological theories on the daily challenges that the members of modern and complex societies are confronted with, in terms of democratic participation, awareness of rights and duties, knowledge of the functioning of a social system. The migrants themselves contribute to increase the complexity of host societies. GSIR, “Social Interactions between Immigrants and Host Country Populations: a Country of Origin Perspective”, INTERACT Research Report 2014/2, available at: <http://cadmus.eui.eu/bitstream/handle/1814/31243/INTERACT_RR_2014_02.pdf?sequence=1>.

4. – Integration Conditionality in EU Secondary Law: Fostering Social Cohesion or Immigration Control?

4.1. The Objectives of EU Secondary Law on Regular Migration and the Clauses on Integration Conditionality

The second aspect of the strategy designed by the Tampere Programme was focused on the adoption of common rules regarding the legal regime of regular migrants. The implementation of the Tampere political mandate encountered many obstacles, as the lack of political will was coupled by the need to reach unanimity within the Council. In particular, due to the opposition of some Member States, the Commission was forced to withdraw its 2001 proposal for a Directive on the conditions of entry and residence for paid and self-employed migrant workers⁵⁰. Other proposed Directives also underwent exhausting negotiations⁵¹. The efforts made led to the adoption of a set of important secondary acts on various categories of regular migrants, such as Directive 2003/109/EC on long-term residents, Directive 2003/86/EC on family reunification, Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service and Directive 2009/50/EC on highly-qualified employment.

As a whole, these acts acknowledge the strategic importance of regular migration for the social and economic development of the EU and share the objective of helping them settle in the EU. Directive 2003/109/EC also provides that long-term residents should enjoy equality of treatment with Member State citizens in a wide range of economic and social matters, as “a genuine instrument for integration”⁵². Accordingly, Directive 2003/86/EC states that family reunification “helps to create sociocultural stability”, facilitating the integration of third country nationals and thereby promoting economic and social cohesion⁵³.

⁵⁰ Communication from the Commission concerning a proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, [COM(2001)386 final], 11 July 2001.

⁵¹ For instance, Directive 2003/109/EC on long-term residents and Directive 2003/86/EC on family reunification were eventually adopted after respectively five and four years of harsh and non-transparent debates within the Council.

⁵² Directive 2003/109/EC, *cit. supra*, note 12, recital 12. See also Case C-571/10, *Kamberaj*, ECR, 2012, I-233.

⁵³ See in particular recital 4.

The wording of these Directives, however, reflects the Member States' primary role in integration policies. In fact, besides general clauses on their objectives, they address integration of regular migrants from the perspective of conditionality. Following a joint proposal put forward by Germany, Austria and the Netherlands, they include provisions allowing Member States to impose a duty of integration on migrants. In light of Article 5(2) of the long-term residents Directive, Member States may require third-country nationals to comply with "integration conditions", in accordance with national law. Likewise, Article 15, concerning the conditions for residence in another Member State, allows national authorities to require them to comply with integration measures. These further requirements are not necessary if the migrants have already complied with integration conditions under Article 5(2) in another Member State. In the same vein, Article 7(2) of the 2003/86/EC Directive stipulates that Member States may require third-country nationals wanting to exercise their right to family reunification to comply with integration measures, in accordance with national law⁵⁴. A specific regime is awarded to refugees, beneficiaries of subsidiary protection⁵⁵ and their family members, to whom integration measures may only be applied once the person concerned has been granted family reunification⁵⁶. The same favourable condition for family reunification applies to family members of highly qualified migrants and migrants residing in the EU in the framework of intra-corporate transfers⁵⁷.

⁵⁴ Another provision has to be mentioned, for the sake of completeness: Art. 4, in fact, states that "where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation at the date of the implementation of this Directive". This provision has lost its importance, since it merely allowed Member States to introduce this exception until the expiration of the deadline for the implementation of the Directive. Not a single Member State implemented this provision, which has then to be considered *a contrario* an express prohibition to impose integration conditions to minors.

⁵⁵ In light of Art. 33 of Directive 2011/95, beneficiaries of subsidiary protection should in principle benefit from the same regime as refugees.

⁵⁶ See Art. 7(2), last sentence, of Directive 2003/86/EC.

⁵⁷ See respectively Art. 15(3) of the Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, in OJ L 155 of 18 June 2009, p. 17, and Art. 19(3) of the Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, in OJ L 157 of 27 May 2014, p. 1.

4.2. – Integration Conditions and Measures: the Risk of Deviating from the Objective of Facilitating Integration

The Directives introduce a *summa divisio* between conditions and measures of integration. At first sight, such conditions and measures seem to be intended to assess migrants' capability or willingness to comply with pre-determined integration standards. However, a deeper analysis of the legal implications of a failure to fulfill the requirements is needed. In particular, it has to be clarified whether such failure could restrict the rights conferred by EU law, precluding family reunification or the acquisition of the status of long-term residents. Such consequences would be regrettable, because one of the main purposes of the Directives under consideration is to reinforce regular migrants' chances of social and economic integration. Since these forms of conditionality can result in a stumbling block to integration, they can deprive the Directives of their effectiveness. At the same time, this is a domain of exclusive national competence. Even though Member States are required to respect the general principles of the EU legal order, they are also entitled to follow their own objectives and political priorities.

Scholars have warned of the risks of unilateral deviations of integration policies that are of exclusive benefit to the Member States⁵⁸. In fact, according to part of legal literature, this normative approach highlights an evident shift in the notion of integration⁵⁹. In the 1970s, the promotion of social and economic inclusion was conceived as a means to enhance mobility through the Member States. The guarantee of equal treatment in the host State, the respect of the right to family life and stringent limits to repatriation were intended to boost social inclusion. Integration in turn ensured the effectiveness of the free movement of persons, which is an essential component of the internal market and one of the Treaties' primary objectives. It was therefore conceived in a positive – and not “impositive” – perspective, since it represented the natural complement to the legal regime provided for EU workers, later on extended to all EU citizens.

Integration clauses provided by EU secondary law on regular migration serve the

⁵⁸ CAGGIANO, “L'integrazione dei migranti fra *soft-law* e atti legislativi: competenze dell'Unione europea e politiche nazionali”, in ID. (ed.), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, 2015, p. 27 ff., p. 38.

⁵⁹ CARRERA, *In Search of the Perfect Citizen? The Intersection between Immigration, Integration and Citizenship in the EU*, Leiden/Boston, 2009, pp. 166-195.

opposite purpose, which is to allow Member States to maintain a certain margin of control over migration flows⁶⁰. From this point of view, one of their main objectives is to enable forms of selection of third-country nationals, based on the assessment of their chances of integration in the host society⁶¹. The Member States' unconcealed ambitions of control and security show the identitarian side of integration measures and conditions⁶² and the risk of “managerial effects”⁶³ on incoming regular migrants.

These concerns are further fuelled by the fact that none of the Directives in question provides a clear definition of the concepts of integration conditions and measures. Wide and fuzzy notions amplify the national authorities' discretionary powers and the heterogeneity of internal implementation laws, to the detriment of a coherent approach to integration policies⁶⁴. This is why the Commission, through the afore-mentioned soft-law instruments, has tried to orient Member States' initiatives on this subject.

4.3. *Meaning and Implications of Integration Conditions and Measures*

Scholars have proposed a wide range of interpretations of the integration clauses. According to a minority opinion, they merely confirm the vertical distribution of powers between the EU and Member States. Consequently, they are pleonastic and devoid of effects⁶⁵. However, this approach does not take into account that EU secondary law has to be read in accordance with the *effet utile* doctrine⁶⁶. Moreover, national laws implementing the clauses must be carefully scrutinized in light of the general principles of the EU legal order⁶⁷, so as to avoid undue deviations from EU law objectives.

⁶⁰ CARRERA, *cit. supra* note 33, p. 154.

⁶¹ JESSE, “Integration Measures, Integration Exams and Immigration Control: *P and S and K and A*”, CMLR, 2016, 1065.

⁶² JOPPKE and MORAWSKA (eds.), *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*, Basingstoke, 2003; BAUBÖCK et al. (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries*, Amsterdam, 2006.

⁶³ KOSTAKOPOULOU, CARRERA and JESSE, “Doing and Deserving: Competing Frames of Integration in the EU”, in GUILD, GROENENDIJK and CARRERA (eds.), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Burlington, 2009, p. 167.

⁶⁴ See in general KRÁL, “On the Choice of Method of Transposition of EU Directives”, ELR, 2016, p. 220.

⁶⁵ CAGGIANO, *cit. supra*, note 58, p. 54.

⁶⁶ See for instance case C-329/11, *Achughbabian*, ECR, 2011, ECLI:EU:C:2011:807, para. 33.

⁶⁷ Case C-438/05, *Finnish Seamen's Union v. Viking*, ECR, 2007, ECLI:EU:C:2007:772.

A second view builds on the dividing line between conditions and measures⁶⁸. Only conditions are deemed to introduce compulsory criteria, so a failure to comply with them can preclude enjoying the rights conferred by the Directives. It also entitles national authorities to exercise their sanctioning powers, for instance by imposing a pecuniary sanction on the migrant concerned. Integration measures, on the other hand, would represent an incentive for the migrants' direct and active involvement in their social integration process. As such, neither binding obligations stem from them, nor the Member States could sanction their violation.

The meaning of integration conditions and measures became a matter of analysis for Advocates General and the Court of Justice in a series of cases concerning the compatibility of certain national integration exams with EU law. According to Advocate General Szpunar in *P and S*, integration measures are not additional mandatory criteria imposed on third-country nationals, but tools to enhance their chances of integration⁶⁹. Nevertheless, this does not exclude the possibility of imposing a penalty in the form of a fine on a person who "persistently refuses to fulfill the obligations imposed ... as part of integration measures"⁷⁰. In his opinion in *Dogan*⁷¹, Advocate General Mengozzi upheld this approach, although reaching different conclusions. The *summa divisio* between conditions and measures is formally correct, but has no practical effects, since the latter notion is broad enough to encompass "obligations to reach a result"⁷². Lastly, in *K and A*⁷³, Advocate General Kokott expressed the view that the words "condition" under Article 5 of Directive 2003/109/EC and "measure" provided in Article 7 of Directive 2003/86/EC actual-

⁶⁸ GROENENDIJK, "Legal Concepts of Integration in EU Migration Law", *European Journal of Migration and Law*, 2004, p. 111. The author underlines that conditionality has turned the rationale of integration upside down. Rights are not tools for integration, rather rewards for the fulfillment of integration conditions and measures.

⁶⁹ Opinion of Advocate General Szpunar delivered on 28 January 2015, Case C-579/13, *P and S*.

⁷⁰ *Ibid.*, para. 104. In any case, these sanctions must be proportional to the offence and also take account of the reasons why such action is considered undesirable.

⁷¹ Opinion of Advocate General Mengozzi delivered on 30 April 2014.

⁷² *Ibid.*, para. 56. The Advocate General refers to Art. 7(2) of the Directive 2003/86/EC, but his reasoning appears to apply to the notion of integration measure *per se*. The Court found that there was no need to answer to the preliminary questions directly regarding the compatibility with this Directive of integration tests imposed in Germany (Case C-138/13, *Dogan*, 10 July 2014). For a note on the judgment see BRIBOSIA and GANTY, "Arrêt *Dogan*: quelle légalité pour les tests d'intégration civique?", *Journal de droit européen*, 2014, p. 378.

⁷³ Opinion of Advocate General Kokott delivered on 19 March 2015, Case C-153/14, *K and A*.

ly share the same meaning. In fact, the distinction between the two concepts in Directive 2003/109/EC is due to the fact that the migrants involved can move freely within the EU. Then, it only aims at ensuring that long-term residents, who have already satisfied an integration condition in one Member State, are not required to take further integration tests in another Member State. The family reunification Directive concerns first entry of family members into the EU and the measures are listed among the requirements for family reunification. The Member States are entitled to verify whether these criteria for the exercise of the right to family reunification have been satisfactorily complied with. According to Advocate General Kokott, this means that the notion of measure, for the purposes of the 2003/86/EC Directive, has to be interpreted autonomously and is close to the concept of condition provided by Article 5 of Directive 2003/109/EC. Consequently, it allows national authorities to impose compulsory integration requirements as a pre-condition for family reunification. It follows, as a rule, that the migrant can be required to fulfill an integration measure in advance, before entry into the territory of the host Member State. This is confirmed by reading *a contrario* Article 7(2), which rules out integration prior to family reunification only for refugees. In practice, the destination Member State can make family reunification dependent upon the fulfillment of certain requirements, such as the successful completion of language and civic education exams, which the migrant can be required to take in the country of origin⁷⁴.

4.4. – The Court of Justice and the Criteria for the Compatibility of Integration Conditions and Measures with EU Law

Placed between autonomous interpretation and the Directives' objective of fostering inclusion, the notions of condition and measure of integration can have a significantly adverse impact on the individuals concerned. Therefore, the Court of Justice has been asked to strike a balance between the restrictions to the rights conferred by the Directives and the need to support a positive attitude towards integration policies.

In its recent case law, the Court has endorsed the view expressed by Advocate

⁷⁴ According to some authors, this is not only due to the wording of Art. 79(4) TFEU. National civic integration exams could be considered a specific implication of the protection of national identities, enshrined in Art. 4(2) TEU. ORGAD, *The Cultural Defence of Nations. A Liberal Theory of Majority Rights*, Oxford, 2015, p. 3.

General Kokott: the conditions under Article 5 of 2003/109/EC Directive and the measures mentioned in Article 7 of the family reunification Directive have similar meanings and effects. Both clauses actually permit the Member States to require third-country nationals to comply with integration criteria imposed by national laws⁷⁵. This applies in particular to integration tests. According to the Court, acquiring basic knowledge of the language and social organization is “undeniably useful for establishing connections with the host Member State”⁷⁶. It facilitates relations with the host Member State’s nationals and encourages the development of social networks, whereby favouring access to vocational training opportunities and the labour market⁷⁷. Therefore, the Directives allow national authorities to make the issue of a long-term residence or entry permit for family reunification contingent upon the fulfillment of predetermined integration criteria.

However, the discretionary powers reserved to national authorities is not unlimited. The Court has underlined elsewhere that, as a general rule, the exercise of national competences cannot obstruct the effectiveness of the EU regime on regular migration⁷⁸. Therefore, the conditions and measures of integration are compatible with EU law only if they contribute to enhancing the chances of integration of third-country nationals permanently settled in Europe. Their content, nature and practical implementation have to be oriented to this fundamental concern.

It follows that national laws implementing the Directives must primarily tend to the issue of the long-term resident permit and the authorization of family reunification. Any deviations from this major objective, including those deriving from a failure to fulfill integration conditions or measures, must be interpreted narrowly and strictly.

⁷⁵ This statement draws a dividing line between the EU citizens’ regime for the issue of a permanent residence permit and the rules on the long-term residence permit. According to the case law of the Court, the former cannot be subject to integration requirements, while the latter can be conditioned. From this point of view, therefore, long-term residents are not granted the same treatment as EU citizens. Joined Cases C-424/10 and C-425/10, *Ziolkowski and Szeja*, ECR, 2011, I-14035.

⁷⁶ Case C-153/14, *K and A*, 9 July 2015, para. 54.

⁷⁷ The Court of Justice uses the concept of integration of a person in a host Member States in various subjects, trying to follow a coherent approach. See for instance the case law concerning the execution of a European arrest warrant, namely case Case C-42/11, *Lopes da Silva*, 5 September 2012, para. 58, where the Court lists family, economic and social connections among the criteria for assessing the degree of integration of an individual.

⁷⁸ Case C-578/08, *Chakroun*, ECR, 2010, I-1839, para. 43. The judgment refers to the family reunification Directive, but the reasoning of the Court can be extended to the whole domain of regular migration.

Second, integration requirements must comply with the principle of proportionality. It means that they must be limited to what is strictly necessary and adequate in light of the objective of facilitating the start of a long integration process. As far as integration exams are concerned, the tests cannot be too selective, as they must only verify the basics of the language and civic education of the host country. This is particularly important in the event of pre-departure exams, which the Court considers *per se* compatible with EU law. In such cases, which primarily affect migrants seeking family reunification, the proportionality test on exam contents and the methods used to evaluate the third-country nationals' knowledge should be particularly stringent. It is in fact almost contradictory to require migrants to fulfill an integration requirement before they arrive in the host society⁷⁹. A contradiction that the UN Committee on the Elimination of Racial Discrimination has recently criticised, in a report focused on the Dutch integration policy⁸⁰. A similar concern was expressed by the European Committee of Social Rights, according to which the German legal order unduly obstructs family reunification – and therefore breaches Article 19(6) of the European Social Charter – by making reunification conditional upon documented evidence of sufficient German linguistic skills⁸¹.

Third, integration requirements cannot be absolute. A failure to pass a test cannot automatically prevent the enjoyment of the rights conferred by the EU legal order, especially where the migrants have made every effort to achieve this objective. By the same token, the fulfillment of integration criteria must be assessed on a case-by-case basis, taking into due account the case's circumstances and each migrant's personal situation⁸². Consequently, national legislations must include exemptions from the duty of integration – the so-called hardship clauses – where the migrant's situation makes complying with these requirements either impossible or excessively difficult⁸³. From

⁷⁹ The need for a stricter proportionality test also derives from the fact that at the time the Directive 2003/86/EC was adopted and implemented at national level the Charter of Fundamental Rights of the EU had no binding value, while nowadays its provisions – and in particular Art. 7 on the right to family life – are to be considered EU primary law.

⁸⁰ Report of the UN Committee on the Elimination of Racial Discrimination, Sixty-Fifth Session, 31 October 2013, Supplement No. 18 (A/65/18).

⁸¹ European Social Charter Committee Report, 13 February 2013, Concerning Conclusions XIX-4 (2011) of the 1961 European Social Charter, p. 80.

⁸² The individual approach is also urged, for instance, by Art. 17 of the family reunification Directive.

⁸³ Case C-155/11 PPU, *Imran*, ECR, 2011, I-5095.

this point of view, Member States have to take into consideration factors such as mental or physical disabilities, severe diseases, education and training levels, illiteracy, different cultural background of the third country of origin, age.

Conversely, the Member States must make any necessary effort to guide migrants towards successful completion of their integration process. Therefore, the case law of the Court confirms that national authorities have to arrange preparatory courses and materials, including in the migrant's mother tongue. These training opportunities and the examinations themselves must also be easily accessible, in practical and financial terms. For instance, the Court has censured the courses and examination fees in the Netherlands as they were considered to be an excessive obstacle to the enjoyment of the rights provided by Directives 2003/109/EC and 2003/86/EC⁸⁴.

5. – Integration Policies as an Overriding Reason in the Public Interest Justifying Derogations from EU Law

As seen in the previous paragraphs, integration conditionality measures included in EU secondary acts are comparable to Trojan horses through which the Member States have tried to preserve wide margins of discretion and control on regular migration. However, they are not the unique source of limits to the rights granted by EU law. In fact, since integration policy falls under the competence of Member States, national authorities are entitled to introduce forms of integration conditionality additional to those referred to in EU secondary law.

From a negative perspective, they can make the enjoyment of a certain right conditional upon fulfilling a certain integration requirement. In such cases, measures and conditions facilitating integration are only means to pursuing further goals, such as an effective organization of the welfare system or rationalization of managing public

⁸⁴ It is worth underlining that in the *P and S* judgment also the financial sanction imposed to the third-country nationals concerned was considered manifestly disproportionate. Its amount was considered an excessive burden placed on the migrants and an obstacle to the successful completion of the test. From this point of view, the Court has built on its case law on the costs for the issue of resident permits for third-country nationals. It had in fact already found excessive amounts to be evidently disproportioned if compared to the burdens imposed to EU citizens for the issue of similar documents. See Case C-508/10, *Commission v. The Netherlands*, 26 April 2012. It has to be pointed out that, in the aftermath of the judgment in *K and A* (*cit. supra* note 76), the Dutch Government has considerably lowered down the fees for integration exams and preparation materials.

finances. From a positive point of view, Member States can also justify a derogation from EU law with the need to enhance the chances of integration of regular migrants residing there. Integration becomes the main objective of national policy choices, on the basis of which a Member State can even try to justify a deviation from the obligations imposed by the European legal order. Practices at national and local levels cover a wide range of situations, including residence conditions, a stay of a certain duration or demonstration of close personal ties. Whatever the case, integration conditionality once again exceeds the merely individual dimension and can have a remarkable systemic impact at social and legal levels.

In this respect, the Court of Justice has recently acknowledged that the objective of ensuring successful integration of third-country nationals in a Member State may constitute an overriding reason in the public interest⁸⁵. This is a duty that the Court has paid to the vertical division of competences between the European Union and Member States. In fact, it implies that national authorities can expect to invoke the achievement of such objective as a justification for a failure to comply with EU law. Of course, they have to respect the general principles of the EU legal order and their conduct must be proportionate and suitable to the objective pursued⁸⁶. However, this is further demonstration of the influence of integration conditionality on the effectiveness of migration policy as a whole. In fact, the Court provides national authorities with incentives to resort to such fundamental aims not only as a source of duties to migrants, but also and as a way out of obligations stemming from the European legal order.

For this reason, the Court has once again tried to set out appropriate boundaries to the Member States' discretionary power. In *Alo and Osso*⁸⁷, for instance, the Court was asked to establish whether a residence condition imposed by a German law on beneficiaries of subsidiary protection recipients of social assistance is compatible with Directive 2011/95/EU⁸⁸. Theoretically, the imposition of a condition of residence amounts to a violation of the freedom of movement. The freedom to

⁸⁵ Case C-561/14, *Genc*, 12 April 2016, paras. 55-56.

⁸⁶ In general, Case 120/78, *Rewe Zentral (Cassis de Dijon)*, ECR, 1979, 649.

⁸⁷ Joined Cases C-443/14 and C-444/14, *Alo and Osso*, 1 March 2016.

⁸⁸ Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337 of 20 December 2011, p. 9.

choose one's place of residence is in fact a corollary of a fundamental pillar of the EU legal order⁸⁹, which is in turn an indispensable condition for the free development of a person⁹⁰. From this point of view, the Court stressed the importance of the principle of equality⁹¹. As a matter of fact, in light of Article 33 of the Directive, beneficiaries of subsidiary protection cannot in principle be subject to more restrictive rules than those applicable to refugees and other categories of regular migrants. If the situation of a beneficiary of subsidiary protection is objectively comparable to that of other legally resident third-country nationals, as the objective of a full integration is concerned, the Member State must ensure the same treatment. Otherwise, a residence condition represents *per se* a justified restriction to the freedom of movement, as long as it is justified by the need to facilitate social inclusion in the host Member State.

As for integration exams, national judicial authorities are entrusted with a key role. In fact, the Court of Justice calls for a case-by-case assessment, in light of each migrant's individual situation. It is then for national courts to determine whether a refugee or beneficiary of subsidiary protection faces greater difficulties than other regular migrants concerning the successful completion of the integration process. Bearing in mind the recent massive inflows of international protection seekers, the Court's finding is even more important and contributes to making the national authorities' task more difficult.

However, the Court of Justice assesses the compatibility of the residence condition only on the basis of the principle of equality, but fails to provide the referring court with any guidance on the criteria for the (strict) proportionality test. From this point of view, the Court departs from its precedents on integration exams, where it has repeatedly underlined the close link between the respect of the principle of proportionality

⁸⁹ See, on the specific implications of the notion of freedom of movement under Art. 33 of Directive 2011/95/EU, Opinion of Advocate General Cruz Villalón delivered on 6 October 2015, Joined Cases C-443/14 and C-444/14, *Alo and Osso*, paras. 49-53. See also Art. 26 of the Convention relating to the Status of Refugees (Geneva, 28 July 1951), entered into force on 22 April 1954, in light of which the freedom of movement includes the right to choose the place of residence in the State that has granted that protection.

⁹⁰ United Nations Human Rights Committee, General Comment 27 of 2 November 1999 on Freedom of Movement, Article 12, CCPR/C/21/Rev.1/Add.9.

⁹¹ In fact, Directive 2011/95/EU has to a large extent removed the differences between the rights conferred to refugees and beneficiaries of subsidiary protection. See the Opinion of Advocate General Bot delivered on 4 September 2014, Case C-562/13, *Abdida*.

and the achievement of the objectives pursued by EU secondary law on regular migration. There, it provided something more than a mere guidance for national judges, since it listed a set of strict and “tangible” criteria that such integration conditions and measures have to meet. A similar approach would help national courts to better identify the limits of national integration policies, in light of the full effectiveness of EU migration law. In fact, factors such as the social and economic context of the area involved or the duration and territorial scope of the residence condition can have a significant impact on migrants’ freedom of movement. Consequently, they inevitably influence the balance between the objective of ensuring the successful integration of third-country nationals – along with the protection of the rights conferred by the EU legal order – and the exercise of national exclusive competences.

6. – *Concluding Remarks*

The analysis highlights a certain degree of inconsistency between visions of integration policies and reality. EU institution statements, their programmes and action plans uphold a positive approach to such long-term challenges. EU soft-law instruments overtly reflect such attitude and strive for the *de facto* Europeanization of the domain. Common problems would need common – or at least coordinated – solutions.

However, integration conditionality provisions introduced in EU secondary legislation after fierce lobbying by the Member States protect national prerogatives and expectations of control on regular migration flows. In fact, they allow for restrictions of the rights conferred by the EU legal order, running counter to the objective of facilitating integration.

Article 79(4) TFEU also refers to promoting integration of third-country nationals in the host Member States as an action by the Member States to be encouraged and supported. On one hand, this reflects the EU’s complementary role in this domain. On the other, integration is a key factor in promoting social and economic cohesion, as well as being a fundamental European Union objective set out in the Treaties. Consequently, the objective of achieving successful integration can constitute an overriding reason in the public interest, justifying derogations from EU law at national level.

Such twofold divide between policy objectives and legal realism can obstruct the effectiveness of EU law, as integration is deeply intertwined with several aspects of European migration policy. The recent massive inflows of international protection seekers further amplify such concern. They urge the EU and Member

States to address the challenge of rapidly involving them in the education system and/or labour market, as a powerful lever for their long-term social inclusion.

In fact, the link between the successful completion of the integration process and other EU objectives, in particular social cohesion and economic development, is close and clearly confirmed by EU soft and hard law. Being conscious of such challenges, the Court of Justice has tried to bring back integration conditionality to its foremost objective and align it with EU law general principles and the Charter of Fundamental Rights of the EU. Integration conditions and measures are in fact compatible with EU law only if they facilitate integration⁹². They also have to pass a strict proportionality test and must not undermine the effectiveness of relevant EU Directives. In both cases, the assessment must be individualized, taking into due account the applicant's situation and avoiding automatic restrictions to the rights conferred by EU law.

Consequently, the Court has placed severe limits on Member States concerning abuse of integration conditionality. In principle, they cannot resort to selective integration requirements as a means of migration control anymore. However, it remains to see how national authorities will react, especially in times of massive migration inflows and related widespread concerns among EU citizens. In such a context, policy choices on immigration are an emblem of national sovereignty and the Member States' ambitions of security and control. Sovereignty however suffers under the pressure of truly European challenges, which require limited national discretionary power and increased coordination and coherence.

⁹² See for instance case *K and A*, *cit. supra* note 76, paras. 52 and 57.

IV. MIGRATION AND DEVELOPMENT: THE CASE OF PEOPLE DISPLACED BY DEVELOPMENT AND STATES' OBLIGATION TO RESPECT THEIR HUMAN RIGHTS

*Laura Messina**

SUMMARY: 1. The Issue of Development-Induced Displacement. – 2. Specific International Provisions and Guidelines on DID. – 3. The Protection Afforded by International Human Rights Law. – 3.1. The Right to Property. – 3.2. The Right to Respect for Private Life and Home. – 3.3. The Right to Adequate Housing. – 3.4. The Right to Freedom of Movement and Choice of Residence. – 3.5. The Right Not to Be Arbitrarily Displaced. – 4. Conclusions.

1. – The Issue of Development-Induced Displacement

An inconvenient kind of forced migration occurs when people are forcibly displaced as a result of development.

Development-induced displacement (“DID”) refers to the forced displacement of persons and whole communities to make way for development projects of all kinds, including the construction of dams and other hydrological plants as well as infrastructure, plans for urban renewal or “beautification” of cities or for agricul-

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tural expansion, the preparation of mega-events like the Olympic Games or large international conferences, conservation projects such as reserve games or national parks, and activities of exploration and exploitation of natural resources such as mining and oil extraction¹.

While development should be pursued with the view to improving the socio-economic conditions within a country and eradicating inequality and poverty for the benefit of the society and all its members, the reality is that it may harm some people by displacing them.

Displacement is always a disruptive and painful experience. It obliges affected people to move to an unfamiliar environment and re-establish a new life there. People evicted from their lands and homes in the name of a supposedly greater economic good, usually with no possibility of return, face serious risks of impoverishment.

These risks have been identified in eight typical interlinked and recurrent processes, according to which displacement leads to: landlessness, joblessness, homelessness, marginalization, increased morbidity, food insecurity, loss of access to common property, and social disarticulation². Essentially, displaced people are deprived of their homes, their livelihoods, and their community ties, which all impact on their life conditions and result in increased social and economic vulnerability and disempowerment. If not properly dealt with, these processes converge into impoverishment³. Moreover, often it is already vulnerable communities such as indigenous peoples and minorities that are affected, as well as, from a gender perspective, women who disproportionately see their conditions worsening due to a lack of

¹ See e.g. MOREL, "Protection Against Development-Induced Displacement in International Law", in SATIROGLU, CHOI (eds.), *Development-Induced Displacement and Resettlement, New Perspectives on Persisting Problems*, New York, 2015, p. 142 ff., p. 142; ID., "Displaced in the Name of Sports: Human Rights Law Comes to the Rescue", *Human Rights and International Legal Discourse*, 2012, p. 229 ff., pp. 237-238; TERMINSKI, *Development-Induced Displacement and Resettlement, Causes, Consequences, and Socio-Legal Context*, Stuttgart, 2015, pp. 83-178.

² CERNEA, "Understanding and Preventing Impoverishment from Displacement", in MCDOWELL (ed.), *Understanding Impoverishment, The Consequences of Development-Induced Displacement*, New York-Oxford, 1996, p. 13 ff., pp. 13-22.

³ Few examples of successful cases where resettlement in another area has led to the improvement of life conditions of displaced people have been reported. These cases have been characterized by comprehensive planning, a significant participation of the affected people, a commitment to job creation as a vehicle of income restoration, and a high degree of flexibility. DE WET, "Risk, Complexity and Local Initiative in Forced Resettlement Outcomes", in DE WET (ed.), *Development-Induced Displacement, Problems, Policies and People*, New York-Oxford, 2006, p. 180 ff., pp. 193-198.

security of tenure, gender bias, violence, and discriminatory inheritance laws. Resettlement plans, when foreseen, have frequently proven insufficient in restoring the livelihoods of displaced people, mainly due to careless planning, poor implementation, lack of capacity and funding⁴.

The consequences suffered by people displaced in the name of development can thus be as dire as those of people displaced by conflicts, persecution and natural disasters, and raise concerns about respect for their human rights. People displaced by development projects generally remain in their own country and are included in the category of Internally Displaced Persons (“IDPs”)⁵.

Notwithstanding this categorization, those millions of people who are victims of DID appear to remain relatively unnoticed.

It is thought that at least 15 million people worldwide are uprooted every year by development projects, although it is difficult to estimate the global number, and due to under-reporting and hidden displacement the number of 15 million people is still considered to be a significant underestimate⁶.

Explanations for the reasons why DID generally attract less attention can be put forward.

⁴ On impoverishment related to DID see e.g. MCDOWELL (ed.), *Understanding Impoverishment, The Consequences of Development-Induced Displacement*, New York-Oxford, 1996; DE WET (ed.), *Development-Induced Displacement, Problems, Policies and People*, New York-Oxford, 2006; BENNETT and MCDOWELL, *Displaced: The Human Cost of Development and Resettlement*, New York, 2012; MEHTA (ed.), *Displaced by Development, Confronting Marginalisation and Gender Injustice*, New Delhi, 2009; KOTHARI, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, UN Doc. E/CN.4/2004/48 (2004), paras. 39-65.

⁵ See Principle 6 of the Guiding Principles on Internal Displacement specifically referring to displacement by development projects. DENG, Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (1998), pp. 6-7. See also Art. 1(2) of the London Declaration of International Law Principles on IDPs adopted in 2000 by the International Law Association. Development-induced displaced people distinguish from refugees, as it is an internal displacement but they are also distinguished from economic migrants or migrant workers, who migrate because of extreme poverty or other economic problems and where the element of coercion is less direct and clear. MOONEY, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concerns”, *Refugee Survey Quarterly*, 2005, p. 9 ff., pp. 12-13; KÁLIN, *Guiding Principles on Internal Displacement: Annotations*, 2nd ed., Washington DC, 2008, p. 4; BARUTCISKI, “International Law and Development-induced Displacement and Resettlement”, in DE WET (ed.), *Development-Induced Displacement, Problems, Policies and People*, New York-Oxford, 2006, p. 71 ff., pp. 72-74.

⁶ MCDOWELL, “Development Created Population Displacement”, in FIDDIAN-QASMIYEH et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, 2014, p. 331 ff., p. 334; TERMINSKI, *cit. supra* note 1, p. 32.

The annual number of 15 million is considered to potentially eclipse the number of refugees and IDPs in conflict situations and divert resources from those situations, with the humanitarian world already facing challenges in financing its operations in disaster and conflict induced displacement. In addition to resources constraints, there is the concern that including people displaced by development among the globally displaced in need of humanitarian protection would confuse public understanding and reduce public sympathy for those fleeing from armed conflict⁷.

Finally, the lack of interest in DID can be explained by the fact that development can be considered “a good cause” for justifying displacement, which is never the case for persecution, conflicts and natural disasters⁸.

In fact, development pursued in the general public interest, that is for the well-being of the country, can well be a legitimate justification for restricting the human rights of affected people. The human rights that are most directly involved will be examined below in turn, along with the conditions to be satisfied for their lawful restriction under international human rights law (“IHRL”). The purpose of the present article is indeed to analyse the topic through the lens of IHRL and identify the constraints it poses on States’ possibilities to carry out lawfully the displacement of part of their population.

Before this is done, the following section will first give a brief account of the international provisions and guidelines that have been adopted and that specifically deal with DID.

2. – Specific International Provisions and Guidelines on DID

Normative instruments containing standards on protection against DID and its negative effects have been elaborated at the international and regional levels. These are mostly non binding, soft law instruments.

At the United Nations level studies considering the human rights implications of DID have been conducted and comprehensive guidelines have been prepared on the basis of IHRL since the late 1990s.

According to these documents, States must pursue only the public interest in development plans, that is the general welfare with a view to facilitating the en-

⁷ McDOWELL, *cit. supra* note 6, p. 341.

⁸ MOREL, “Protection Against Development-Induced Displacement in International Law”, *cit. supra* note 1, p. 143.

joyment of human rights, without discrimination of any sort, particularly without development being used as a pretext to disguise discrimination or other human rights violations. Only those measures that are established by law, and which are necessary and proportional to the public interest being pursued, can be undertaken. All possible alternatives need to be considered, with the meaningful, fully informed participation of the people affected, including to some extent the consent of these people. Displacement is considered to be permissible only when compelling and overriding public interests justify and require it, and in the absence of alternative viable options to avoid it. Importantly, the right to an effective remedy and to access to justice have to be guaranteed in order for affected people to have the necessity and proportionality of a measure reviewed by a competent, independent tribunal. The right to full and fair compensation likewise needs to be ensured, along with safe and suitable resettlement in comparable areas and rehabilitation measures to enable displaced people to improve, or at least restore their living conditions at levels comparable to those before the displacement. Special consideration is to be given to women and the most vulnerable, including minorities and indigenous people with particular attachment to their lands⁹.

Similar are the obligations prescribed by the only legally binding provisions specific to the matter adopted in the African regional context. They are included in the 2009 African Union Convention for the Protection and Assistance of IDPs in Africa¹⁰ and the 2006 Protocol on the Protection and Assistance to IDPs, adopted by the Member States of the International Conference on the Great Lakes together

⁹ See AL-KHASAWNEH, Human Rights and Population Transfer, UN Doc. E/CN.4/Sub.2/1997/23 (1997), paras. 11, 51, 68; The Practice of Forced Evictions: Comprehensive Human Rights Guidelines on Development-Based Displacement, Expert Seminar on Forced Eviction, UN Doc. E/CN.4/Sub.2/1997/7 (1997); DENG, *cit. supra* note 5, Principles 6-9; KÄLIN, *cit. supra* note 5, pp. 32-33; KOTHARI, Basic Principles and Guidelines on Development-Based Evictions and Displacement, UN Doc. A/HRC/4/18 (2007); DE SCHUTTER, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, UN Doc. A/HRC/13/33/Add.2 (2009), Principles 1-2. The practice of forced evictions and their impact on affected vulnerable population, including and in particular forced evictions undertaken for development purposes have been object of a number of UN publications, with the Special Rapporteur on the right to adequate housing notably at the forefront of addressing this issue. See e.g. Forced Evictions, Human Rights Fact Sheet No. 25, Rev. 1, 2014 and recent cases reported to the Special Rapporteur, Communications Report of Special Procedures, UN Doc. A/HRC/30/27 (2015), pp. 18, and 41; Communications Report of Special Procedures, UN Doc. A/HRC/28/85 (2015), pp. 65, 67, and 75.

¹⁰ Kampala Convention.

with the Pact on Security, Stability and Development in the Great Lakes Region¹¹.

Again, displacement caused by development projects that is not strictly necessary and proportionate to the public interest and thus not justified by compelling and overriding public interests is considered a prohibited kind of arbitrary displacement. States must ensure that all feasible development alternatives are explored, with full information and consultation of people likely to be displaced, in order to avoid DID altogether whenever possible. Prior to undertaking any development projects, socio-economic and environmental impact assessments must be carried out. Where displacement cannot be avoided, States must take all necessary measures to minimize it and mitigate its adverse effects, including through the provision of adequate and habitable sites of relocation with effective participation of displaced people and proper accommodation to the greatest practicable extent. States must ensure that the displacement takes place in satisfactory conditions of safety, nutrition, health, and hygiene. Adequate compensation must be guaranteed and legal remedies made available. States also have a particular obligation to protect against displacement those who have a special attachment to or are particularly dependent on their lands, such as indigenous people, minorities and peasants¹².

Turning to lending agencies, in 1980 the World Bank adopted its first Operational Policy on Involuntary Resettlement, which has been an influential bench-

¹¹ IDPs Protocol to the Great Lakes Pact.

¹² See Art. 10 of the Kampala Convention and Art. 5 of the IDPs Protocol to the Great Lakes. See also Arts. 4(5), 11(5), 12(1) and (2) of the Kampala Convention and Art. 4(1)(c) and (d) of the IDPs Protocol to the Great Lakes and the Protocol on the Property Rights of Returning Persons to the Great Lakes Pact, also applying to people displaced by development projects. Interestingly, the IDPs Protocol to the Great Lakes Pact, under Art. 1(5), includes a second definition expressly specifying that IDPs are also persons displaced by development projects. Moreover, Art. 5 of the IDPs Protocol to the Great Lakes is a more detailed and more strongly formulated provision compared to Art. 10 of the Kampala Convention. Under the first, States are also obliged to obtain, “as far as possible”, the free and informed consent of those to be displaced prior to undertaking their displacement. For a comparison and also previous, more detailed draft of the Kampala Convention see e.g. DUCHATELLIER and PHUONG, “The African Contribution to the Protection of Internally Displaced Persons: A Commentary on the 2009 Kampala Convention”, in CHETAIL and BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham and Northampton, 2014, p. 650 ff., pp. 655-659; ZORZI GIUSTINIANI, “New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa”, *Denver Journal of International Law and Policy*, 2011, p. 347 ff., p. 356; MARU, *The Kampala Convention and Its Contributions to International Law: Legal Analyses and Interpretations of the African Union Convention for the Protection and Assistance of Internally Displaced Persons*, The Hague, 2014, pp. 148-156 and 177-182.

mark for other regional development banks and international financial institutions that later adopted similar policies¹³. The World Bank has been prompted to adopt safeguards policies by the criticism related to the projects it was financing and the serious impact these projects were having on the human rights of affected populations and the environment. These are self-imposed limitations with which the World Bank's conduct has to be in accordance.

Operational Policy 4.12 on Involuntary Resettlement ("OP 4.12") has a specific focus on the restoration and rehabilitation of conditions of people in order to face the impoverishment risks and thus minimize adverse effects of displacement and resettlement when the latter cannot be avoided¹⁴. OP 4.12 is also based on the assumption that all viable alternative project designs need to be explored in order to avoid displacement and resettlement, if possible. If not, resettlement activities are to be conceived and implemented as sustainable development programs, with sufficient investment resources to enable displaced persons to share in project benefits, including their meaningful consultation and participation in the planning and implementation of the programs. Displaced people need to be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them¹⁵. Prompt and effective compensation at full replacement costs for losses of assets is to be provided, along with assistance during relocation and residential housing, or housing sites, or even agricultural sites with at least comparable properties to the old site. In new resettlement sites, infrastructure and public services are to be provided as necessary to improve or maintain accessibility and levels of services for displaced persons and host communities alike, with the provision of alternative or similar resources to compensate for the loss of access to community resources, such as fishing or grazing areas. If necessary, to assist displaced people in restoring

¹³ For a comparison between policies, see the recent study prepared at the World Bank: HIMBERG, *Comparative Review of Multilateral Development Bank Safeguards Systems*, Washington DC, 2015, pp. 21-22 and 86-106.

¹⁴ See OP 4.12, para. 1, affirming that: "Bank experience indicates that involuntary resettlement under development projects, if unmitigated, often gives rise to severe economic, social, and environmental risks: production systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost. This policy includes safeguards to address and mitigate these impoverishment risks" (ff omitted).

¹⁵ See OP 4.12, para. 2.

their livelihoods they are to be offered support after displacement in terms of development assistance such as land preparation, credit facilities, training, or job opportunities, for the time needed to restore their livelihoods. Appropriate and accessible grievances mechanisms have to be established. Particular attention needs to be paid to the special needs of vulnerable groups among those displaced, such as those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities, and others who may not be protected through national land compensation. Land-based resettlement strategies are to be preferred for displaced persons whose livelihoods are land-based, such as indigenous peoples, while existing social and cultural institutions of displaced persons are to be generally preserved, if possible. Otherwise, new community organization needs to be made according to the displaced people's choices¹⁶.

The underlying idea is always that displacement should be avoided, but where this is not possible, an adequate resettlement plan needs to be devised so that the negative consequences and harmful impact of it are properly tackled and displacement does not result in impoverishment for the affected population.

The same can be said of the Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects, adopted in 1992 by the Organisation for Economic Cooperation and Development. They are similar and equally conceived as a useful and practical tool of best practices for envisaging a sound resettlement plan to ensure that displaced people can benefit and have development opportunities from the project when displacement is unavoidable¹⁷.

¹⁶ See OP 4.12, paras. 4, 6, 8-9, 13. See also Operational Policy 4.10 that is expressly dedicated to indigenous peoples, especially see paras. 20-21. Unfortunately, as the World Bank itself recently acknowledged, OP 4.12 is not regularly carefully and fully implemented and ranks third with regard to most frequent policy violations brought up in the requests before the Inspection Panel. See Social Development Department Involuntary Resettlement Portfolio Review Phase I. Inventory of Bank-financed Projects Triggering the Involuntary Resettlement Policy (1990–2010), The World Bank, Washington DC, 2012, p. 18. The World Bank's policies are undergoing a process of revision that has put the Bank under the pressure of international NGOs and human rights scholars that have urged it to finally embrace the human rights discourse. The Bank has been especially asked to explicitly establish that only in exceptional circumstances, namely the promotion of the general welfare and in a manner consistent with IHRL, displacement and resettlement is permissible. See ROLNIK, Report of the Special Rapporteur on Adequate Housing as a Component to the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context on Her Mission to the World Bank, UN Doc. A/HRC/22/46/Add.3 (2013), paras. 19-76; ALSTON, Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/70/274 (2015).

¹⁷ These guidelines particularly stress that in every case the alternative to refrain from carrying out the

Finally, the United Nations Development Programme has also adopted its Social and Environmental Standards in 2014, which are explicitly human rights based. According to Standard 5 on displacement and resettlement, "... in exceptional circumstances and where avoidance is not possible, displacement may occur only with full justification, appropriate forms of legal protection and compensation, and according to the following requirements"¹⁸. As for the previous instruments, the mentioned requirements aim at countering adverse effects and enhancing or restoring displaced people's livelihoods through accurate resettlement plans. Additionally, however, Standard 5 expressly includes the prohibition of forced evictions, limiting lawful evictions to those allowed by law, carried out in accordance with IHRL, undertaken for the purpose of promoting the general welfare, reasonable and proportional, regulated to ensure due process standards, as well as including full and fair compensation and rehabilitation¹⁹.

3. – The Protection Afforded by International Human Rights Law

DID seriously affects the human rights of the people that have to be displaced. In particular, their right to the peaceful enjoyment of their life and home, as specified by the right to property, the right to respect for private and family life and home and the right to adequate housing, are firstly affected. Additionally, displacement entails a direct interference with these people's right to freedom of movement and choice of residence. On the basis of these well-established rights, a "right not to be arbitrarily displaced" is then considered to be emerging.

As already stated, development cannot serve to disguise discrimination and violations of human rights with regard to specific groups of persons. Since displaced people are often already vulnerable people (the poorest, minority groups or indigenous peoples and women), it is worth stressing that first and foremost these people need to be protected against discrimination. The right to equality and non-discrimination implies that DID is not undertaken in a discriminatory manner in that it directly or indirectly targets specific groups. This right has been considered a

project, that is, the non-action alternative, should be seriously considered. See Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects, OECD, Paris, 1992, p. 6.

¹⁸ See Social and Environmental Standards, Standard 5: Displacement and Resettlement, UNDP, 2014, p. 30, para. 1.

¹⁹ *Ibid.*, p. 31, para. 6. For all detailed requirements see: *ibid.*, pp. 31-35, paras. 6-11.

fundamental rule of IHRL, as all human beings are entitled to the full enjoyment of human rights, without distinction of any sort²⁰. As the Committee on Economic, Social and Cultural Rights (“CESCR”) has affirmed: “[i]ndividuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society”²¹. Furthermore, in respect of property status as a prohibited grounds of discrimination, which is to be broadly conceived as to include real and personal property or *the lack of it*, the CESCR has recalled that “...Covenant rights, such as access to water services and *protection from forced eviction, should not be made conditional on a person’s land tenure status, such as living in an informal settlement*”²².

3.1. – *The Right to Property*

Displaced people are entitled to the enjoyment of their possessions and to compensation in the event of deprivation. The human right to property²³ indeed protects the continued possession and peaceful enjoyment of property. It therefore provides protection in cases of DID where the deprivation of property is involved, including property destruction. Moreover, the concept of property within the human rights conventions is autonomous from the meaning given to property under national legislation. It is indeed wider, as developed in the jurisprudence of the relevant human rights courts and bodies²⁴.

Generally, to lawfully deprive people of their possessions three conditions need to be satisfied, namely: a condition of legality; a condition of legitimacy; and a condition of proportionality. A deprivation of property is thus lawful when it is in accordance with the law, justified in the public interest, and provided it is a neces-

²⁰ See Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993), para. 15.

²¹ General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN doc. E/C.12/GC/20 (2009), para. 35.

²² *Ibid.*, para. 25 (emphasis added).

²³ See Art. 17 of the Universal Declaration of Human Rights, Art. 1 of Protocol 1 to the European Convention on Human Rights, Art. 21 of the American Convention on Human Rights, Art. 14 of the African Charter on Human and Peoples’ Rights, and Art. 31 of the Arab Charter on Human Rights.

²⁴ On this right, see e.g. MOREL, *The Right not to Be Displaced in International Law*, Antwerp-Cambridge, 2014, pp. 176-201; KÄLIN and KÜNZLI, *The Law of International Human Rights Protection*, Oxford, 2009, pp. 434-439; BARTOLE, DE SENA and ZAGREBELSKY, *Commentario breve alla Convenzione Europea per la salvaguardia dei diritti dell’uomo e delle libertà fondamentali*, Padova, 2012, pp. 791-812.

sary and proportional measure. Adequate compensation is part of the right to property and is material to the assessment of whether the proportionality condition has been respected and, as a result, the individuals' interests in continuing to enjoy their possessions on one side and the general interest pursued on the other have been fairly balanced.

What is noteworthy from the contribution of the jurisprudence of the human rights courts is, first of all, that the social importance of the individuals' interests involved has been taken into account²⁵. In the *Lallement* case, the European Court of Human Rights considered the compensation awarded as non appropriate and the applicant, a French farmer, was found to have borne an excessive and disproportionate burden, since the expropriation concerned a piece of land that was part of his "*outil de travail*", and being deprived of it meant that the applicant would be prevented from continuing his work under acceptable conditions and from providing his family with an adequate living. The compensation was thus deemed insufficient and not reasonable because it did not cover the loss of his "*outil de travail*" and did not allow him to re-establish his source of livelihood. The Court even affirmed that in cases of expropriation such as this compensation should as far as possible consist of the offer of land in return²⁶. In the *Velikovi and Others* case, as in previous cases concerning transition towards democracy in Czech Republic²⁷, again in the assessment of adequate compensation and proportionality test the same Court took into account the practical realities in which the applicants found themselves, specifically the serious housing problems they faced, as they had no other place to live in and endured additional hardship after having lost their property.²⁸

²⁵ DE SENA, "Economic and Non-Economic Values in the Case Law of the European Courts of Human Rights", in DUPUY, FRANCONI and PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, 2009, p. 208 ff., p. 216; BARTOLE, DE SENA and ZAGREBELSKY, *cit. supra* note 24, pp. 801-802.

²⁶ *Lallement v. France*, Application No. 46044/99, Judgment of 11 April 2002, paras. 18-24.

²⁷ See e.g., *Pincová and Pinc v. Czech Republic*, Application No. 36548/97, Judgment of 5 November 2002, paras. 61-64.

²⁸ *Velikovi and Others v. Bulgaria*, Application Nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01, and 194/02, Judgment of 17 March 2007, paras. 223-225. It is to be noted that the European Court of Human Rights has specified that Art. 1 of Protocol 1 to the European Convention on Human Rights does not guarantee a right to full compensation in all circumstances. Legitimate objectives in the public interest, such as those pursued in measures of economic reforms or measures designed to achieve greater social justice, like in the context of a change of political or economic regime or a country's transition towards a democratic regime, can result in a below market value com-

Secondly, in the international jurisprudence, the right to property has been interpreted so that protection has been extended to cases where individuals do not have formal legal title to their land and home.

That is the case of indigenous communities that usually do not formally own their ancestral lands, and if they do, they do not own them individually. The Inter-American Court of Human Rights in particular has developed important jurisprudence on indigenous peoples' land rights and has recognized the traditional communal possession and use of the land by indigenous peoples as a form of property protected under Article 21 of the American Convention on Human Rights²⁹.

Indigenous peoples enjoy a special relationship with their lands that needs to be safeguarded for their physical and cultural survival. In the *Saramaka People* case concerning logging and mining activities, the Inter-American Court recognized the Saramaka people's right to own the land they had traditionally used and occupied communally, including the natural resources they had traditionally used within their territory and that were necessary for their survival, development and continuation of way of life. However, indigenous peoples' property rights may be also restricted insofar as the restriction is previously established by law, necessary, proportional, with the aim of achieving a legitimate objective, and, additionally, it does not deny their survival as a people, that is, such a restriction may not amount to a denial of their traditions and customs in a way that endangers their survival. In this regard, the State must comply with three safeguards. Firstly, it must ensure the effective participation of the people, in conformity with their customs and traditions regarding any development, investment, exploration or extraction plan within their territory; secondly, it must guarantee that they will receive a reasonable benefit from any such plan, which is inherent to their right to just compensation; and thirdly, it must ensure that no concession will be issued, unless and until a prior environmental and social impact assessment by an independent and technically com-

pensation being considered proportional, whereas a total lack of compensation may be justifiable only in exceptional circumstances. All that provided however that the individuals concerned do not have to bear a disproportionate and excessive burden against the general demands, which is to be ascertained on a case-by-case basis. See e.g., *Scordino v. Italy*, Application No. 36813/97, Judgment of 29 March 2006, paras. 95-99. KÄLIN, KÜNZLI, *cit. supra* note 24, pp. 435-436; BARTOLE, DE SENA and ZAGREBELSKY, *cit. supra* note 24, pp. 800-803.

²⁹ For an overview, see Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II.Doc. 56/09 (2010), paras. 55-189.

petent entity is carried out. Effective participation requires the State to actively consult with the people in good faith from the early stages of a plan, accepting and disseminating information, and particularly with regard to major development or investment project that may have a profound impact on the territory and their property rights, the Court added that the State had a duty not only to consult with the Saramakas, but also to obtain their free, prior and informed consent³⁰.

Drawing on relevant international case law, including the *Saramaka* case, the African Commission also adopted similar reasoning in the *Endorois* case, where Endorois people had been evicted from their ancestral land and prevented from accessing it when the State created a game reserve. The African Commission considered that, given their traditional possession, the State had the duty to recognize the right to property of members of the Endorois community within the framework of a communal property system, and the duty to establish the mechanisms necessary to give domestic legal effect to such a right. Although property rights under Article 14 of the African Charter may be restricted, the Commission found that the State had unlawfully evicted the Endorois from their ancestral land and destroyed their possessions in the pursuit of creating a game reserve, because their upheaval and displacement from their motherland and the denial of their property rights over it was disproportionate to any public need served by the game reserve. The Commission considered that even though the game reserve had been a legitimate aim and served a public need it could have been accomplished by alternative means proportionate to the need. Indeed, the Endorois were willing to collaborate with the government in a way that respected their property rights, even if a game reserve was being created. No effective participation had however been allowed to the Endorois people, no prior environmental and social impact assessment had been carried out, and no reasonable benefit-sharing had been guaranteed to and enjoyed by the Endorois, who had not been compensated and had been relegated to semi-arid lands where they could not practice their pastoral life and were living in precarious conditions³¹.

In addition to the specific case of indigenous peoples, the situation of those living in informal settlements has also been taken into account. The European Court

³⁰ *Saramaka People v. Suriname*, Judgment of 28 November 2007, paras. 77-158.

³¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Decision of 4 February 2010, paras. 174-238. For similar case-law of the Human Rights Committee also, see JOSEPH and CASTAN, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed., Oxford, 2013, pp. 849-858.

of Human Rights has considered Article 1 of Protocol 1 to be applicable in cases where applicants were illegally settled. In the *Öneryildiz* case, the applicant used to live in a slum that had developed around a rubbish tip without authorization, where a methane explosion killed his relatives and destroyed his dwelling and belongings. The applicant's dwelling had been erected in breach of the town-planning regulations, without conforming to the relevant technical standards and on a land that belonged to the State. Yet, the State's authorities had tolerated it, they had let them live there undisturbed, and had even levied council tax and provided them with public services for which they had been charged. Therefore, the Court considered that the State's authorities had *de facto* acknowledged that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods, which were deemed to constitute "possessions" falling within the meaning of Article 1 of Protocol 1, to which protection has been extended³².

Notwithstanding the broad interpretation adopted by human rights bodies, the right to property is considered to provide rather weak protection, since many vulnerable displaced people lack property ownership³³. However, in addition to the contribution of the case law discussed above, it is worth mentioning the effort at the United Nations level to urge States to confer and strengthen legal security of tenure upon vulnerable people lacking it in order to empower and reduce the insecurity suffered by these people³⁴.

³² *Öneryildiz v. Turkey*, Application No. 48939/99, Judgment of 30 November 2004, paras. 124-129. BARTOLE, DE SENA and ZAGREBELSKY, *cit. supra* note 24, pp. 794-795. In the case at hand, the Court found the violation of Art. 1 of Protocol 1 because the Turkish authorities had not fulfilled their positive obligation to take measures to protect the applicant's proprietary interests. *ibid.*, paras. 133-138. However, often slums are let to grow consistently, with States' authorities tolerating the illegal occupation of the land for years, even providing services and requiring the payment of taxes until they decide that, maybe for purposes of urban renewal or for a particular major event happening or other concealed discriminatory reasons, the area needs to be cleared and people are evicted, even violently, and all their belongings are destroyed, with no safeguards at all on account of their illegal condition. See e.g., Forced Evictions: Global Crisis, Global Solutions, UN-Habitat, 2011, pp. 36-45.

³³ MOREL, *cit. supra* note 1, p. 150.

³⁴ See e.g., KOTHARI, *cit. supra* note 9, para. 25; ROLNIK, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, UN Doc. A/HRC/22/46 (2012), paras. 44-69; DE SCHUTTER, *cit. supra* note 9, paras. 23-26; ID., The Right to Food, UN Doc. A/65/281 (2010), paras. 40-41. See also *infra* Section 3.3.

3.2. – The Right to Respect for Private Life and Home

DID clearly entails an interference with individuals' right to the enjoyment of their private and family life and the enjoyment of their home.

The Human Rights Committee has expressly stated in its Concluding Observations on Kenya that the forcible eviction of thousands of inhabitants from informal settlements in Nairobi and elsewhere in the country without prior consultation and notification of concerned population constitutes an arbitrary interference, especially with their right to have private and family life and home respected. It recommended the adoption of transparent laws, policies and procedures for conducting evictions to ensure that they are undertaken only when the affected population has been consulted and appropriate resettlement arrangements have been made³⁵.

The right to respect for private and family life and home³⁶ protects the individual private sphere from unwarranted and unreasonable intrusions, allowing for the shaping of one's life and identity according to one's own aspirations and wishes. It protects the right to live together within the family in a place of refuge where one can develop private and family life and enjoy it without fear of disturbance. Besides, the right to have one's home respected protects the personal freedom of the person living in his or her home regardless of legal title, that is, regardless of whether the person is the owner, tenant, subtenant or even squatter. However, individuals' enjoyment of this right can be subjected to limitations provided that the three conditions of legality, legitimacy, and proportionality are satisfied, as for the right to property discussed above. Restrictions to this right have to be in accordance with the law, justified by a legitimate purpose, and be a necessary and proportionate measure in relation to the purpose sought to be achieved. Again, the individual interests and the competing public interests pursued need to be fairly balanced, and the individual interests need to be taken in due consideration and given due respect.³⁷

³⁵ See Concluding Observations on Kenya, UN Doc. CCPR/CO/83/KEN (2005), para. 22 and Concluding Observations on Kenya, UN Doc. CCPR/C/KEN/CO/3 (2012), para. 21.

³⁶ See Art. 12 of the Universal Declaration of Human Rights, Art. 17 of the International Covenant on Civil and Political Rights, Art. 8 of the European Convention on Human Rights, Art. 11 of the American Convention on Human Rights, and Art. 21 of the Arab Charter.

³⁷ On the right, see JOSEPH, CASTAN, *cit. supra* note 31, pp. 533-561; KÄLIN and KÜNZLI, *cit. supra* note 24, pp. 381-400; BARTOLE, DE SENA and ZAGREBELSKY, *cit. supra* note 24, pp. 297-355; NOWAK, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2nd ed., Kehl am Rhein, 2005, pp. 378-405; MOREL, *cit. supra* note 24, pp. 143-176.

The European Court of Human Rights has taken several elements into consideration. In the *Winterstein et autres* case, as in the previous similar *Yordanova and Others* case, the Court considered first of all whether procedural safeguards were available to individuals, since the loss of one's home is a most extreme form of interference with the right to respect for one's home, which is a right of central importance to individuals. The Court considered therefore whether the proportionality of the measure, namely eviction orders justified by conservation purposes of the landscape in the first case and by the improvement of the urban environment in the interest of economic well-being and of the protection of the health and rights of others in the second, had been determined by an independent tribunal which had adequately examined the situation of the individuals concerned, notwithstanding that under domestic law those individuals had no right of occupation. Interference with one's home is indeed a matter of fact, regardless of the lawfulness of occupation. However, in the proportionality assessment the Court has considered that if the home was lawfully established this factor itself weighs against the legitimacy of requiring the individual to move. On the contrary, if the establishment of the home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. Nevertheless, the consequences of the individual's removal need to be considered, particularly if individuals face the risk of being left without shelter. If no alternative accommodation is available, the interference is obviously deemed to be more serious. If it is available, the more suitable the alternative accommodation is, the less serious is the interference. The evaluation of the suitability of alternative accommodation involves the consideration of the particular needs of the person concerned, that is, his or her family requirements and financial resources on one side and the rights of the local community on the other. Whether individuals belong to a vulnerable minority is another particular aspect to be taken into account, and it requires that special consideration be given to their needs and to their different lifestyles that are also protected under Article 8 of the European Convention on Human Rights. Additionally, the Court has considered whether an entire community and a long period of time were involved, namely whether individuals had developed a community life with strong links with the place. In both cases, national authorities had tolerated for years the unlawful occupation of municipal land by the applicants, French travellers living in caravans in

the first case and Bulgarian Roma in the second, allowing them to build a close community there³⁸.

Thus, despite the fact that Article 8 does not normally entail a right to be provided with a home, with all the above aspects to be considered in the proportionality assessment, the Court has however recognized its social implication and value, influenced by the social right to adequate housing³⁹.

Finally, it is noteworthy that the same Court considered the extremely difficult and unhealthy living conditions experienced for years by a community following the destruction of their houses and displacement from their villages, together with the discrimination they were subjected to, not only as a violation of Article 8, but also as a violation of Article 3 of the European Convention, amounting to “degrading treatment”⁴⁰.

3.3. – *The Right to Adequate Housing*

The right to adequate housing is usually the most invoked right in cases of forced evictions and displacement, including DID⁴¹. It refers to everyone’s “... right to a secure place to live in peace and dignity, which includes the right not to be evicted unlawfully, arbitrarily or on a discriminatory basis from one’s home, land or community”⁴².

³⁸ *Winterstein et autres c. France*, Application No. 27013/07, Judgment of 17 October 2013, paras. 141-167; *Yordanova and Others v. Bulgaria*, Application No. 25446/06, Judgment of 24 April 2012, paras. 101-144.

³⁹ REMICHE, “*Yordanova and Others v. Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Rights to Respect for One’s Home*”, *Human Rights Law Review*, 2012, p. 787 ff., pp. 794-800. Showing the mutually reinforcing character of the two rights, the CESCR affirmed that the right not to be subjected to arbitrary or unlawful interference with one’s private and family life, as well as home complements the right not to be forcefully evicted without adequate protection and constitutes a very important dimension in defining the right to adequate housing: General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), UN Doc. E/1992/23 (1991), para. 9; General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions, UN Doc. E/1998/22 (1997), para. 8.

⁴⁰ *Moldovan and Others v. Romania*, Application Nos. 41138/98 and 64320/01, Judgment No. 2 of 12 July 2005, paras. 102-114. In context of violence and conflict, the international case law has recognized the totally unjustified destruction of homes as a violation of the right to respect for private life and home and as amounting to “inhuman treatment”. See MOREL, *cit. supra* note 24, pp. 151-158; European Court of Human Rights, *Selçuk and Asker v. Turkey*, Application No. 12/1997/796/998-999, Judgment of 24 April 1998, paras. 77-78.

⁴¹ MOREL, *cit. supra* note 1, pp. 145-146.

⁴² Prohibition of Forced Eviction, UN Doc. E/CN.4/RES/2004/28 (2004), third preambular para-

A key condition for its realization, as well as one of the components of the right to adequate housing identified by the CESCR is legal security of tenure, meaning a degree of security of tenure which guarantees legal protection against forced eviction to all persons, regardless of the type of tenure⁴³. The CESCR firstly considered that “... instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law”⁴⁴. Subsequently, it defined forced evictions as

“... the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights”⁴⁵.

The CESCR expressly mentioned that instances of forced eviction occur in the name of development⁴⁶. While the right to housing may be subjected to limitations⁴⁷, the CESCR has however specified States’ obligations. States must refrain

graph. Also, CESCR, General Comment No. 4, *cit. supra* note 39, para. 7. For the right to adequate housing, see Art. 25(1) of the Universal Declaration of Human Rights, Art. 11(1) of the International Covenant on Economic, Social and Cultural Rights, Art. 31 of the Revised European Social Charter, and Art. 38 of the Arab Charter on Human Rights.

⁴³ General Comment No. 4, *cit. supra* note 39, para. 8(a), specifying that “[t]enure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and *informal settlements, including occupation of land or property*” (emphasis added). HOHMANN, *The Right to Housing: Law, Concept, Possibilities*, Oxford and Portland, 2013, p. 21, saying that “[l]egal security of tenure can be considered the cornerstone of the right to housing”; MOREL, “Protection Against Development-Induced Displacement in International Law”, *cit. supra* note 1, p. 146.

⁴⁴ General Comment No. 4, *cit. supra* note 39, para. 18.

⁴⁵ General Comment No. 7, *cit. supra* note 39, para. 3.

⁴⁶ *Ibid.*, para. 7. For CESCR’s concerns for practice of forced evictions without adequate safeguards in its Concluding Observations on States’ periodic reports also, see e.g., SAUL, KINLEY, MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, Oxford, 2014, pp. 946-951.

⁴⁷ *Ibid.*, para. 5: “... Even in situations where it may be necessary to impose limitations on such a right, full compliance with article 4 of the Covenant is required so that any limitations imposed must be ‘determined by law only insofar as this may be compatible with the nature of these [i.e. economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society’”.

from forcibly evicting individuals and ensure that law is enforced against their agents or third parties that engage in forced evictions. They must adopt adequate legislation against forced evictions for an effective system of protection⁴⁸. An eviction must be provided for by the law, justified by the promotion of the general welfare, and be a reasonable and proportionate measure. Hence, States must explore all feasible alternatives in consultation with affected persons, no form of discrimination must be involved for the protection of vulnerable groups, adequate compensation for any affected property must be provided, and all legal recourses and remedies must be made available. Appropriate procedural guarantees and due process are especially essential, and the CESCR particularly considers: timely information on the proposed eviction; genuine consultation with those affected; prior adequate and reasonable notice; identification of all persons carrying out the eviction, at the presence of government officials; no eviction in particularly bad weather or at night unless the affected persons consent otherwise; and provision of legal remedies and where possible, legal aid to those in need of it⁴⁹. Importantly,

“Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available”⁵⁰.

In the European context, the European Committee of Social Rights (“ECSR”) has also specified that a condition of adequate housing is secure tenure supported by the law, which means protection from forced eviction⁵¹.

Similar to the CESCR, the ECSR has also affirmed that legal protection must include an obligation to consult with affected persons to find alternative solutions to eviction and the obligation to establish a reasonable notice period. Evictions must be justified. Evictions carried out at night or during winter must be prohibited

⁴⁸ *Ibid*, paras. 8-9.

⁴⁹ *Ibid.*, paras. 10-15.

⁵⁰ *Ibid.*, para. 16.

⁵¹ See e.g., *Conclusions 2003*, Vol. 1 (Bulgaria, France, Italy), 2003, p. 221; *European Roma Rights Centre v. Bulgaria*, Decision of 18 October 2006, paras. 16 and 34, which concerns the violation of Art. 16 of the Revised European Social Charter providing for family housing. According to the ECSR, Art. 16 partially overlaps with Art. 31, specifically the notions of adequate housing and forced eviction are considered to be identical under both articles: *ibid.*, para. 17.

by law, as they must be carried out in conditions that respect the dignity of the persons concerned. Legal remedies, including legal aid to those in need to seek redress from the courts, must be provided. States must make sure that alternative accommodation is available: authorities must adopt measures to re-house or financially assist the persons concerned. In respect to the situation of illegal occupation of a site or dwelling, while this may justify the eviction of the illegal occupants, the ECSR nevertheless specified that the criteria of illegal occupation must not be unduly wide and the above-mentioned safeguards must be respected⁵². Additionally, the ECSR considered whether the State's authorities had *de facto* tolerated the actions of illegal occupants, as in the case of Roma families whose illegal settlements had existed for many years and the provision of public services, like electricity, had been ensured and inhabitants had been charged for it. Particularly, the ECSR affirmed that the State's authorities "...must strike the balance between the general interest and the fundamental rights of the individuals, in the particular case the right to housing and its corollary of not making individuals becoming homeless"⁵³: the State must ensure that persons evicted are not rendered homeless⁵⁴.

Finally, while the African Charter on Human and Peoples' Rights does not explicitly contain it, the African Commission has remarkably inferred a right to housing from the combined effect of the rights to health, property and family provided in Articles 14, 16 and 18(1) of the Charter. In the *SERAC and CESR* case concerning oil production operations that caused environmental degradation and contamination resulting in health problems for the Ogoni population, the African Commission affirmed that the combination of those provisions "... forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected" and that "... reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated"⁵⁵. Indeed, in response to the campaign of the population to oppose the destruction of their environment, the security forces of the government engaged in conduct in complete violation of the rights of the Ogoni by attacking, burning, and destroying several

⁵² *Conclusions 2003, cit. supra* note 51, p. 231; *European Roma Rights Centre v. Bulgaria, cit. supra* note 51, paras. 51-52.

⁵³ *European Roma Rights Centre v. Bulgaria, cit. supra* note 51, para. 54.

⁵⁴ *Ibid.*, para. 57.

⁵⁵ *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, Decision of 27 October 2001, para. 60.

Ogoni villages and homes which rendered thousands of them homeless. Security forces also obstructed, harassed, beat, and in some cases, even shot and killed innocent citizens who attempted to return to and rebuild their homes⁵⁶. The African Commission added that “[t]he particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions ...” and concluded that “[t]he conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right”⁵⁷.

3.4. – The Right to Freedom of Movement and Choice of Residence

The right to freedom of movement and choice of one’s residence⁵⁸ is considered one of the most basic and fundamental human rights. It provides for the right of every person lawfully present in the territory of a State to move freely and choose his or her place of residence within the whole territory of that State, subject only to those limitations envisaged by the law, justified for legitimate purposes, necessary and proportionate. Significantly, it implies the right *not* to move, that is, the right to remain in the place and residence of one’s choice. Thus, it includes protection against forced displacement⁵⁹.

In the *Yanomami Community* case, the Inter-American Commission on Human Rights found the violation of several human rights of Yanomami Indians, including the right to residence and movement contained in Article VIII of the American Declaration of the Rights and Duties of Man. The Yanomamis had been displaced from their ancestral territory due to the construction of a highway passing through their land after the adoption of a government plan for the development of the Amazon region and the exploitation of its vast natural resources. The discovery of rich

⁵⁶ *Ibid.*, paras. 61-62.

⁵⁷ *Ibid.*, para. 63.

⁵⁸ See Art. 13(1) of the Universal Declaration of Human Rights, Art. 12 of the International Covenant on Civil and Political Rights, Art. 2 of Protocol 4 to the European Convention on Human Rights; Art. 22 of the American Convention of Human Rights, Art. 12 of the African Charter of Human and Peoples’ Rights, and Arts. 26 and 27 of the Arab Charter on Human Rights.

⁵⁹ Human Rights Committee, General Comment No. 27, Freedom of Movement (article 12), UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), paras. 1-7 and 11-18; MOREL, *cit. supra* note 24, pp. 104-142; KÄLIN and KÜNZLI, *cit. supra* note 24, pp. 488-489. Citizens of a State are lawfully within the territory of that State. Whether an alien is lawfully in the territory of a State is a matter of domestic law, but still in accordance with IHRL.

mineral deposits further attracted mining companies and independent prospectors which worsened their displacement and had devastating physical and psychological consequences on them, while an agricultural development project aimed at benefiting them had had the opposite result of further loss of their lands⁶⁰.

3.5. – *The Right not to Be Arbitrarily Displaced*

It is argued that a “right not to be displaced” is emerging in international law.

It is the right of every person to be protected against being displaced from his or her home or places of habitual residence in an arbitrary way, so in violation of domestic law, in the absence of a legitimate aim, and when not necessary and proportional to that aim. It is indeed a qualified right, that may be subjected to limitations provided that the conditions of legality, legitimacy, necessity and proportionality seen above are however respected.

It extends to any kind of displacement, including DID. In the context of DID specifically, it would thus protect people from being forcibly displaced, when their displacement represents an unnecessary and excessive measure compared to the legitimate development aim sought to be achieved.

The right not to be arbitrarily displaced is considered to be already implicitly recognized in international law. It is indeed derived from other, well-established human rights, particularly the right to adequate housing, freedom of movement, and private life seen above which are directly interfered with by forced displacement. It is therefore implicitly grounded in hard law. On the other hand, it has been explicitly recognized only in soft law instruments⁶¹. Scholars have argued that the right not to be arbitrarily displaced should be expressly recognized in an international legally binding instrument dedicated to displacement, including DID. It is contended that such an instrument would strengthen the protection of persons from forced displacement because it would no longer be necessary to resort to the other

⁶⁰ *Yanomami Community v. Brazil*, Decision of 5 March 1985, paras. 2-3 (“background”), and 2, 10-12 (“considering”).

⁶¹ Except for Art. 4(4) of the Kampala Convention, which explicitly mentions this right. For soft law instruments, see DENG, *cit. supra* note 5, Principle 6(1); PINHEIRO, Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (2005), Principle 5(1); Protection of and Assistance to Internally Displaced Persons, Un Doc. A/RES/66/165 (2012), eighth preambular paragraph; Art. 4(1) of the London Declaration of International Law Principles on IDPs adopted in 2000 by the International Law Association.

human rights in such situations. It would pressure and make clear to State and non-State actors involved that arbitrary displacement is a gross violation of IHRL, and as such strictly prohibited. It would equally raise awareness and encourage renewed efforts in its prevention, as well as empower affected people with a direct and stronger legal basis in pleading their cases⁶².

4. – Conclusions

States may legitimately take steps to promote their economic development, but not at the expense of people's human rights.

The analysis above shows that IHRL provides substantive and procedural safeguards in the context of DID. While it does not prohibit evictions necessitated by development projects in general terms, as the rights examined are not absolute and may be restricted for a legitimate purpose, such as the pursuit of development for the well-being of the country, evictions must still be a necessary and proportionate measure. This implies that all feasible and less intrusive alternatives need to have been adequately considered, along with the situation of the individuals concerned. Specifically, the availability of adequate alternative housing, the presence of a long established community, the special attachment or dependence on the land as source of livelihood, and access to justice are elements that need to be weighed against the proportionality of a removal measure. IHRL thus affords protection against DID leading to impoverishment.

While the analysis has been limited to those four core rights that are automatically interfered with, a far broader range of human rights may be implicated in DID. When people are evicted with violence and intimidation or they are met with violence while resisting, the right to security of the person, even the right to life and freedom from torture and other cruel, inhuman or degrading treatment may be involved. Their right to information and participation, freedom of expression and association are also frequently concerned. When they live in precarious conditions as a consequence of their displacement, the enjoyment of many socio-economic

⁶² See, MOREL, *cit. supra* note 24; STAVROPOULOU, "The Right Not to Be Displaced", *American University Journal of International Law and Policy*, 1994, p. 689 ff.; ID., "The Question of a Right Not to Be Displaced", *ASIL*, 1996, p. 549 ff.; MOREL, STAVROPOULOU, DURIEUX, "The History and Status of the Right Not to Be Displaced", *Forced Migration Review*, 2012, p. 5 ff.; SIMONS, "The Emergence of a Norm Against Arbitrary Forced Relocation", *Columbia Human Rights Law Review*, 2002, p. 95 ff.; MCFADDEN, "The Right to Stay", *Vanderbilt Journal of Transnational Law*, 1996, p. 1 ff.

rights is then evidently affected. In other words, DID is a true human rights issue, and as such is deserving of attention.

V.

**THE UNDESIRABLE WORKER FICTION:
DEMAND-BASED LABOUR MIGRATION SCHEMES
AND MIGRANT WORKERS'
SOCIO-ECONOMIC RIGHTS**

*Fulvia Staiano**

SUMMARY: 1. Introduction. – 2. Limitations to Legal Routes of Labour Migration in the Irish and Italian Jurisdictions – 3. The Imperfect Remedy of Regularization Programmes. – 4. International and European Standards of Protection of Migrant Workers' Socio-Economic Rights. – 5. Labour Rights for Illegally Employed Migrants: Judicial Solutions from Italian and Irish Courts. – 6. Concluding Remarks.

1. – Introduction

Across Europe, EU Member States regulate labour migration flows by establishing limitations to the entry and stay of third-country national migrant workers. Many Member States, in particular, have crafted their labour migration law and policy on the grounds of labour market demands for said workers. Ideally, such systems pursue the objective of admitting on the national territory only as many workers as the domestic labour market is capable of absorbing. Moreover, these

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programmes also embrace the idea that third-country national workers may be allowed to carry out employment in the host country only in so far as the same positions cannot be filled by national or EU workers. Labour migration from non-EU countries, then, is only welcome when it fulfils specific (and ideally temporary) labour market needs.

EU Member States pursue these policy goals through a variety of measures. The most common one consists in the adoption of preliminary labour market needs tests, which determine the unavailability of national or EU workers in certain areas or professions. The identification of these shortages is imposed as a precondition for issuing a residence and work permit to a third-country national worker. Such models are adopted, among other countries, by Belgium, Denmark, France, Germany, the Netherlands, Poland, Spain, Sweden and the United Kingdom¹. A peculiar variation of the described system is adopted in Ireland. In addition to enforcing a preliminary labour market test needs, Irish immigration law also envisages a list of ineligible categories of occupations for employment permits.

Furthermore, Southern European States such as Greece, Italy, Portugal and Spain combine this limitation with a further one – namely, the adoption of annual quotas of admission of migrant workers². Quota systems often target unskilled workers, and are also ideally based on labour market shortages and employers' demands for third-country national workers. In Italy, the quota system - based on the yearly *decreto flussi* - constitutes the main source of regulation of labour migration.

The described labour migration schemes consistently incorporate some form of assessment of the situation of the national labour market.³ The unavailability of national or EU workers in certain sectors is often established by ministerial decision, in consultation with advisory public bodies and/or social parties and on the grounds of data on unemployment and job vacancies. Moreover, labour market needs tests generally imply an obligation for prospective employers to advertise job offers in national public employment systems as well as in the European Employment Service (“EURES”) portal. Annual quotas are also usually determined by national governments, according to procedures that entail various degrees of consultation of social partners and stakeholders.

¹ See for instance CHALOFF, “The Impact of EU Directives on the Labour Migration Framework in EU Countries”, *OECD Social, Employment and Migration Working Papers*, No. 180, OECD Publishing (2016), available at: <<http://dx.doi.org/10.1787/5jlwxzbzpw33-en>>, pp. 12 – 13.

² *Ibid.* pp. 11 – 12.

³ *Ibid.* pp. 11 – 15.

Against this background, a crucial question concerns the effects of such demand-based systems of admission on third-country national workers. In particular, whenever these systems underestimate or misrepresent the needs of national labour markets and employers' demands, they inevitably restrict opportunities for legal immigration and employment of third-country nationals - pushing them into unregulated and informal employment. A perverse effect of this phenomenon, then, is the creation of significant barriers to third-country national workers' enjoyment of basic socio-economic and labour rights. First, workers with an irregular migration status are not necessarily recognized with such rights - especially not in a condition of equality with regularly resident ones. Second, even those countries which do recognize these socio-economic and labour rights to migrants in an irregular status usually do not envisage protections against expulsion for those who claim these rights before domestic courts. In other words, while such workers are entitled to access justice in order to obtain a recognition and enforcement of their rights, immigration laws will still apply to them and they might face expulsion as a consequence of exposing their irregular status.

This paper analyses demand-based labour migration regimes and their negative effects on migrant workers'⁴ enjoyment of socio-economic and labour rights, with a special focus on their right to receive wages. It aims to answer the question of which normative and judicial sources are currently capable of ensuring the most effective protection of such rights, and the most equitable balance of the interests involved in this matter.

To do so, this paper critically compares the domestic jurisdictions of Ireland and Italy. In line with the general trend within the European Union, these countries have adopted demand-based labour migration regimes. Moreover, they have both envisaged regularization schemes as a partial corrective to their closure towards unskilled workers. The degree of protection of irregular migrant workers respectively provided in these jurisdictions, however, varies significantly both in quality and in intensity.

Therefore, this paper will first pay a closer look at the Irish and Italian labour migration schemes - with a special focus on the limitations to the entry and residence of unskilled third-country national workers and on the negative effects of

⁴ For the purpose of this chapter and unless otherwise specified, the term "migrant workers" should be understood as referring to third-country national workers.

these restrictions on migrant workers' socio-economic rights. Second, it will analyse regularization programmes adopted in these countries as an *ex post* remedy to the restrictions imposed by labour migration schemes, highlighting their limited scope and effectiveness. Third, it will turn to enquire on the degree of recognition of migrant workers' socio-economic rights within international and EU law - and on whether those in an irregular status are included within the scope of application of the main legal sources in this field. Fourth, this paper will analyse Irish and Italian approaches to the recognition of irregular migrant workers' rights through the example of the right to receive wages. Lastly, the paper will draw some final conclusions on the most effective ways to ensure a fair balance between the State interest to control labour migration fluxes and migrant workers' right to be free from labour exploitation and employers' abuse.

2. – Limitations to Legal Routes of Labour Migration in the Irish and Italian Jurisdictions

Ireland and Italy are no exception to the general European trend of imposing preliminary labour market needs test as a precondition for issuing employment permits to third-country nationals. The Irish system clearly aims to encourage the immigration of skilled workers⁵. In line with EU standards in this field (and particularly with the so-called EU Blue Card Directive)⁶, high-skilled professions are identified with highly paid ones. Under the Employment Permits (Amendment) Act 2014, workers in any profession with an annual salary of more than 60,000 euros or highly qualified workers with an annual salary above 30,000 euros may obtain a Critical Skills Employment Permit. For this purpose, employers are not obliged to previously verify the availability of EU or Irish citizens for the post and therefore a labour market needs test is not required. Because the rationale of the permit is to encourage the permanent settlement in Ireland of highly skilled workers, holders will not need to apply for the renewal of the permit. Rather, after its expiration

⁵ For a complete overview of Irish labour migration law, see GUSCIUTE, QUINN and BARRETT, *Determining Labour and Skills Shortages and the Need for Labour Migration in Ireland*, European Migration Network, November 2015, available at: <<https://www.esri.ie/publications/determining-labour-and-skills-shortages-and-the-need-for-non-eea-labour-migration-in-ireland/>>.

⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24 of 30 June 2009. On this topic, see Ch. IX by ROSANÒ, p. 197 ff.

(normally, 2 years) they will be issued with an authorization to reside and work permanently in the country.

In principle, it is not possible for a third-country national to enter Ireland in order to perform employment with a yearly remuneration inferior to 30,000 Euros. For unskilled work remunerated above this threshold, a General Employment Permit can be issued under certain conditions. First, the employer must advertise the job vacancy through a variety of channels, to ensure that no suitably skilled Irish or EEA citizens are available to cover the post. Second, the profession must not be included in the Ineligible Categories of Employment list. It is therefore not possible for a non-EEA citizen to enter Ireland in order to perform a profession included in the list.

The Ineligible Categories of Employment list enshrines a crucial contradiction. Ineligible professions include, among others, retail cashiers, “elementary agricultural occupations” such as farming and fishing, agricultural and fishing trades, and “elementary services occupations” such as waitressing, bartending and kitchen assistance. Care and domestic workers (listed as childminders, care workers, home carers, senior care workers, care escorts, housekeepers and caretakers) are also included in the list.

Yet, since 2008 non-EEA employment has consistently risen precisely in those occupations qualified as ineligible for employment permits – particularly in the sectors of retail, restaurant and catering as well as of work carried out in private homes⁷. The strong presence of non-EEA citizens in these sectors of the Irish labour market responds to a strong demand for cheap, accessible and flexible workers from employers. It was noted with this respect that “disconnect between labour migration policy and employment demand has created an unregulated and exploitative system”⁸. The denial to recognize this demand by Irish immigration law pushes migrant workers towards unregulated and informal work, denies them with basic socio-economic rights and significantly increases the risk of experiencing labour exploitation and employers’ abuse.

It is not a coincidence that such phenomena have recently emerged in respect of categories of migrant workers considered ineligible for residence permits. Care work-

⁷ Migrant Rights Centre Ireland, *Workers on the Move: Past Lessons and Future Perspectives on Ireland’s Labour Migration*, December 2015, p. 9, available at: <<http://www.mrci.ie/resources/workers-on-the-move-past-lessons-and-future-perspectives-on-irelands-labour-migration/>>.

⁸ Migrant Rights Centre Ireland, *Childcare in the Domestic Work Sector: Who’s Minding the Children?*, May 2015, available at: <<http://www.mrci.ie/press-centre/new-research-tracks-growing-exploitation-of-au-pairs-and-childminders-in-irish-homes/>>.

ers and fishermen, in particular, have been pointed out as particularly at risk of labour exploitation, breaches of basic labour protections and in the latter case trafficking.

The impossibility to enter Ireland legally in order to perform care and domestic work⁹ has been directly linked with the prevalence of informal and irregular work in this sector. The result of the inclusion of such professions in the list of ineligible occupations has been the recruitment of either undocumented migrants or of non-EEA students under the label of *au pairs*¹⁰. Indeed, a significant portion of the total number of undocumented migrants present in Ireland (estimated between 20,000 and 26,000¹¹) is concentrated in the domestic work sector, particularly in elder care services¹².

The presence of undocumented migrant workers in the Irish fishing industry has also been cause for concern. Issues of labour exploitation and trafficking have emerged with reference to non-EEA fishermen on board of Irish trawlers - an occupation also ineligible for employment permits since 2006. An Emergency Task Force set up to face allegations of employers' abuse acknowledged international reports of deceptive recruitment practices, low wages and detrimental working conditions¹³.

Italian immigration law also conveys preference for certain categories of migrant workers. Article 27 of the so-called *Testo Unico Immigrazione*¹⁴ ("*Testo Unico*") exempts certain categories from the general quota system. Such privileged professions include, among others, corporate executives, university lecturers and professors, intra-corporate transferees, but also less remunerated professions such as seamen, artists in private clubs, as well as domestic workers who have worked

⁹ Currently, the sole exception to the impossibility for non-EEA citizens to enter Ireland in order to perform care work concerns trained medical professionals, where the person who requires the care has a severe medical condition, or where the prospective worker can show that he or she has a long history of caring for the person requiring the care.

¹⁰ See Migrant Rights Centre Ireland, *cit. supra* note 8.

¹¹ Migrant Rights Centre Ireland, *Ireland is Home: An analysis of the current situation of undocumented migrants in Ireland*, November 2014, available at: <<http://www.mrci.ie/our-work/justice-for-undocumented/>>.

¹² Migrant Rights Centre Ireland, *Migrant Workers in the Home Care Sector: Preparing for the Elder Boom in Ireland*, September 2015, available at: <<http://www.mrci.ie/resources/publications/migrant-workers-in-the-home-care-sector-preparing-for-the-elder-boom-in-ireland/>>.

¹³ Report of the Government Task Force on Non-EEA Workers in the Irish Fishing Fleet, December 2015, p. 14, available at: <http://www.inis.gov.ie/en/INIS/Pages/atypical-scheme-fishing-crew>.

¹⁴ *Decreto Legislativo* no. 286 of 25 July 1998, *Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, G.U. no. 191 of 18 August 1998, S.O. no. 139.

for their employer for at least one year and follow him or her to Italy.

For all other categories of workers, Italian law envisages a quota system whereby each year the Government adopts a special decree (called *decreto flussi*) that determines the maximum number of visas issued to third-country nationals for the purpose of dependent and autonomous work. Article 3(4) of the *Testo Unico* allows for a certain flexibility of this system, establishing that if necessary further decrees may be adopted on this point throughout the year.

Differently than in Ireland, then, there is no marked preference for highly skilled or highly paid migrant workers in Italian immigration law. The *decreto flussi* generally concerns all categories of employment, both seasonal and non-seasonal. In the past few years, however, the Italian quota system has failed to envisage any first entry visa for prospective migrant workers. Excluding autonomous workers, the *decreto flussi* for 2016¹⁵ reserved these visas only to third-country nationals who had completed vocational training courses pursuant Article 23 of the *Testo Unico*, to migrant workers of Italian descent and to those who had worked within the 2015 Expo in Milan.

This trend has persisted since 2012, when the Italian Government ceased to establish quotas for non-seasonal dependent employment. The negative effects of this closure are particularly evident with respect to domestic and care workers. Until 2011, a portion of the annual quotas was reserved to this category. This mechanism not only allowed migrant workers to enter the Italian territory in order to carry out domestic work there, but was also often taken advantage of by employers who wanted to regularize undocumented domestic workers¹⁶. The impossibility to do either, however, has inevitably channelled migrant domestic workers into unregulated, informal work and into irregular status. A significant number of EU and non-EU workers in Italy are employed informally. While the latest data relate almost 700,000 foreign domestic workers officially employed in 2014, their actual number (including those irregularly employed) is estimated to be around 1 million and 665 thousand. The vast majority of this group is made up by women from Eastern Eu-

¹⁵ *Decreto del Presidente del Consiglio dei Ministri* of 14 December 2015, *Programmazione transitoria dei flussi d'ingresso dei lavoratori non comunitari nel territorio dello Stato, per l'anno 2016*, G.U. no. 26 of 2 February 2016.

¹⁶ PALUMBO, *Trafficking and Labour Exploitation in Domestic Work and the Agricultural Sector in Italy*, Global Governance Programme (TRAFFICKO) 2016, available at: <<http://cadmus.eui.eu/handle/1814/42406>>.

rope and Asian countries such as the Philippines, Sri Lanka and India¹⁷. Whether they irregularly reside in Italy or they hold a residence permit but work informally without a contract, these domestic workers experience a precarious employment situation as well as an invisible status.

The presence of significant numbers of irregular migrant workers in Ireland and Italy has not been acknowledged by law and institutions as a consequence of the described restrictions to the availability of legal entry routes for prospective workers. Nonetheless, their problematic character has been implicitly recognized and addressed through targeted regularisation programmes. The next paragraph will critically analyse such programmes as they are implemented in Ireland and Italy, highlighting their effectiveness and shortcomings from the point of view of migrant workers' socio-economic rights.

3. – The Imperfect Remedy of Regularization Programmes

The contradiction between the structural demand for migrant workers and the many limitations to their legal entry has given rise to regularization schemes both in Ireland and in Italy. The latter has established repeated mass regularizations for all undocumented workers (although domestic and care workers have been a particular concern in this context)¹⁸. The approach of the former, on the other hand, has been to target specific categories of migrant workers that emerge as particularly vulnerable to exploitation at a given moment in addition to provide a more general procedure to all workers who pursue regularization.

As to Ireland, in February 2016 a regularization scheme specifically established for non-EEA fishermen was envisaged as a response to allegations of abuse and human trafficking in this sector. The Atypical Working Scheme for non-EEA crewmembers targeted those already working in Ireland. The application required support from an employer (i.e., the holder of a licensed sea-fishing boat), as well as a 12-month written contract of employment. This scheme was capped at a maximum of 500 regularized workers, and it was initially bound to expire in mid-May 2016. After that deadline, only applications from persons outside of Ireland would be accepted. The Atypical Working Scheme, however, had an extremely low take-

¹⁷ Centro Studi e Ricerche IDOS, *Dossier Statistico Immigrazione 2015*, December 2015, pp. 287-288.

¹⁸ See also LAZARIDIS, *International Migration to Europe: from Subjects to Abjects*, Basingstoke, 2015, p. 140.

up rate, to the point that its deadline was extended. Many employers proved to be resistant to initiate the regularization process and dismissed workers who asked them to support their application¹⁹.

In addition to the Atypical Working Scheme, a broader route to the acquisition of a residence and work permits for irregular residents consists in the Reactivation Employment Permit. Non-EEA nationals who no longer hold an employment permit “through no fault of their own” or because of exploitation in the workplace may obtain such a permit provided that they have a job offer²⁰. Undocumented domestic workers and carers, however, are specifically excluded from said permit and currently have no way to achieve a regular status in Ireland.

In Italy, on the other hand, mass regularization schemes have frequently privileged domestic workers. For instance, this category has been the only one to be allowed to access regularization even in case of part-time work²¹. Moreover, in 2009 the Italian Government created a special regularization programme devoted to domestic and care workers exclusively. This programme was presented as a countermeasure to the economic crisis and as a support to families residing in Italy (regardless of citizenship)²². As in the smaller-scale case of fishermen in Ireland, the actual number of applications was significantly lower than what had been envisaged by the Government²³. The high costs of the regularization process, its length and the difficulty for domestic workers to find an employer willing to initiate and

¹⁹ Migrant Rights Centre Ireland, *MRCI welcomes extension of scheme for undocumented fishermen*, 19 May 2016, available at: <<http://www.mrci.ie/press-centre/mrci-welcomes-extension-of-scheme-for-undocumented-fishermen/>>.

²⁰ AMBROSINI, “Employers as ‘Care Managers’: Contracts, Emotions and Mutual Obligations within Italy’s Invisible Welfare System”, in MARCHETTI and TRIANDAFYLIDOU (eds.), *Employers, Agencies and Immigration: Paying for Care*, Farnham, 2015, p. 19 ff., p. 25; HEPWORTH, *At the Edges of Citizenship: Security and the Constitution of Non-Citizen Subjects*, Farnham, 2015, p. 84; PALUMBO, “Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy”, DemandAT Country Study No. 5, June 2016, 21 ff., available at: <<http://research.icmpd.org/projects/trafficking-in-human-beings/demandat/>>.

²¹ See, for instance, Art. 5(2) of *Decreto Legislativo* no. 109 of 16 July 2012, *Attuazione della direttiva 2009/52/CE che introduce norme minime relative a sanzioni e a provvedimenti nei confronti di datori di lavoro che impiegano cittadini di Paesi terzi il cui soggiorno e' irregolare*, G.U. no. 172 of 25 July 2012.

²² Art. 1 *ter* of *Decreto-Legge* no. 78 of 1 July 2009, *Provvedimenti anticrisi*, G.U. no. 150 of 1 July 2009, then converted into *Legge* no. 102 of 3 August 2009, G.U. no. 179 of 4 August 2009, S.O. no. 140.

²³ BONIZZONI, “Undocumented Domestic Workers in Italy: Surviving and Regularizing Strategies”, in TRIANDAFYLIDOU (ed.), *Irregular Migrant Domestic Workers in Europe: Who Cares?*, Farnham, 2013, p. 135 ff., p. 140.

support their application can be ascribed to the causes of this lower take-up.

In the light of this brief analysis, regularization programmes for undocumented workers emerge as limited in both scope and effectiveness. In principle, such programmes might constitute a path for migrant workers in the informal economy to secure basic socio-economic and labour rights (related for instance to minimum wage, written employment contracts, established working hours and protection against unjustified dismissal). However, the Irish and Italian examples reveal the significant shortcomings of such programmes. First, they are limited in time. Applications may only be filed within a certain time frame (usually very short), and regularization schemes are implemented sporadically or without a predictable continuity. This feature responds to the State interest to avoid encouraging irregular immigration by fostering the expectation of regularization in all cases. On the other hand, it does create an inequality of treatment between undocumented workers who happen to be in the country at the right time, and those who are not.

Another interesting feature of the discussed regularization schemes concerns the discrepancy between the expected number of applications, the actual take-up rate of such programmes and the number of undocumented workers estimated to reside in the country. Often, regularization programmes are under-utilized by undocumented migrant workers. This has been the case, for instance, of the above-mentioned Irish Atypical Working Scheme for fishermen, or of the 2014 regularisation scheme for seasonal workers in Italy²⁴. A possible explanation for this issue concerns the great control granted to employers by regularization programmes, both in Ireland and in Italy. An application for the Atypical Working Scheme had to be initiated by the employer, who was required to hire a solicitor in charge of submitting an employment contract to competent authorities together with all the necessary documentation. Any repatriation expense at the end of the contract would have to be equally sustained by the employer. Similarly, in Italy employers were required to initiate and consistently support the regularization process, and sustain substantial costs (for which repayment is often demanded to workers)²⁵. The

²⁴ On 2 April 2015, a decree by the Italian Prime Minister reduced the number of available quotas for seasonal workers of 2.000 units in comparison to the previous year, observing that the quota set in 2014 had been underutilized by third-country national workers (*Decreto del Presidente del Consiglio dei Ministri* of 2 April 2015, *Programmazione transitoria dei flussi d'ingresso dei lavoratori non comunitari per lavoro stagionale nel territorio dello Stato, per l'anno 2015*, G.U. no. 104 of 7 May 2015).

²⁵ See AMBROSINI, *cit. supra* note 20, p. 25.

choice to entrust such strong responsibilities within regularisation programmes to employers suggests a paternalistic approach to the management of irregular migration fluxes. It has been rightly observed that this type of migration policies and laws have “fostered the conception that it is the employer who allows a migrant worker to ... stay in Italy”²⁶. Therefore, the tight control of employers throughout the process of emersion from informal work can generate further vulnerability and employment precariousness for undocumented or irregular migrant workers, who risk to be subjected to various forms of blackmail and exploitation by their employers as a precondition for the latter’s continued support.

These shortcomings raise the question of whether regularization programmes are actually the best tool to realize a fair balance between the State interest to migration control and undocumented migrant workers’ socio-economic rights. Irish and Italian migration law exemplify a broader European tendency to base labour migration schemes on supposed labour market demands which overlook employers’ pursuit of unskilled migrant workers. Thus, preferential routes are created for highly skilled (i.e., highly paid) workers, while unskilled ones are excluded - sometimes completely - from the possibility to immigrate legally for the purpose of employment. As a result, the latter are pushed into irregular status and informal employment relationships.

Regularisation programmes such as the one described above aim to remedy this contradiction by allowing irregular or undocumented migrant workers to acquire a regular status with the collaboration of their employers - but do so in a limited way. The fiction of the undesirable worker in European labour migration regimes is then only half-defeated.

While awareness of the contradictions and of the perverse effects of such a system is a crucial goal in itself, the described normative and policy choices pertain to State sovereignty. States are obviously free to design their labour migration policies according to what they identify as necessary for their national economy and for the domestic labour market. There is obviously no positive State obligation under international or European law to admit an unlimited number of third-country national workers on the national territory, nor to grant a regular residence status to all those who pursue it.

In the light of these observations, the remaining part of this chapter will explore whether and to what extent undocumented and irregular migrant workers are cur-

²⁶ See PALUMBO, *cit. supra*, note 20, p. 22.

rently able to enjoy socio-economic and labour rights regardless of their residence status. Especially within legal systems that push them into irregularity and informal employment, this question is crucial to remedy the precariousness and vulnerability to labour exploitation. The next paragraph, then, will analyse the standards of protection of migrant workers' rights in international and European law - with a special focus on those who are undocumented or in an irregular status. It will unveil how these systems are currently incapable of compensating for the lack of protection of these workers' socio-economic rights at domestic level.

4. – International and European Standards of Protection of Migrant Workers' Socio-Economic Rights

At present time, international and European sources in the field of human rights law can be split in two groups with reference to migrant workers' socio-economic rights. A first group, mainly made up by soft-law sources and hard-law sources assisted by non-judicial compliance mechanisms, envisages important protections of such rights, including for undocumented or irregularly resident workers. On the other hand, the majority of hard-law sources applicable to the European context focus on extreme instances of exploitation such as slavery, servitude and forced labour.

As to the first group, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("Migrant Workers Convention")²⁷ envisages the widest protections for undocumented workers. The Convention draws a distinction between migrant workers who are documented or in a regular position and those who are not, but grants a number of socio-economic rights to the latter - such as the right to equal treatment with citizens of the host State as to working conditions, remuneration and social security and the right to unionize (Articles 25-27). The Migrant Workers Committee clarified that such right to equality of treatment also produces horizontal effects, applying to relationships between migrant workers and employers and generating a positive State obligation to provide appropriate sanctions for employers who breach it²⁸.

²⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), entered into force on 1 July 2003.

²⁸ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, 28 August 2013, para. 64, CMW/C/GC/2.

However, precisely the inclusion of undocumented and irregular migrant workers among the scope of this Convention has contributed to its low ratification rate among States of immigration - likely due to the fear of encouraging irregular immigration fluxes. In 2013, the Council of the European Union expressed the view that the Migrant Workers Convention draws an “insufficient distinction ... between the economic and social rights of regular and irregular migrant workers”, deeming this “not in line with national and EU policies”²⁹. Before the adoption of the Migrant Workers Convention, a similarly low ratification rate characterized the 1975 ILO Convention on Migrant Workers³⁰ - whose Article 9(1) also established a right to equal treatment as to “remuneration, social security and other benefits” for workers with an irregular status.

In the same line, the Committee for Economic, Social and Cultural Rights recently clarified that the right to just and favourable conditions of work under Article 7 of the International Covenant for Economic, Social and Cultural Rights (“ICESCR”)³¹ specifically relates to all migrant workers regardless of status - thus also including undocumented workers within its scope³². Differently than the abovementioned legal sources, ICESCR has been signed and ratified by the majority of States of the international community. However - while undoubtedly authoritative - General Comments by human rights treaty bodies are not legally binding³³, and therefore States Parties might also choose to depart from the Committee’s interpretation of Article 7 ICESCR.

²⁹ Council of the European Union, Conclusions of the Council and of the Representatives of Governments of the Member States meeting within the Council on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus, 19 July 2013, para 13, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012415%202013%20INIT>. For an analysis of the low ratification rate of the Migrant Workers Convention, see DESMOND, “The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review”, *European Journal of Migration and Law*, 2015, p. 39 ff.

³⁰ Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Geneva, 24 June 1975), entered into force on 9 December 1978. Italy is one of the few countries of immigration which has ratified the Convention.

³¹ International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), entered into force on 3 January 1976.

³² Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work, 27 April 2016, para. 42 (let. e), E/C.12/GC/23.

³³ KELLER and GROVER, “General Comments of the Human Rights Committee and their Legitimacy”, in KELLER and ULFSTEIN (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, 2012, p. 116 ff., pp. 129 -130.

Moreover, domestic workers who are undocumented or in an irregular status have been identified as a particularly vulnerable category to labour exploitation by the General Recommendation No. 26 of the Committee for the Elimination of Discrimination against Women³⁴ and the ILO Domestic Workers Convention³⁵ - which applies to any person engaged in domestic work within an employment relationship. The latter source too has been so far ratified by a very low number of States, although Italy and Ireland are both parties to it.

In the Council of Europe context, Article 19 of the European Social Charter³⁶ reserves the right to equal treatment with nationals of the host State in relation to working conditions and remuneration, taxes, access to justice and so forth exclusively to migrant workers with a regular status. Article 18(1) and (3), however, envisages an obligation for States Parties to “apply existing regulations in a spirit of liberality” and to liberalize regulations on the employment of foreign workers in order to ensure the right to engage in a gainful occupation in the territory of other Parties. Interestingly, the European Committee for Social Rights (“ECSR”) has found domestic labour migration systems granting priority to EEA workers to be incompatible with such provisions. This assessment has also involved Italian and Irish laws on the matter³⁷. However, this interpretation may hardly produce a significant impact on the rights of undocumented workers - much less foster opportunities for legal labour migration. First, the Conclusions of the ECSR are not directly enforceable in the domestic jurisdictions of State Parties, and the latter are generally not compelled to comply with them. Second, and most importantly, the Charter has an extremely restricted scope of application when it comes to non-EEA workers, because it only applies to migrant workers who are citizens of a State Party and move to the territory of another State Party³⁸.

Moving on to the second group of legal sources, important protections for undocumented workers have been established both within the Council of Europe and Euro-

³⁴ Committee for the Elimination of Discrimination against Women, General Recommendation No. 26 on women migrant workers, para. 22, 5 December 2008, CEDAW/C/2009/WP.1/R.

³⁵ Convention concerning decent work for domestic workers (Geneva, 16 June 2011), entered into force on 5 September 2013.

³⁶ European Social Charter (revised) (Strasbourg, 3 May 1996), entered into force on 1 July 1999.

³⁷ European Committee of Social Rights, Conclusions 2012, Italy, Art. 18(1), 2012/def/ITA/18/1/EN; Conclusions 2012, Italy, Art. 18(3), 2012/def/ITA/18/3/EN; Conclusions 2012, Ireland, Art. 18(1), 2012/def/IRL/18/1/EN; Conclusions 2012, Ireland, Art. 18(3), 2012/def/IRL/18/3/EN.

³⁸ See para. 19 of the Preamble to the European Social Charter.

pean Union law. As to the former, the European Court of Human Rights (“ECtHR”) has extracted positive State obligations to protect undocumented migrants against serious forms of labour exploitation from Article 4 of the European Convention on Human Rights (“ECHR”). In the judgment of *Rantsev v. Cyprus and Russia*³⁹, the ECtHR clarified that the positive obligation to set up an effective system of protection against trafficking and forced labour does not simply involve criminal law, but also labour migration law. This case concerned a young Russian woman who had been subjected to trafficking for the purpose of sexual exploitation. Here, the ECtHR found Cyprus in breach of Article 4 ECHR specifically because it had put in place a visa regime for cabaret artists that did not ensure effective protection against trafficking to workers. By doing so, this judgment revealed the existence of a link between precarious migration status and vulnerability to exploitation⁴⁰.

The judgments of *Siliadin v. France*⁴¹, *C.N. and V. v. France*⁴², and *C.N. v. the United Kingdom*⁴³ directly concerned labour exploitation. These cases concerned third-country national women brought into the Union territory at a very young age and in some instances while still minors. They were forced to perform unpaid domestic work by employers who exploited their vulnerability, stemming from their undocumented status and their related risk of expulsion from the host State. In this context, the ECtHR identified a positive obligation under Article 4 ECHR to put up an effective legal framework to contrast slavery, servitude and forced labour. Therefore, the respondent States were found in breach of Article 4 ECHR due to their failure to qualify these conducts as criminal offences in their domestic law⁴⁴. Moreover, the *C.N.* judgment also specified the existence of a procedural obligation to conduct effective and thorough investigations in this field⁴⁵.

By clarifying these principles, the ECtHR created an important human rights framework for the protection not only of young girls subjected to servitude and

³⁹ *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment of 7 January 2010.

⁴⁰ MULLALLY and MURPHY, “Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions and Rights”, in MULLALLY (Ed.) *Care, Migration and Human Rights: Law and Practice*, Abingdon, 2015, p. 59 ff.

⁴¹ *Siliadin v. France*, Application No. 73316/01, Judgment of 26 July 2005.

⁴² *C.N. and V. v. France*, Application No. 4239/08, Judgment of 11 October 2012.

⁴³ *C.N. v. the United Kingdom*, Application No. 4239/08, Judgment of 13 November 2012.

⁴⁴ *Siliadin v. France*, *cit. supra* note 41, paras. 130-149; *C.N. and V. v. France*, *cit. supra* note 42, paras. 104-108; *C.N. v. the United Kingdom*, *cit. supra* note 43, paras. 70-82.

⁴⁵ *C.N. v. the United Kingdom*, *cit. supra* note 43, paras. 60-82.

forced labour but more broadly of all migrants - included undocumented ones - against labour exploitation. Undoubtedly, the intervention of the ECtHR into horizontal relationships between employers and employees, and the establishment of positive State obligations indirectly aimed the significant vulnerability stemming from undocumented status is a significant development. For these reasons, this case law has been qualified as a step towards a steadier application of the ECHR to employment relationships⁴⁶.

At the same time, the extreme character of the exploitation suffered by the applicants in the judgments at issue suggest that its relevance pertains more to the field of civil rights than to that of socio-economic rights. While the two realms cannot be neatly distinguished, it should not be taken for granted that the same positive obligations established by the ECtHR with respect to individuals subjected to domestic servitude might also apply to more common forms of labour exploitation, let alone to breaches of labour rights.

At EU level, Directive 2009/50 (“Employers’ Sanctions Directive”)⁴⁷ establishes minimum standards on measures against employers of third-country national workers with an irregular status. According to Paragraph 2 of its Preamble, the aim of the Employers’ Sanctions Directive is to eliminate “a key pull factor for illegal immigration into the EU”, namely “the possibility of obtaining work in the EU without the required legal status”. To fulfil this aim, the Directive establishes a range of obligations for employers of third-country national workers (e.g., to verify the residence status of prospective employees, or to notify authorities of the commencement of an employment relationship)⁴⁸ and for Member States (e.g. to ensure that effective labour inspections are carried out in this area⁴⁹, and that effective mechanisms are in place to allow illegally employed workers to lodge complaints against their employers)⁵⁰. The Employers’ Sanctions Directive was implemented

⁴⁶ MANTOUVALOU, “Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an integrated Approach to Interpretation”, *Human Rights Law Review*, 2013, p. 529 ff., pp. 534-535. See also MANTOUVALOU, “Servitude and Forced Labour in the 21st Century: the Human Rights of Domestic Workers”, *Industrial Law Journal*, 2006, p. 395 ff.

⁴⁷ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24 of 30 June 2009.

⁴⁸ *Ibid.*, Art. 4.

⁴⁹ *Ibid.*, Art. 14.

⁵⁰ *Ibid.*, Art. 13.

very unevenly by EU Member States, and in some cases it actually worsened the situation of undocumented workers⁵¹. In Italy, for instance, legislative decree no. 109/2012 unlawfully restricted the definition of “particularly exploitative working conditions” adopted by the Directive, in presence of which Article 13(4) establishes an obligation for Member States to grant residence permits to exploited workers under certain circumstances⁵². According to the Directive, this condition is fulfilled whenever there is a striking disproportion of working conditions in comparison with the terms of employment of legally employed workers⁵³. Legislative decree no. 109, on the other hand, provides this possibility in a much more restricted number of situations of exploitation. Only three cases are indeed envisaged by its Article 22(12 *bis*), namely the illegal employment of more than three workers, the illegal employment of at least one minor, and the exposure of workers to situations of grave danger as to working conditions. This discrepancy between the Employers’ Sanction Directive and the Italian implementing legislation was highlighted, together with other issues, in a complaint to the European Commission submitted in June 2015 by the Association for Juridical Studies on Immigration (“ASGI”).⁵⁴

The existing protections of the rights of migrant workers in an irregular or undocumented status at supranational level - and their degree of implementation at domestic level - suggest a strong resistance of States to accept significant limitations of sovereignty in this field. Particularly in relation to labour rights and socio-economic rights, the majority of States of immigration have appeared very reluctant to assume positive obligations beyond the protection of migrant workers clearly identifiable as victims. Thus, the fear of encouraging the illegal entry of third-country nationals for the purpose of work by recognising them with basic rights steered many States away from ratifying key conventions and treaties in this field. This lack of legal commitment constitutes a further source of vulnerability to exploitation for undocumented and irregular workers, which aggravates the effects of

⁵¹ Platform for International Cooperation on Undocumented Migrants (PICUM), *Employers’ Sanctions: Impacts on Undocumented Migrant Workers’ Rights in Four EU Countries*, April 2015, available at: <http://picum.org/picum.org/uploads/publication/EmployerSanctions_Final.pdf>.

⁵² In particular, this provision establishes an obligation for Member States to define in their national law the conditions under which said residence permits might be granted on a case-by-case basis and for the duration of relevant national proceedings.

⁵³ Art. 2(i) of Directive 2009/52, *cit. supra* note 47.

⁵⁴ A synthesis of the complaint is available at: <<http://www.asgi.it/english/sanctions-against-employers-of-illegally-staying-third-country-nationals/>>.

the discussed restrictions to legal labour migration routes despite a significant demand for third-country national workers.

This tendency has been mirrored by a focus of international and European law - including human rights law - on the most extreme instances of labour exploitation, consisting in breaches of civil rights such as the right to be free from slavery, servitude and forced labour under Article 4 ECHR. Such a feature especially characterizes binding sources of international and European law.

As a result, the recognition of basic socio-economic rights for undocumented or irregular migrant workers is more likely to derive from judicial interpretations of domestic legislation carried out by national courts, rather than from general standards established at supranational level. In fact, both in Ireland and in Italy domestic courts have in some instances elaborated interesting interpretations that have fostered a stronger protection of undocumented or migrant workers' rights than what is currently afforded by the weak standards established by international and European law. The next paragraph will illustrate a significant example of this phenomenon, concerning the recognition of labour rights to undocumented or irregular migrant workers in the domestic jurisdictions of Ireland and Italy. Through this example, the next paragraph will analyse to what extent domestic courts have at least in part remedied the current lack of international commitment of their respective States to ensuring the respect of all migrant workers' socio-economic rights.

5. – Labour Rights for Illegally Employed Migrants: Judicial Solutions from Italian and Irish Courts

Ireland and Italy adopt a fundamentally divergent approach to the employment of third-country nationals in breach of domestic immigration law. In line with other common law countries such as the United Kingdom, Irish law provides that in case of employment of a worker without an employment permit, both the employer and the employee commit an offence⁵⁵. On the other hand, Article 22(12) of the Italian

⁵⁵ Employment Permits (Amendment) Act 2014, S2. For a general review of different approaches adopted at international, regional and domestic level with respect to the protection of labour rights of migrant workers employed in breach of immigration laws, see DEWHURST, "The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems", in COSTELLO and FREEDLAND (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford, 2014, p. 216 ff.

Testo Unico exclusively targets employers, stating that those who employ workers who do not hold a valid residence permit are punished with imprisonment and the payment of a fine.

Regardless of the legislative choice to criminalize the conduct of migrants who engage in dependent work without a residence and/or work permit, a common issue that has arisen in both the Irish and the Italian jurisdiction stems from the principle whereby an employment contract concluded in breach of the law cannot be enforced by a judicial authority. A rigid application of such a principle would prevent undocumented migrant workers from enjoying even the most basic labour rights, such as the right to protection against unfair dismissal, the right to daily and weekly rest, or the right to receive minimum wage. Italian and Irish courts have been presented with this issue. Despite the opposite approaches of their respective normative frameworks in relations to the responsibility of migrant workers as to their participation to illegal employment contracts, it is interesting to note that such courts are converging towards similar solutions.

In Italy, the *Corte di Cassazione*⁵⁶ has interpreted Article 22(12) of the *Testo Unico* as compatible with employers' obligation to pay pension contributions as well as wages to undocumented workers. In fact, such an obligation is still in place, and can be enforced by competent courts even when the employment contract is illegal. The Court grounded this interpretation on Article 2126(2) of the Civil Code, which grants dependent workers with the right to receive compensation whenever they have been employed in breach of norms established with the aim to protect employees. It considered that Article 22 of the *Testo Unico* also aims to ensure that migrant workers enjoy adequate living and working conditions, and thus to protect them. As such, this provision must be included within the scope of Article 2126(2) of the Civil Code, and illegal contracts constitute a legitimate ground for migrant workers to pursue pension contribution and wages not paid by employers.

Due to its focus on the right to receive wages, this case law might appear of limited relevance for the recognition of other socio-economic rights to migrant workers. However, this feature does not constitute an insurmountable obstacle to

⁵⁶ *Corte di Cassazione Civile (Sezione Lavoro), G.M. v. Uniriscossioni S.P.A. ed Istituto Nazionale della Previdenza Sociale*, 26 March 2010, No. 7380; *Corte di Cassazione Civile (Sezione Lavoro), R.G. v. Istituto Nazionale della Previdenza Sociale*, 5 November 2010, No. 22559; *Corte di Cassazione Civile (Sezione Lavoro), C.S. v. Cu.Re.*, 21 September 2015, No. 18540.

the expansion of the principles established therein to other socio-economic rights. First, the *Cassazione* itself noted that the right to wages envisaged by Article 2126(2) of the Civil Code logically encompasses also the right to receive pension contributions. Therefore, it concluded that the employer in this case also had an obligation to pay said contributions to social security services for illegally employed workers⁵⁷. Moreover, the principles established by the *Cassazione* in this context are of a sufficiently general nature to be potentially applied to other labour rights. It is particularly noteworthy that this court justified its conclusions stating that “allowing employers who breach the law on the employment of third-country nationals to avoid paying retributions and wages would alter the basic rules of market and competition ..., enjoying clearly more favourable conditions than those who respect the law”⁵⁸. This principle may also be applied, for instance, to breaches of *Decreto Legislativo* No. 66/2003 on working time⁵⁹ (undoubtedly an area where wide margins of profit are available to employers who fail to respect the law).

While the solution elaborated by Italian courts appears to be quite straightforward, in Ireland the matter was complicated by the normative choice of considering undocumented migrants who work without an employment contract as criminal offenders.

In the Irish context, the illegality of an employment contract concluded with a worker who does not hold an employment permit was established through judicial interpretation on the grounds of Section 2 of the Employment Permits Act. One case in particular marked an interesting evolution of Irish law and jurisprudence on this matter. On 31 August 2012, the High Court of Ireland assessed the case of a Pakistani undocumented worker (Mr Younis) who had been recruited by his second cousin (Mr Hussein) to work as a chef at his restaurant⁶⁰. As ascertained by the

⁵⁷ Judgment No. 7380/2010, *cit. supra* note 56, para. 3 of Legal Grounds (author’s translation).

⁵⁸ *Ibid.* This principle was further reinstated by the *Cassazione* in judgments Nos. 22559/2010 and 18540/2015 (*cit. supra* note 56).

⁵⁹ *Decreto Legislativo* no. 66 of 8 April 2003, *Attuazione delle direttive 93/104/CE e 2000/34/CE concernenti taluni aspetti dell'organizzazione dell'orario di lavoro*, G.U. no. 87 of 14 April 2003, S.O. no. 61. As clarified by its title, the decree implemented Directive 104/93/EC and its subsequent amendment Directive 34/2000/EC in the Italian order (Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307 of 13 December 1993, and Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ L 195 of 1 August 2000).

⁶⁰ High Court (Ireland), *Hussein v. The Labour Court & Anor*, Judgment of 31 August 2012, available at: <<http://www.bailii.org/ie/cases/IEHC/2012/H364.html>>.

Rights Commissioner and by the Labour Court in lower degrees of jurisdiction, Mr Younis had been exploited by Mr Hussein. He was required to work seven days a week with no holidays, and he only received “pocket money in cash” as pay⁶¹. His position had never been regularized nor formalized. While the Labour Court had found Mr Hussein in breach of several labour laws - in particular the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997 and the National Minimum Wage Act 2000 - the latter refused to pay the compensation awarded to Mr Younis. Before the High Court, he argued that Mr Younis could not invoke the mentioned employment legislation because the contract of employment was fundamentally illegal in absence of an employment permit.

The High Court upheld this view. It observed that an extensive and non-formalistic interpretation of the law was impossible in this case. At the time of the judgment, Section 2(4) of the Employment Permits Act allowed employers to defend criminal proceedings brought against them for employing undocumented migrants by stating that they had taken “all reasonable steps to secure compliance” with the Act itself. The same possibility was not granted to employees. The High Court, then, necessarily had to deduce that as far as employees were concerned, the offence of working without an employment permit was absolute. Consequently, any reasons for failure to comply with the law was irrelevant, and the employment contract irremediably void⁶².

Nonetheless, the High Court was dissatisfied with merely dismissing Mr Younis’ claim. While it believed this result to be “inescapable on the application of established legal principles”, it also observed that “there must be some concern that this legislation will produce (and, perhaps, has produced) consequences which were not foreseen or envisaged”⁶³. In particular:

“it may not have been intended by the Oireachtas that undocumented migrant workers - not least a vulnerable migrant such as Mr. Younis - should be effectively deprived of the benefit of all employment legislation by virtue of his illegal status, even though he or she may not be responsible for or even realise the nature of the illegality”⁶⁴.

⁶¹ *Ibid.*, para. 2.

⁶² *Ibid.*, paras. 13-16.

⁶³ *Ibid.*, para. 23.

⁶⁴ *Id.*

Therefore, in an unprecedented move, the High Court decided to transmit a copy of its decision to Irish institutional bodies - including the Minister for Jobs, Enterprise and Innovation - in order to encourage reflection on the effects of the legislation in place⁶⁵.

In response, the Irish Parliament included employees within the scope of the exception provided by Section 2(4). The current Employment Permits (Amendment) Act 2014, indeed, allows employees to bring civil actions against employers whenever they can prove that they took all steps that are reasonably open to them to ensure compliance with the requirement of holding an employment permit. This solution, however, is unsatisfactory. The general principle of illegality of the employment contract still denies access to justice to those workers who are unable to demonstrate that they took “all reasonable steps” to comply with the law.

Against this complex background, the Irish Supreme Court weighed in on the issue with a significant *obiter dictum*. On 25 June 2015, the Supreme Court rejected an application by Mr Hussein where he maintained that the High Court had erred in law⁶⁶. Although it was not necessary in this context to examine the issue of the illegality of the contract, the Supreme Court meaningfully observed that traditional judicial principles whereby such an illegality constitutes a ground for not enforcing an employment contract “may have to be reviewed or nuanced in the light of the modern regulatory environment, and applied with the principle of proportionality in mind”⁶⁷. Moreover, the Court reinforced this view by distinguishing the case where the illegality of a contract stems from “something which was inherently immoral or inherently against the public interests” from that of “an inherently lawful subject matter”⁶⁸ such as an employment relationship. The Supreme Court hinted that the latter case could in some instances give rise to civil claims of labour rights, without referring to the “reasonable steps” rule.

⁶⁵ MURPHY, “Access to Justice for Undocumented Migrant Domestic Workers in Europe: The Consequences of Constructed Illegality”, in MULLALLY, *cit. supra* note 40, p. 110 ff., p. 122.

⁶⁶ Supreme Court (Ireland), *Hussein v. The Labour Court*, Judgment of 25 June 2015, available at: <<http://www.bailii.org/ie/cases/IESC/2015/S58.html>>.

⁶⁷ *Ibid.*, para. 52.

⁶⁸ *Ibid.*, para. 53.

6. – Concluding Remarks

The convergence of Italian and Irish courts on the principle whereby migrants who are illegally employed should not be prevented from enforcing their labour rights because of their irregular residence prompts several observations of a more general character. The examined case law suggests the extremely positive effect of extensive judicial interpretations carried out by domestic courts on undocumented and irregular migrant workers' labour rights. Ultimately, these courts were able to establish a fair balance between the state interest to prevent and suppress the illegal employment of migrants and the need to protect the latter from labour exploitation.

The cases examined in this chapter reveal the importance of coordinating labour law and immigration law. In many instances, domestic law generates vulnerability for migrant workers not because of single provisions, but due to the interaction of norms pertaining to traditionally separated realms. Thus, a right theoretically recognized to all migrant workers by labour law might be *de facto* impossible to enjoy for those who do not hold a residence permit because of immigration laws that criminalize the employment of irregular migrants. A normative and judicial awareness of this matter is therefore crucial to ensure the effectiveness of domestic norms that aim to protect all migrant workers regardless of their residence status.

On a more general level, the cases examined in this paper suggest that an extensive interpretation of immigration law by domestic courts is currently capable of guaranteeing a stronger protection of migrant workers' rights in comparison to what is currently afforded by international and EU law - including human rights law.

It is meaningful - but not surprising - that international and European law did not play any role in the reasoning of either Irish or Italian courts. This paper has highlighted that undocumented workers' socio-economic rights are mostly entrusted to sources that are not supported by strong compliance mechanisms, or that are rarely ratified by States of immigration. The strongest supranational standards of protection currently available to this group pertain to civil rights such as the right to be free from trafficking, slavery, servitude and forced labour. In situations where undocumented workers cannot be clearly qualified as helpless victims, instead, States have appeared more reluctant to accept significant limitations of sovereignty - and particularly keen to retain as much control as possible over the management of labour migration. This phenomenon has been reinforced by the lack of further ECtHR judgments on the issue of positive State obligations as to their labour migration regimes after the *Rantsev* judgment.

Carefully targeted regularization programmes are still the corrective tool of choice for legislators of European States to remedy migrant workers' vulnerability generated by their irregular migration status. At the same time, domestic courts have been challenging this system by ensuring undocumented workers' access to basic labour rights *vis-à-vis* restrictive provisions of immigration law.

While these developments are remarkable, the recognition of undocumented and irregular migrant workers' labour rights within hard-law sources of international and European law remains a goal to be pursued. The provision of universal obligations for States of immigration in this realm (at least at regional level) is not simply convenient from migrant workers' point of view. In addition to fostering homogeneous levels of protection of migrant workers against labour exploitation, the availability of common supranational standards would ensure that no employer or State could benefit from this exploitation - and thus guarantee fair competition also from a strictly economic perspective.

VI. LIMITS TO THE IMPLEMENTATION OF INTERNATIONAL LAW INSTRUMENTS ON LABOUR MIGRATION: A FOCUS ON ILO'S PRAXIS

*Beatrice Gornati**

SUMMARY: 1. Introduction. – 2. Migrant Workers in the Light of the ILO's Legal Instruments and Praxis. – 2.1. A Step Further on Migrant Workers' Rights Defence. – 2.2. ILO's Compliance on Its Binding and Non-Binding Instruments. – 3. Refugees and Other Displaced Persons: Problems of Employment. – 3.1. Difference of Treatment in Labour Context Between Refugees and Displaced Persons. – 3.2. Problems and Good Practices Related to the Employment of Refugees in Host Countries. – 4. Forced Labour. – 4.1. Law Enforcement Against Forced Labour. – 4.2. Forced Labour and Business. – 5. Conclusions.

1. – Introduction

International migration has been incorporated in several key internationally adopted documents, including the *Universal and Transformative 2030 Agenda for*

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*Sustainable Development*¹ (hereinafter the Agenda) and the *Addis Ababa Action Agenda* (AAAA)². The *Paris Agreement on Climate Change*³ also includes important references to displacement due to climate change, stating that well-managed migration has the potential to increase the resilience of climate-vulnerable populations. In addition to that, the UN General Assembly has adopted a Resolution, namely the *Declaration of the second High-Level Dialogue on International Migration and Development*⁴, by which Member States recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination.

International migration is a worldwide phenomenon and it is caused in particular by three main drivers: the places where decent job opportunities exist are not always where people live, and even when jobs may be available, the income differences prevailing in different countries provide the strongest incentives to mobility. Income differentials coincide quite closely with demographic trends, which are the other key driver of migration. The third driver of mobility is the pressure on people to escape from situations of conflict, repression, or, increasingly, the consequences of climate change.

The recognition of migration as a condition for development by the United Nations is an important indicator of a new awareness of the problem at international level.

The question remains how to reconcile the restrictions that may accompany the granting of access of migrants to labour markets with the principle of equal treatment and non-discrimination. Such restrictions can address multiple facets of the migration process: limits on time, limits on mobility and limits on family reunification.

Many of the issues raised by migration are eminently technical and need to be addressed in the context of overall labour market policies.

The first effort must be to dismiss the notion that by virtue of the major disadvantages which migrants may face in their countries of origin, it is acceptable for them to be subjected to lesser disadvantages and injustice in the countries to which

¹ Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 25 September 2015.

² Addis Ababa Action Agenda of the Third International Conference on Financing for Development, UN Doc. A/RES/69/313, 27 July 2015.

³ Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, UN doc. FCCC/CP/2015/10/Add.1.

⁴ Declaration of the High-Level Dialogue on International Migration and Development, UN Doc. A/68/L.5, 1 October 2013.

they go to seek work.

It is important to consider that, as far as international law is concerned, instruments to facilitate labour migration, in order to foster development, dates back to the Fifties. It is the case of Convention 97 (*Migration for Employment Convention*, 1949)⁵ and 143 (*Migrant workers, supplementary provisions*, 1975)⁶ of the International Labour Organization (ILO), followed by the *International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families*, adopted by the UN in 1990.

The scope of this paper is to outline the international legal instruments, and in particular those introduced by the International Labour Organization, which can be assumed as a lighthouse for the defence of migrant workers' rights, with the special intent to find out why these instruments struggle to be implemented effectively.

The analysis will focus on three particular aspects. The first, and more general, part will concentrate on the ILO's praxis as far as labour migrations is concerned. A special focus will be given to the effective implementation of ILO's binding and non-binding instruments. The intent is to understand why both Conventions and Recommendations struggle to be put into practice by States, despite the copious production of such legal instruments by the ILO.

In the wake of these considerations, second and third parts will move to particularly problematic areas, namely the employment of refugees and the phenomenon of forced labour. The two areas, among other things, appear to influence each other. In particular, the precarious situation of these refugees may render them vulnerable to discriminatory practices which can lead to exploitation and the denial of fundamental principles and rights at work, even to forced labour.

2. – Migrant Workers in the Light of the ILO's Legal Instruments and Praxis

This paragraph analyses ILO's juridical instruments which are directed to the protection of migrant workers. In particular, the focus is to analyse if and how they

⁵ Migration for Employment Convention (Revised) (Geneva, 1 July 1949), entered into force on 22 January 1952.

⁶ Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Geneva, 24 June 1975), entered into force on 9 December 1978.

are fully implemented. In doing so, a brief comment on ILO's internal structure and on its legislative procedure is required.

The mandate of the ILO is the progressive improvement of working conditions among its members, which today number 183, thus nearly universal membership. What makes the ILO distinct from other international organizations is its tripartite structure, which includes workers' and employers' organizations in all activities of the organization on an equal footing with Member States. The Governing Body (GB) is the executive council of the ILO, it has a tripartite structure, and it holds three sessions each year in March, June and November, in Geneva. The tasks of the GB include setting the programme and budget, the preparation of the agenda of the annual International Labour Conference, the follow-up to decisions taken at the ILC and the election of the Director-General⁷. The GB is composed of 28 government members: employers' members and 14 workers' members are elected at the ILC every three years, although ten seats are reserved for countries of chief industrial importance.

In putting its mandate into practice the ILO primarily relies on normative regulation, in the form of legally binding Conventions and non-binding Recommendations, adopted through majority vote by the annual International Labour Conference (ILC), the legislative organ of the ILO.

Up to today 189 Conventions and 201 Recommendations have been adopted, although the pace at which these standards are adopted has slowed considerably since the 1990s. The supervision of these instruments rests on two important committees of the ILO: the independent Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on the Application of Standards of the ILC⁸.

It is worth noting that the ILO's governing bodies has identified in total eight ILO Conventions as fundamental to the rights of people at work and hence applicable to all workers. In particular, ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182 covering freedom of association and collective bargaining, child labour, forced and compulsory labour, discrimination on respect to employment and

⁷ JOHNSTON, *The International Labor Organization. Its work for social and economic progress*, London, 2007.

⁸ See THOMANN, *Steps to Compliance with International Labour Standards. The International Labour Organization (ILO) and the Abolition of Forced Labour*, Heidelberg, 2011.

occupation should be recalled. In effect, the 1998 ILO Declaration on Fundamental Principles and Rights at Work stresses at Article 2 that all ILO Members, even if they have not ratified the Convention in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights. In addition to that, the 1989 Directive on Safety and Health at Work defines “worker” as “any person employed by an employer” without restricting it to regular workers.

2.1. – A Step Further on Migrant Workers’ Rights Defence

There are three main migrants’ rights – as highlighted by the European Union Agency for Fundamental Rights in its Report on Fundamental Rights of migrants in an irregular situation in the European Union⁹ – which are central to ensuring fair employment conditions for immigrants in an irregular situation.

The first one relates to avoid withheld or unfair remuneration and the possibility of claiming fair payment. Article 9(1) of the ILO Convention No. 143 (1975) states that: “Without prejudice to measures [...to ensure] that migrant workers enter national territory ... in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits”.

However, seeking justice by reporting an incident of underpayment or withheld pay is neither simple nor common. One of the main obstacles to obtain unpaid wages is the difficulty in proving a work relationship, in particular the lack of an employment contract. In other cases, the dispute is on the actual number of hours worked.

The second fundamental right is the access to compensation for work accidents. On this point, Article 27 of the ILO Convention No. 121 on Employment Injury Benefits¹⁰ affirms that: “Each Member shall within its territory assure to non-nationals equality of treatment with its own nationals as regards employment injury

⁹ EU Agency for Fundamental Rights, *Report on Fundamental Rights of migrants in an irregular situation in the European Union*, November 2011.

¹⁰ Convention concerning benefits in the case of employment benefits (Geneva, 8 July 1964), entered into force on 28 July 1967.

benefits”. This also applies to migrants in an irregular situation depending on the definition of an employee according to national law.

Last but not least, there is the right of access to justice: a number of obstacles make it difficult for migrant workers in an irregular situation to claim their rights in court. This difficulty may increase the migrants’ dependency on employers and diminish the likelihood that they will denounce incidents of abuse or other labour law violations. Problems for access to justice may be fear of detection; security of residence; low rights awareness; evidence requirements. In this context, it clearly appears how much important could be the role of trade unions, which has been recognised by ILO in its Convention on Freedom of Association No. 87. The Convention also confirms that the right to join trade unions is applicable to migrant workers in an irregular situation.

The 1949 Convention concerning Migration for Employment covers recruitment and working conditions’ standards for migrant workers. It establishes the principle of equal treatment of migrant workers and nationals with regard to laws, regulations and administrative practices that concern living and working conditions, remuneration, social security, employment taxes and access to justice.

The 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers was the first multilateral attempt to address irregular migration and to call for sanctions against traffickers of human beings. It emphasized that Member States are obliged to respect the basic human rights of all migrant workers, including irregular migrants. It also provided that lawfully present migrant workers and their families should not only be entitled to equal treatment but also to equality of opportunity, e.g. equal access to employment and occupation, trade union and cultural rights and individual and collective freedoms.

The effort of the International Labour Organization to defend migrant workers’ rights moved a step further in 2006 with the creation of the ILO Multilateral Framework on Labour Migration¹¹. It contains 15 principles for promoting the rights and welfare of labour migrants and their families, providing “guidelines for a rights-based approach to labour migration”. The principles include, among others, the opportunity to obtain decent and productive work in conditions of freedom, eq-

¹¹ ILO, Multilateral Framework on Labour Migration. Non-binding principles and guidelines for a right-based approach to labour migration, Geneva, 2006.

uity, security and human dignity as well as the recognition of fundamental rights at work, an income to enable people to meet their basic economic, social and family needs and responsibilities and an adequate level of social protection. The Multilateral Framework has been helpful in informing the development of national policies on labour migration, often acting as a reference point.

While it has played an important role in setting standards, its non-binding nature restricts considerably its influence, because it means that governments can select which principles and recommended policies they wish to apply to migrant workers. In addition to that, the impact of the Framework is weakened by the fact that there is no robust monitoring mechanism to evaluate how these principles are being enforced.

In 2011, the ILO promoted the Convention concerning Decent Work for Domestic Workers, which entered into force in 2013. It was the first multilateral instrument to establish global labour standards for domestic workers, guaranteeing them the same basic rights as other workers. The Convention establishes that domestic workers, regardless of their migration status, have the same basic labour rights as those recognized for other workers: reasonable hours of work, a limit on payment in-kind, clear information on the terms and conditions of employment, as well as respect for fundamental principles and rights at work, including freedom of association and the right to collective bargaining.

In November 2013, only one month after the *Declaration of the High-level Dialogue on International Migration and Development* (HLD), the ILO issued the Report of the discussion of the *Tripartite Technical Meeting on Labour Migration*. It focuses on the challenges and opportunities for the ILO in the follow-up to the HLD and post-2015 development debate, in particular the effective protection of migrant workers. Certain migrant workers' protection gaps have been identified with regard to recruitment, equal treatment for temporary migrant workers, migrants in an irregular situation, access to social protection and portability of social security benefits, among others.

On the occasion of the International Labour Conference, in 2014, the ILO, which is also the Chair of the Global Migration Group, announced its new objective for the protection of migrant workers' rights, namely a new Agenda on Fair Migration¹². The objective of ILO is to construct an agenda which not only respects

¹² ILO, Fair Migration. Setting an ILO Agenda. Report of the Director-General, International Labour Conference 103rd Session, 2014.

the fundamental rights of migrant workers but also offers them real opportunities for decent work. The ILO brings to this debate its right-based approach grounded in universal values of equal treatment and non-discrimination. Migrant workers should enjoy equal pay for work of equal value and they should be able to exercise their fundamental rights, including trade union rights.

In setting an agenda for fair migration, the ILO pointed out that migrant workers might be affected differently in relation to various conditions. In particular, it matters a great deal whether migration is undertaken in a permanent or temporary basis. The ILO's Migration for Employment Recommendation¹³ contained in its annex a model bilateral agreement distinguishing clearly between temporary and permanent migration and prescribing additional rights for settlers.

Another important point is whether the migrant is in a regular or irregular situation. In fact, migration which takes place outside regular channels leaves the workers concerned vulnerable to abuse and exploitation and, where human smugglers are involved, those dangers become all the more acute. Even if there is wide consensus that migration should be regular, this consensus is more difficult to achieve when large stocks of undocumented workers are already active in labour markets, estimated at 11 million in the United States in 2011¹⁴ and 1.9-3.8 million in the European Union in 2008¹⁵.

Whether the migrant is granted or denied any or all of the rights, then, is a crucial aspect. Governments determine the national legal framework for labour migration. Many conclude bilateral agreements, and some are making migration one dimension of regional integration processes. They also have the opportunity for cooperation in the multilateral system to improve the governance of migration globally.

In fact, it has been noted that migration is increasingly taking place through schemes providing for temporary or circular movement of workers or for the movement of workers with specific skills. Such schemes raise important questions about the provisions required to ensure decent treatment of the workers concerned and equitable consideration of the interests of sending and receiving countries.

¹³ ILO, Recommendation concerning Migration for Employment (Revised 1949), Geneva, 32nd ILC Session, 1 July 1949.

¹⁴ Pew Research Centre, *A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized*, 29 January 2013.

¹⁵ EU Agency for Fundamental Rights, *Fundamental rights of migrants in an irregular situation in the European Union: Comparative Report*, Vienna, 2011.

The ILO is undertaking a mapping exercise to better understand and evaluate the content of bilateral arrangements and has so far covered 160 agreements in Europe and Asia. In fact, the work being undertaken to collect and analyse the many agreements already concluded by Member States to regulate the movement of workers between them should be the basis for increased cooperation in this area to promote fair migration practices.

2.2. – ILO's Compliance on Its Binding and Non-Binding Instruments

The application of international labour standards is subject to a complex supervisory system, as established by the ILO's Constitution. It includes a regular reporting system supervised by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), as well as special supervisory procedures dealing with complaints alleging infringements of Conventions or cases relating to violations of freedom of association rights¹⁶. The CEACR is in charge of examining the application of ratified Conventions on the basis of reports that governments – under Article 22 of ILO's Constitution – are required to issue¹⁷. In assessing whether States have complied with their obligations the CEACR makes either observations or direct requests: while the former relate to serious cases of non-compliance the latter concern either minor cases or technical issues in need of clarification¹⁸.

Apart from the regular reporting and monitoring system, then, there is a special three-part supervision procedure: Article 24 allows local, national or international industrial workers' or employers' organizations to make a so-called *representation* in which it may be claimed that a given Member State has failed to apply a ratified Convention.

If the Government fails to implement the standards within the time limit specified in the recommendations of the Commission of Inquiry, according to Article 33 the GB “may recommend to the Conference such action as it may deem wise and

¹⁶ WISSKIRCHEN and HESS, *Employers' Handbook on ILO Standards-Related Activities*, Geneva, 2001.

¹⁷ Three different types of reporting obligations exist under the Constitution: Arts. 19, 22, and 35. Art. 22 reports are due on ratified Conventions and provide information on the implementation and application of ratified instruments.

¹⁸ After the number of reports on ratified Conventions arose significantly, in 1926 the ILC established both the CEACR and the Conference Committee to take joint charge of the supervision of standards.

expedient to secure compliance therewith". Thus, Article 33 is the basis for the imposition of sanctions within the special supervisory procedure against States not implementing the recommendations of Commissions of Inquiry set up under article 26. After the GB has made a proposal, the ILC must approve and recommend the measures under Article 33 in the form of a resolution; the actual implementation of these measures is, however, left to the Member States.

A final supervisory body is the Committee on Freedom of Association (CFA), a tripartite body that receives and reviews complaints alleging violations of the rights of freedom of association and to collective bargaining. The CFA was created to support the Fact-Finding and Conciliation Commission (FFCC) – set up on the basis of an agreement between the ILO and the UN Economic and Social Council in 1950. However, since the FFCC required consent of the concerned government, the procedure was hardly used and instead the CFA became more active. The CFA comprises nine members drawn from the three groups of the GB. Governments, relevant workers' or employers' associations, or international employers' and workers' organizations with ILO consultative status may trigger the Freedom of Association procedure. It is not necessary that the State concerned has ratified the relevant Conventions, Nos. 87 and 98. If the case is accepted, the government concerned is asked to provide further information and the Committee will examine the documentary evidence. A final or interim report by the CFA, including its recommendations and conclusions, is then submitted to the GB.

Despite ILO's efforts to verify the correct implementation of labour standards, the ILO is currently facing a situation, in which its constituents find it increasingly hard to agree upon new standards. In particular, States ratify new standards adopted at a slower pace than before. The declining adoption rate of international labour standards may be due to diverging interests and a lack of agreement among its heterogeneous members – including employers' and workers' organizations.

Looking at the ratification status, to this day¹⁹, 49 ILO Member States out of 185 had ratified ILO Convention No. 97; 23 Member States had ratified Convention No. 143; and 10 Member States had ratified Convention No. 189. In total, two of ILO's 185 Member States – Italy and the Philippines – had ratified all three instruments, representing less than one per cent of ILO member States and hosting less than three

¹⁹ All data about ILO's Conventions ratifications are available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO>.

per cent of all international migrants worldwide (5.9 million) in 2013.

In addition to the aforementioned ILO's Conventions, it is worth noting that in 1990 the UN General Assembly introduced the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families²⁰, which is to be considered as the third and most comprehensive international treaty on migrant rights. It established international definitions for categories of migrant workers and formalized the responsibility of States in upholding the rights of migrant workers and members of their families. However, as highlighted by the Office of the High Commissioner for Human Rights – in charge of monitoring the implementation of the Convention and working to further its ratification – none of the States Parties to the 1990 Convention were major migrant receiving countries. It clearly represents an important obstacle to the implementation of the Convention, in consideration of the fact that only six of these countries hosted more than one million international migrants. Even if over the past years the status of ratifications improved slightly, the objectives of the Convention are far from being reached: as of the end of 2013, 47 Member States (out of a total of 193 United Nations Member States) had ratified the Convention. They collectively hosted 17 million international migrants in 2013, about seven per cent of the global migrant population. Overall, 87 countries had ratified at least one of the four instruments regarding migrant workers. Together they hosted 32 per cent of the world migrant population in 2010, or 75.8 million in absolute figures²¹.

3. – Refugees and Other Displaced Persons: Problems of Employment

Of the 17.4 million *recognized* refugees and *registered* asylum seekers, and millions of forcibly displaced persons, only a very small minority gain access to labour markets in the formal economy, opportunities for decent work and satisfactory conditions of employment and rights protection in the workplace.

In 2015, more than 244 million international migrants were estimated to live outside their countries of origin for more than 12 months²². Of these, the ILO esti-

²⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), entered into force on 1 July 2003.

²¹ United Nations Human Rights Office of the High Commissioner, Map of ratifications of the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families, available at: <<http://www.ohchr.org/Documents/HRBodies/CMW/StatRatCMW.pdf>>.

²² UNDESA, "Trends in International Migration", Population Facts No. 2015/4, UN Department of

mates that over 150 million (about 62 per cent) are migrant workers²³. Globally, almost 61 million people are forcibly displaced by conflict, violence and human rights violations, overwhelmingly in emerging economies (UNHCR (2015)). By mid-2015, an estimated 15.1 million of this total were refugees. The top five countries of origin – the Syrian Arab Republic, Afghanistan, Somalia, Sudan and South Sudan – account for 10 million refugees, while the top five hosting countries in absolute numbers – Turkey, Pakistan, Lebanon, the Islamic Republic of Iran and Ethiopia – accommodate 6.1 million refugees.

Access to work may be prohibited or restricted by law and those that do manage to find work do so, in many instances, in the informal economy – the main labour market in many of the refugee-impacted countries. The precarious situation of these populations renders them vulnerable to discriminatory practices which can lead to exploitation and the denial of fundamental principles and rights at work. The failure to uphold fundamental principles and rights at work can result in situations of forced labour, bonded labour, child labour and sexual exploitation.

In situations where the displacement of refugees is protracted, unacceptable forms of work are rising in magnitude. For example, in Jordan, Lebanon and Turkey, the incidence of child labour among the Syrian refugee population has increased dramatically in the last few years, reversing gains made in addressing the phenomenon among the national population²⁴.

Discussion about this enormous problem have taken place within the ILO during a side event organized at the 14th Session of the International Labour Conference (ILC) in June 2015 and during the 325th and 326th Sessions of the Governing Body in November 2015 and March 2016 respectively. In this context, the Governing Body at its 326th Session agreed to convene a tripartite technical meeting on the access of refugees and other forcibly displaced persons to the labour market. It was aimed at: discussing the adoption of a set of guiding principles to inform policy measures on the access of refugees and other forcibly displaced persons to the labour market based on relevant ILO standards and other related human rights instruments, as well as good practices where these exist; recommending ways to dis-

Economic and Social Affairs, Population Division, 2015.

²³ ILO, *ILO global estimates on migrant workers: Results and methodology*, Geneva, 2015.

²⁴ ILO, UNICEF, Save the Children and Ministry of Labour, *Children living and working on the streets of Lebanon: Profile and Magnitude*, February 2015.

seminate and give practical effect to such ILO guidance, including to inform national and multilateral responses and forums; preparing the ILO and its constituents to contribute to international events addressing global concern about refugees and forced displacement, in particular the UN General Assembly Summit addressing large movements of refugees and migrants and the US Summit on the refugees crisis both to be held in September 2016.

A related feature is that globally, the majority of refugees, forcibly displaced persons, IDPs and returnees, now live in urban and rural areas usually among their host communities, not in refugees' camps. As displacement becomes increasingly protracted, cities may offer better economic prospects than camps and rural areas. But access to urban labour markets is usually constrained by unclear legal status and degree of enjoyment of economic and social rights. Competition in the highly crowded informal economy, where most forcibly displaced persons search for work, results in unfair competition for unauthorized and unprotected jobs.

The ILO has a mandate to protect the interests of all workers "when employed in countries other than their own" including refugees²⁵. In its 2016 General Survey concerning the ILO's migrant worker instruments, the Committee of Experts on the Application of Conventions and Recommendations stated that: "Refugees and displaced persons, where they are employed as workers outside their own countries, are covered by the instruments"²⁶. Against this backdrop, the ILO is challenged to further define, enhance and implement its contribution both to the overall international effort to assist refugees and other forcibly displaced persons and through its own distinctive expertise and services to member States to support them in facing these challenges.

3.1. – Difference of Treatment in Labour Context Between Refugees and Displaced Persons

In the context of forced migrations, a distinction must be introduced between refugees and displaced persons in general. A refugee recognized under the provisions of the 1951 Refugee Convention²⁷, in fact, may also benefit from certain la-

²⁵ ILO, Constitution of the International Labour Organisation, Preamble.

²⁶ ILO, Promoting Fair Migration, Geneva, 105th ILC Session, 2016.

²⁷ Convention relating to the Status of Refugees (Geneva, 28 July 1951), entered into force on 22 April 1954 ("Refugee Convention").

bour rights spelled out in Article 17 to 19 of this Convention (access to employment), Articles 15 and 24 (labour rights), and Article 15 (right of association through trade unions). Article 17 of the Refugee Convention extends to refugees the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment. The same Article specifies also that “restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned” or to a refugee who has completed three years’ residence in the country. The same conditions are reserved to a refugee who has a spouse possessing the nationality of the country of residence or who has one or more children possessing the nationality of the country of residence.

As far as self-employment is concerned, then, Article 18 requires Contracting Parties to accord to a refugee a treatment not less favourable than the one accorded to aliens generally in the same circumstances, while Article 19 requires the same conditions of Article 18 for a refugee engaged in liberal professions.

Refugees are “privileged” under these articles over other categories of forcibly displaced persons, even though many countries constrain or limit the application of these rights. In fact, even those with refugee status work mainly in the informal economy because of labour market constraints and legal impediments to their access to work²⁸, while for migrants without refugee status, those with temporary protection, and other forcibly displaced persons, their only option may be to work informally.

From the perspective of the ILO and its mandate, access to labour markets for refugees and other forcibly displaced persons is the turnkey to these developmental objectives alongside managing the wider socio-economic impacts of labour market access.

3.2. – Problems and Good Practices Related to the Employment of Refugees in Host Countries

In response to the current situation, the ILO is providing technical support to Member States in supporting both refugees and national workers. Some examples

²⁸ According to the ILO-FAFO study “Impact of Syrian refugees on the Jordanian labour market”, 2015, around 99 per cent of the sample of Syrian refugee workers were employed in the informal economy, compared with 50 per cent of Jordanian workers in the sample.

are: pioneering assessments of the impact of the growing number of refugees inside Lebanon and Jordan, as well as a survey of their employment status; joint ILO-UNHCR collaboration in Egypt and Zambia focused on providing integrated value chain development projects for refugees; further joint ILO-UNHCR collaboration with the tripartite partners in the garment sector in Jordan is piloting the initial creation of up to 2,000 jobs for Syrian refugees underpinned by the Better Work programme; and the Local Economic Recovery approach to provide jobs and income opportunities for host communities and refugees, returnees and IDPs.

In addition to that, an ILO's Flagship Programme on Jobs for Peace and Resilience (JPR)²⁹ has been created to work in conflict-affected and disaster-prone countries to prevent, resist, adapt to and recover from conflicts and slow onset disasters with potentially important dividends on peace and resilience. The Programme combines large-scale and employment-centred interventions with skills and vocational training, entrepreneurship development and awareness raising of fundamental principles and rights at work in fragile settings, with a specific focus on youth as the primary beneficiary group. It also offers a selected package of technical inputs as entry points in fragile settings, consisting of Employment Intensive Investment Programmes (EIIP) complemented by skills and enterprise development initiatives to create an enabling policy environment for social-economic recovery.

Even though the implementation of the Refugee Convention has been combined with a great effort of the ILO for the protection of migrant workers' rights, many problems persist in the creation of decent work conditions for refugees. The difficulty of solving these problems is due to many concurrent factors, such as the fact that refugee-hosting States are not all signatories to the 1951 Convention or some have made reservation to Articles 17 to 19 affording refugees the right to engage in different kinds of employment; furthermore, very few States have undertaken legislative or administrative reform to improve access to labour markets for refugees and forcibly displaced persons. In addition to that, access to labour market is rarely provided with the clarity envisaged in international law; rather, it is mediated by political and economic considerations. Generally, refugee and forced migration issues fall under the remit of interior or immigration ministries with varying degrees of centralization and decentralization of functions such as status determination, and renewal of permits and visas.

²⁹ The ILO's Flagship Programme is one of the ILO's five flagship programmes, designed to enhance the efficiency and impact of its development cooperation with constituents on a global scale.

In the case of refugees and other forcibly displaced persons, the right and access to work are further conditioned by their overall status. The fact that few countries display a systematic correlation between the legal and normative provisions for status determination and protection, on the one hand, and right to work on the other, is a major constraint.

It is worth noting, however, that many countries, as reported by the ILO in 2016³⁰, are implementing a series of good practices in recent years, also in cooperation with international organizations.

In February 2016, the Turkish Government adopted the Regulation on Work Permits of Foreigners under Temporary Protection, allowing Syrian refugees in possession of their temporary identity cards and residing in Turkey for six months, to apply for work permits. In Turkey, the ILO is supporting vocational training and language courses delivered to refugees by public education centres to ease their access into the Turkish labour market.

Jordan is also engaged in labour market reform with respect to refugees' access to its labour markets and has developed a pioneering strategy, the Jordan Compact. Furthermore, the ILO, in collaboration with the UNHCR, is piloting through its Better Work programme in Jordan the creation of jobs in the garment manufacturing sector which particularly targets women refugees, including through skills training.

The Federal Employment Agency of Germany make refugees and asylum seekers eligible for Type II unemployment benefits which are designed to secure a livelihood by screening their competences and offering individualized services with intensive counselling and language courses.

Some States, such as Ecuador, in partnership with the UNHCR and civil society organizations, have taken positive measures to facilitate inclusion in the labour market through small enterprise schemes, skills upgrading and training programmes and self-reliance programmes.

The ILO is also publishing a *Joint ILO-UNHCR Guide to Market-based Livelihoods Intervention for Refugees*³¹ providing guidance on entrepreneurship, voca-

³⁰ ILO, *The access of refugees and other forcibly displaced persons to the labour market*. Background paper of the ILO guiding principles for discussion at the ILO tripartite technical meeting on the access of refugees and other forcibly displaced persons to the labour market, Geneva, 5-7 July 2016.

³¹ ILO, UNHCR, *Responding to the Global Refugee Crisis: How market assessments can enhance the impact of livelihood interventions for refugees – An intervention model for joint efforts of UNHCR and ILO to integrate refugees into the labour market of host countries*, 2016.

tional training and financial education to enable refugees to set up micro-enterprises or small income-generating activities to improve livelihoods and self-reliance. The tourist industry in Sweden, for example, has helped fast-tracking access by validating or upgrading skills of qualified asylum seekers or refugees.

The EU has developed a clear legal framework that seeks to promote greater region-wide consistency on access of refugees and asylum seekers to the labour market that is applied in 25 of its 28 Member States, through the Refugee Qualification (Directive 2011/95/EU) and Reception Conditions Directives (Directive 2013/33/UE). Article 26(1) of the Refugee Qualification Directive states that: “Member States shall authorize beneficiaries of international protection to engage in employed or self-employed activities subject to the rules generally applicable to the profession and to the public service, immediately after protection has been granted”. Furthermore, Article 15(1) of the Reception Conditions Directive highlights that “States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant”.

In the African region, a Joint Labour Migration Programme (JLMP) was developed by the African Union Commission together with the ILO, the International Organization for Migration (“IOM”) and the United Nations Economic Commission for Africa (“UNECA”).

4. – Forced Labour

The analysis of migrant workers’ condition and the protection of their rights will move now to the complex topic of forced labour, a condition that particularly affects persons in a vulnerable situation, among which migrant workers are the most eligible target.

The ILO produced its last Global Estimate of Forced Labour in 2012³², which revealed figures of 21 million victims of forced labour all over the world, of which 11.4 million are women and girls and 9.5 million are men and boys.

Almost 19 million persons are exploited by private individuals or enterprises and over 2 million by States or rebel groups. Of those exploited by individuals or

³² ILO Global Estimate of Forced Labour, 2012.

enterprises, 4.5 million are victims of forced sexual exploitation.

Indeed, forced labour in the private economy generates US \$ 150 billion in illegal profit per year and domestic work, agriculture, construction, manufacturing and entertainment are among the sectors most concerned³³.

The ILO introduced two main Conventions on forced labour. The Forced Labour Convention, 1930 (No. 29)³⁴ defines forced labour for the purposes of international law as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Article 2(1)). As evinced by the aforementioned article, the ILO’s definition comprises two basic elements: the work or service is exacted under the menace of penalty and it is undertaken involuntarily.

The Abolition of Forced Labour Convention, 1957 (No. 105)³⁵, then, specifies that forced labour can never be used for the purpose of economic development or as a means of political education, discrimination, labour discipline, or punishment for having participated in strikes (Article 1).

In 1999, the ILO also introduced the Worst Forms of Child Labour Convention (No. 182)³⁶. The Convention clarifies that child labour amounts to forced labour not only when children are forced, as individuals in their own right, by a third party to work under the menace of a penalty, but also when a child’s work is included within the forced labour provided by the family as a whole.

The work of the ILO supervisory bodies over 75 years has served to clarify both of these elements. The penalty does not need to be in the form of penal sanctions, but may also take the form of a loss of rights and privileges. Moreover, the menace of a penalty can take multiple different forms. There can also be a subtle form of menace, sometimes of a psychological nature. Situation examined by the ILO, and reported in its Global Report³⁷, have included threats to denounce victims to the po-

³³ The ILO’s usual method of deriving global estimates is to aggregate national estimates into regional and then global figures. This direct aggregation method is often preceded by preliminary steps to harmonize differences in national concepts and definitions, and to impute for possible missing data.

³⁴ ILO, Convention concerning Forced or Compulsory Labour (N.29), Geneva, 14th ILC Session, 28 June 1930.

³⁵ ILO, Convention concerning the Abolition of Forced Labour Convention, Geneva, 40th ILC Session, 25 June 1957.

³⁶ ILO, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Geneva, 87th ILC Session, 17 June 1999.

³⁷ ILO, *A Global Alliance Against Forced Labour*, Global Report under the Follow-up to the ILO

lice or immigration authorities when their employment status is illegal, or denunciation to village elders in the case of girls forced to prostitute themselves in distant cities. Other penalties can be of a financial nature, including economic penalties linked to debts, the non-payment of wages, or the loss of wages accompanied by threats of dismissal if workers refuse to do overtime beyond the scope of their contract or of national law. Employers sometimes also require workers to hand over their identity papers, and may use the threat of confiscation of these documents in order to exact forced labour.

As regards freedom of choice, the ILO's report refers that there may be many subtle forms of coercion. Many victims enter forced labour situations initially of their own accord, albeit through fraud and deception, only to discover later that they are not free to withdraw their labour. They are subsequently unable to leave their work owing to legal, physical or psychological coercion.

The ILO Report on forced labour evidenced also that older forms of coercion and compulsion are transmuting into newer ones. In order to move forward effectively, salient features of much contemporary forced labour need to be understood. In 2005, ILO identified three main new trends: forced labour is most frequently exacted by private agents rather than directly by the State; induced indebtedness is a key instrument of coercion; precarious legal status of millions of irregular migrants makes them particularly vulnerable to coercion.

Besides these new features of forced labour practice, effective protection of migrant workers is made more difficult by a serious legislative gap. On this point, the ILO highlighted as the main problem the fact that, with very few exceptions, forced labour is not defined in any detail, making it difficult for law enforcement agents to identify and prosecute the offence. While the vast majority of ILO Member States have ratified one or both of the ILO's Conventions on forced labour, many have not provided for the specific offence of forced labour in their criminal law, although many have included it in their labour law. The law may also be couched in very general terms rather than by identifying the various ways in which forced labour may be exacted by private actors. In consequence of this, there have been very few prosecutions for forced labour anywhere in the world.

For the purposes of this article, it is necessary to move briefly to the UN Convention on Human Trafficking, which includes forced labour in the main purposes

of exploitation. Indeed, the report of the Expert Group on Trafficking in Human Beings, convened by the European Union in 2003, has identified forced labour exploitation as the crucial element of the Trafficking Protocol³⁸.

Clearly, the Trafficking Protocol functions as a complementary legislative instrument to the ILO's Conventions on forced labour. However, it is worth noting that by no means all the forced labour practices to which even migrant workers are subjected in destination countries are necessarily a result of trafficking. And not only migrants are the victims of forced labour in the destination countries.

In addition to that, while the Trafficking Protocol draws certain distinctions between *trafficking for sexual exploitation* and *trafficking for forced labour or services*, this should not be taken to imply that coercive sexual exploitation does not constitute forced labour. Indeed, the ILO supervisory bodies have regularly dealt with forced prostitution and sexual exploitation under Convention No. 29.

As far as modern-slavery is concerned, then, the ILO clarifies that it is one form of forced labour. In particular, "slavery-like practices" clearly encompass situations where individuals or social groups are forced to work for others³⁹. There is an evident overlap between forced labour situations and slavery-like practices. Debt bondage, for example, is a particularly prominent feature of contemporary forced labour situations. This practice, which is most common in South Asia, involves the taking of a loan or wage advance by a worker from an employer or labour recruiter, in return for which the worker pledges his or her labour and sometimes that of family members in order to repay the loan. The terms of the loan or work, however, may be such that the worker is trapped for years without being able to pay back the loan⁴⁰.

4.1. – Law Enforcement Against Forced Labour

At its 103rd Session in June 2014, the International Labour Conference voted

³⁸ European Commission, *Report of the Expert Group on Trafficking in Human Beings*, Brussels, 22 December 2004, p. 53.

³⁹ Slavery is defined in the Slavery Convention (Geneva, 25 September 1926), entered into force on 9 March 1927.

⁴⁰ Debt bondage is defined in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956), entered into force on 30 April 1957, as "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined" (Art. 1(a)).

overwhelmingly in favour of adopting a new Protocol to the Forced Labour Convention, 1930 (No. 29)⁴¹, as well as a Recommendation that supplements both the Protocol and Convention No. 29⁴². The Protocol establishes the obligations to prevent forced labour, protect victims and provide them with access to remedies and emphasizes the link between forced labour and trafficking in persons. In line with Convention No. 29, the Protocol also reaffirms the importance of prosecuting the perpetrators of forced labour and ending their impunity. A special focus on prevention is intended to implement measures that strengthen the role of labour inspections and workers' and employers' organizations.

In addition to the Protocol, then, the ILO introduced the Forced Labour Recommendation, 2014 (No. 203). The Recommendation, which must be read in conjunction with the Protocol, functions as a non-binding practical guidance concerning measures to strengthen national law and policy on forced labour in the areas of prevention, protection of victims and ensuring their access to justice and remedies, enforcement and international cooperation.

However, the potential of the Protocol, which entered into force on 9 November 2016, is put to a hard test by the fact that it obtained only ten ratifications so far⁴³.

Article 1(1) of the Protocol sets out its central requirement: in giving effect to its obligations under Convention No. 29 to suppress forced or compulsory labour, each Member must take effective measures□to prevent and eliminate its use, to provide to victim protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour.

The development of a comprehensive national strategy on forced labour and an appropriate institutional framework for its implementation can strengthen the impact of measures taken against forced labour. The Protocol, at Article 1(2), encourages such policy coherence by requiring Members to develop a national policy and plan of action on forced labour.

The Protocol requires also consultation and exchange of information between representatives of governments, employers and workers as well as engagement

⁴¹ Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 11 June 2014), entered into force on 6 November 2016.

⁴² ILO, Recommendation on supplementary measures for the effective suppression of forced labour, Geneva, 103rd ILC Session, 11 June 2014.

⁴³ Until today, Protocol No. 29 has been ratified by Argentina, Czech Republic, Estonia, France, Mali, Mauritania, Niger, Norway, Panama and United Kingdom.

with other key stakeholders, in order to ensure the effectiveness of measures. Under the Protocol, the national policy and plan of action must be developed in consultation with employers' and workers' organizations.

More generally, measures taken to apply the provisions of the Protocol and Convention No. 29 are to be determined by national laws or regulations or by the competent authority, after consultation with organizations of employers and workers concerned (Article 6).

Finally, the national policy and plan of action must involve systematic action by the competent authorities – taken, as appropriate, in coordination with employers' and workers' organization, as well as with other groups concerned, which could include, for example, other civil society organizations.

The Protocol places particular emphasis on the effective enforcement of criminal law, which can deter forced labour violations, but other types of legislation are also relevant to prevention. It requires Member States to undertake efforts to ensure that the coverage and enforcement of such legislation, including labour law as appropriate, apply to all workers and sectors of the economy⁴⁴ – so that certain vulnerable groups are not left unprotected. Relatedly, the Protocol also requires Members to undertake efforts to strengthen labour inspection services and other services responsible for the implementation of this legislation.

While the provision is broadly worded to encompass all legislation relevant to the prevention of forced or compulsory labour and the relevant services, labour law and labour inspection are highlighted, reflecting the important roles they play in combating forced labour.

For example, forced labour cases may involve several simultaneous violations of labour law relating to wages, hours of work, occupational safety and health or other areas. By taking immediate action to address and correct such violations, labour inspectors can prevent exploitative situations from degenerating further into forced labour.

Certain workers, including migrant workers, may be particularly vulnerable to abuses committed during the recruitment process that can result in forced labour situations. Such abuses may include debt process linked to repayment of recruitment fees, illegal wage deductions, retention of passports, threats if workers want to leave their employers and deception about the nature and conditions of work.

⁴⁴ Art. 2(c)(i) of the Protocol.

Ensuring fair and transparent recruitment and placement practices are key in preventing forced labour. So, the Protocol establishes that measures to prevent forced labour must include protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process.

The importance of effective preventive measures is central to the Recommendation No. 203, which provides a list of actions to be implemented, such as orientation and information for migrants before departure and upon arrival and the introduction of employment and labour migration policies. In addition to that, the Recommendation encourages the cooperation of victims for the identification and punishment of perpetrators while not conditioning the provision of protective measures on such cooperation. It also affirms the need to provide accommodation, health care, material assistance and social and economic assistance, as well as the importance to protect the privacy and identity of victims and their safety along with that of family members and witnesses.

Despite the important provisions introduced by the Recommendation, it is worth noticing that since Recommendations are non-legally binding by definition they do not create any legal effect at all. Furthermore, in some situations it might be difficult to establish if a worker is a victim of forced labour, since the boundaries between poor working conditions and forced labour often are fluid and blurred. The difficulties countries encounter in implementation may be related to the specificity of international labour standards as human rights. In fact, fundamental labour rights, including the abolition of forced labour, belong in contrast to many other rights set forth in ILO standards, primarily to the realm of civil and political rights and, to a lesser extent to that of economic and social rights.

4.2. – Forced Labour and Business

In recent years, a special attention has been paid to corporate social responsibility as an important instrument to monitor forced labour. This awareness is strictly linked to relevant figures concerning labour exploitation in private sector – as outlined above.

In particular, it is worth mentioning the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) endorsed by the UN Human Rights Coun-

cil in June 2011⁴⁵. These Principles are founded with the understanding that all business enterprises, regardless of their size, sector, location, ownership or structure, are required to comply with all applicable laws and to respect human rights. The UNGPs have set the stage for meaningful development in business and human rights policies by clearly defining, for the first time, the roles and responsibilities of the State and companies, and the means of redress open to people who are victims of human rights violations. In doing so, they have placed rights firmly back onto the corporate social responsibility (“CSR”) agenda.

The UNGPs are grounded on three general principles: first, States have a duty to protect human rights stemming from their international human rights law obligations; secondly, companies have a responsibility to respect human rights; and finally, remedies for harms must be provided.

The UNGPs identify three modes of business responsibility for human rights: first, causing human rights abuse or “adverse human rights impacts”; second, contributing to adverse impacts on human rights; or third, a “direct linkage between the operations, products or services” of a business with adverse impacts on human rights through “business relationships, even if they have not contributed to those impacts”⁴⁶.

The UNGPs should be implemented with a special focus on the rights and needs of groups who are particularly vulnerable to human rights abuses linked to business practices. An essential starting point is for companies to map where vulnerable groups exist in the supply chain in order to understand how the business is impacting these people. The results of vulnerability mapping can then be used to establish the salient impacts on which the company needs to take action.

In the light of these observations, UNGPs may be considered as a further instrument to contrast forced labour. Indeed, even if they are not focused on labour exploitation specifically, principles 18 through 21 elaborate essential components of human rights due diligence. In particular, UNGPs establish that business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability

⁴⁵ United Nations Human Rights Council, *Guiding Principles on Business and Human Rights*, New York/Geneva, 2011.

⁴⁶ UNGPs, Principle 15.

or marginalization, and bear in mind the different risks that may be faced by women and men.

For its part, the ILO has always paid particular attention to Corporate Social Responsibility (CSR) as an important instrument to protect workers. The point of reference for the ILO on CSR is the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, which is the only international instrument addressed to enterprises which has been agreed to by governments, employers' and workers' organisations.

Reliable statistical information about the economic sectors where forced labour is found remains difficult to establish. However, ILO estimates that, globally, only 10% of all forced labour is exacted by the State or armed forces. This means that the overwhelming majority of forced labour is exacted by private agents. Of this majority, 22% is exacted for forced sexual exploitation, while 68% is exacted for the purpose of forced labour exploitation.

Forced labour that results from human trafficking largely affects persons working at the margins of the formal economy, with irregular employment or migration status. However, it is increasingly evident that coercive recruitment and employment practices can affect migrant workers in other mainstream economic sectors as well, for example in health care, food processing, and contract cleaning, both in private and public sector employment.

Some key steps have already been taken by enterprises and business actors of all kinds. Companies are adopting policy measures – for example, codes of conduct – that explicitly prohibit forced labour, while others have joined multi-stakeholder initiatives such as the UN Global Compact. These are important initiatives. However, there is growing international consensus that much more still needs to be done.

More recently, the ILO addressed the problem of forced labour in business by publishing an *Employers' Handbook on Forced Labour*, in collaboration with the International Organization of Employers⁴⁷. The handbook reflects new ILO statistics and researches on forced labour as well as the framework of action approved by the ILO Governing Body in 2014.

In its Handbook, the ILO encourages many companies to undertake many important actions to prevent and combat forced labour. It is recommended, for example,

⁴⁷ ILO, *A Handbook for Employers and Business. Special Action Programme to Combat Forced Labour*, Geneva, 2015.

that employers' organizations play a central role in providing their members with information and advice on addressing forced labour and human trafficking. By virtue of their role in representing business, employers' organizations can develop or participate in programmes that seek to rehabilitate and reintegrate former victims of forced labour and human trafficking. They can lead job placement or apprenticeship programmes, and provide vocational training and skills development opportunities.

The Handbook also identifies some tips for taking action against forced labour, such as establishing a clear and transparent company policy that sets out the measures to prevent forced labour. The ILO also requires companies to monitor their suppliers and sub-contractors and to build bridges with other stakeholders, including workers' organizations, law enforcement authorities, labour inspectorates and non-governmental organizations.

5. – Conclusions

The recognition of migration as a condition for development by the UN Post-2015 development Agenda is only the tip of the iceberg of a new awareness of the problem at international level. Even if the first legal instrument to facilitate labour migration dates back to the fifties, the above analysis outlined an important increase of the UN production of treaties, in particular by the ILO, on this matter.

As emerged in paragraph 2, however, many problems arise in relation with the effective implementation of these instruments. As far as binding Conventions are concerned, the ratification status is far from sufficient. Countries that have ratified are mostly sending countries, while respect for the rights of labour migrants is likely to be more important in receiving countries.

Additionally, the friction between institutional declarations and practical implementation of the dispositions, especially at local level, is one of the major obstacles.

Although remittances are globally assumed as an important means of implementing the development goals, economic migrants are diffusely perceived more as a problem than as a resource.

Labour migration turned out to be a really complex phenomenon not only for the various characteristics it may assume, but also for the social and political implications which may concern it. First of all, migration falls within the domestic domain of the State. That is precisely why governments have the quite exclusive competence to determine the national legal framework for labour migration. In addition to that, the ratification status of the international law instruments on labour migration is far

to be sufficient. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the UN in 1990, for example, introduced many important provisions, but its effectiveness in upholding the rights of migrant workers has been constrained by slow ratification.

The same problem has also emerged in relation to refugees' rights protection, where refugee-hosting States are not all signatories to the 1951 Refugee Convention and some have made reservation to Articles 17 to 19 affording refugees the right to engage in different kinds of employment.

A critical consequence of the lack of agreements on international mobility, as emerged above, is that irregular migration is encouraged. In many countries, for example, migrants are entirely dependent on their employers because their residence permit are linked to a specific job.

The condition of vulnerability that labour migration may produce contributes to the increase of labour exploitation cases, even to forced labour.

In that respect the ILO has recently produced an important legal instrument, namely the Protocol to the Forced Labour Convention of 1930, which unfortunately has been ratified only by ten countries to date. Besides binding instruments, the ILO produced also Recommendations, which, despite their non-binding status, are able to provide States an important guidance in addressing forced labour suppression. In effect, it is a matter of fact that in order to implement effectively international measures against forced labour, a change of States' migration policies is needed.

In the light of what said, it must be considered that ILO's praxis in the context of migrant workers' right defence has been really prolific in recent years, but a major effort by Member States is required in order to implement these dispositions effectively and to guarantee law enforcement worldwide.

VII.

**THE “ASYLUM PAYERS”: QUESTIONING
THE ASYLUM SEEKERS’ OBLIGATION
TO CONTRIBUTE TO THE COSTS OF
THEIR RECEPTION UNDER INTERNATIONAL
AND EUROPEAN UNION LAW**

*Salvatore Fabio Nicolosi**

SUMMARY: 1. Introduction and Context. – 2. The Practice Related to the Asylum Seekers’ Contribution to the Costs of their Reception in Europe. – 3. International Law and the Economic Treatment of Refugees and their Property. – 3.1. The Refugee Convention. – 3.2. International Human Rights Law. 4. Asylum Seekers’ Financial Contributions to the Costs of their Reception under EU Law. – 5. Testing Asylum Seekers’ Resources in order to Ensure Dignified Standards of Living. – 5.1. The Court of Justice’s Guidelines. – 5.2. The Amendments Suggested by the Proposal to Recast the Reception Directive. – 6. Conclusions.

1. – Introduction and Context

The adoption in January 2016 by the Danish Parliament of an amendment to the Aliens Act, known as the “Jewellery Law”¹, providing for the search and seizure of

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¹ See Bill No. L87 presented by the Danish Government on 10 December 2015, and adopted by the

certain assets of asylum seekers that may serve as a contribution to the costs of their reception, raised several concerns especially as to its human rights implications². The United Nations High Commissioner on Refugees (UNHCR), in fact, questioned the legality of the law, in particular as regards the introduction of the new police search and seizure powers which have been criticized to be “an affront to... dignity and an arbitrary interference with [the] right to privacy”³.

This heavily debated law is to be situated within the initiatives undertaken by the Danish government to limit the attractiveness of Denmark as a country of destination for asylum seekers and migrants⁴. More broadly, the Jewellery Law constitutes one of the reactions to the ongoing migratory flows affecting many Member States of the European Union (“EU”)⁵. As stressed by Groenendijk and Peers, similar rules exist in the legislation of several Member States, including Germany, the Netherlands or Sweden⁶. The domestic practice at the European level shows the ex-

Danish Parliament on 26 January 2016. The so called “Jewellery Law” was incorporated into Act No. 102 of 3 February 2016, amending the Danish Aliens Act, whose original text is available at: <www.retsinformation.dk/forms/R0710.aspx?id=164258>. For comments see IBEN JENSEN and VEDSTED-HANSEN, “The Danish ‘Jewellery Law’: When the signal hits the fan?”, *European Immigration and Asylum Law and Policy*, 4 March 2016, available at: <<http://eumigrationlawblog.eu/the-danish-jewellery-law-when-the-signal-hits-the-fan/>>.

² See, e.g., HARTMANN and FEITH TAN, “The Danish Law on Seizing Asylum Seekers’ Assets”, *EJIL: Talk!*, 27 January 2016, available at: <<http://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/>>.

³ United Nations High Commissioner for Refugees (UNHCR), “Observations on the proposed amendments to the Danish Aliens legislation, L 87, 6 January 2016,” available at: <<http://www.refworld.org/docid/5694ed3a4.html>>.

⁴ A series of 34 proposals for legislative amendments and administrative initiatives was tabled by the Danish government on 13 November 2015 as part of the “Asylum Package”. These amendments include also the controversial possibility to postpone from one to three years access to family reunification for aliens with temporary protected status, a form of protection which is different from refugee status. As to the concerns raised by the changes to the Danish Aliens Act, see the Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, CommDH(2016)4, 15 January 2016, available at: <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)4&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)4&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

⁵ As highlighted by Eurostat, in the second quarter of 2016, the number of persons seeking asylum in the EU reached 305,700, marking an increase of 6 per cent compared with the first quarter of 2016. For an overall overview of migration and asylum statistics, see the tables and figures updated by Eurostat at: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics>.

⁶ GROENENDIJK and PEERS, “Can Member States seize asylum-seekers’ assets?”, *EU Law Analysis*, 24 January 2016, available at: <<http://eulawanalysis.blogspot.be/2016/01/can-member-states-seize-asylum-seekers.html>>.

istence of a series of national rules concerning the possibility to force asylum seekers to contribute from their own assets and income to the cost of their reception.

Despite triggering initial debates, the issue of the asylum seekers' contribution to the expenses of their maintenance has remained partly unexplored, though constituting a burning topic of the migration and development discourse. Host States claim, in fact, that the cost of reception of asylum seekers may have an impact on the state of national economy, particularly in time of crisis⁷.

Generally, migration constitutes a development vehicle that could be greatly beneficial to countries of both origin and destination⁸. Nonetheless, the impact of the migratory pressure on the EU has been challenging the reception conditions of many Member States, especially in cases of forced migration of persons in need for protection⁹. The difficulties in distinguishing economic migrants from asylum seekers and other people in need for protection in a context of mixed migratory flows¹⁰ has resulted in the adoption of legislative measures aimed at discouraging any possible pull factor in countries of destination.

Recognizing that host countries, as confirmed by the UNHCR, have to pay a high price for receiving asylum seekers¹¹, it is pivotal to answer the question

⁷ For an economic analysis see in particular AIYAR et al., "Refugee Surge in Europe: Economic Challenges", International Monetary Fund Staff Discussion Note SDN/16/02, 1 January 2016, available at: <<https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf>>.

⁸ See UN General Assembly, Second Committee, 19th Meeting, 27 October 2010, GA/EF/3291. The link between migration and development has been especially explored by CHIMNI, "Development and Migration", in ALEINIKOFF and CHETAIL (eds.), *Migration and International Legal Norms*, The Hague, 2003, p. 255 ff.

⁹ International Organization for Migration ("IOM"), *Glossary on Migration*, Geneva, 2004, p. 25, refers to forced migration as a

"general term used to describe a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)."

¹⁰ Mixed flows are generally defined by the IOM, *cit. supra* note 9, as "complex population movements including refugees, asylum seekers, economic migrants and other migrants." For references, see in particular, LINDE, "Mixed Migration - A Humanitarian Counterpoint", *Refugee Survey Quarterly*, 2011, pp. 89-99. For further references see EL-ENANY, "The EU Asylum, Immigration and Border Control Regimes: Including and Excluding the 'Deserving Migrant'", *European Journal of Social Security*, 2013, p. 171 ff.

¹¹ UNHCR Standing Committee, "Social and economic impact of large refugee populations on host developing countries" UN Doc. EC/47/SC/CRP.7, 6 January 1997, para. 28, available at: <<http://www.unhcr.org/en-us/excom/standcom/3ae68d0e10/social-economic-impact-large-refugee->

whether asylum seekers may be legitimately required to contribute to the cost of their reception. Accordingly, the nature and scope of a specific obligation in this regard needs to be properly investigated as well as its compatibility with EU law and the international legal framework.

To this extent, the research will firstly review the most relevant domestic practice at the European level, highlighting the possible risks beyond construing asylum seekers as profiteering from the international refugee protection regime. The scope of the research will be limited to the European context, the latter being one of the regions which are most concerned with migratory flows that are even likely to hinder one of the essential values of the European cooperation, such as the free movement of persons¹².

Next, the research will examine the international legal framework and notably the Geneva Convention on the Status of Refugee¹³ as to the possibility for States to impose on refugees and asylum seekers any obligation to contribute to the cost of their reception. The analysis will also consider States' international duties to respect the property of aliens and that aliens have the right to the peaceful enjoyment of their property under international human rights law.

It will be argued that the tendency to impose an obligation for asylum seekers to contribute to the cost of their reception may undermine the exercise of the right to asylum and can also create discriminations on how property and possessions are protected, if treating asylum seekers radically different from other migrants and from national citizens. Furthermore, the paper will focus on the pertinent rules of the Common European Asylum System ("CEAS"),¹⁴ especially the Reception Di-

[populations-host-developing-countries.html - ga=1.194174126.26314193.1474381000>](#).

¹² See, e.g., FIJNAUT, "The Refugee Crisis: The End of Schengen?", *European Journal of Crime Criminal Law and Criminal Justice*, 2015, p. 313 ff.

¹³ Convention relating to the Status of Refugees (Geneva, 28 July 1951), entered into force on 22 April 1954 ("Refugee Convention"), and the Protocol relating to the Status of Refugees (New York, 31 January 1967), entered into force on 4 October 1967.

¹⁴ The Common European Asylum System consists of the following binding acts: Council Regulation 604/2013, OJ L 180/31, 29 June 2013 ("Dublin III Regulation"); Council Regulation 603/2010, OJ L 180/1, 29 June 2013 ("Eurodac Regulation"); Directive 2011/95/EU, OJ L 337/9, 20 December 2011 ("Qualification Directive"); Directive 2013/33/EU, OJ L 180/96, 29 June 2013 ("Reception Directive"); Directive 2013/32/EU, OJ L 180/249, 29 June 2013 ("Procedures Directive"); Council Directive 2001/55/EC, OJ L212/12, 20 July 2001. For an interpretation of the CEAS as an integrated legal system, see extensively BATTJES and SPIJKERBOER, "The Systematic Nature of the Common European Asylum System", in JULIEN-LAFERRIÈRE, LABAYLE and EDSTRÖM (eds.), *The European Immigration and Asy-*

rective, to reach the conclusions on the implications of asylum seekers' obligations to contribute to the costs of their reception.

Ultimately, it will be suggested that a national rule allowing authorities to confiscate all means of an asylum seeker above a fixed amount, is not thoroughly compatible with international and EU law, as it may violate the principle of proportionality and can be detrimental to the effective exercise of the right to asylum.

2. – *The Practice Related to the Asylum Seekers' Contribution to the Costs of their Reception in Europe*

A few European States have consolidated rules within their legislation concerning asylum seekers' contributions to the cost of their reception.

The Danish Aliens Act, in fact, even before the recent amendment of January 2016, envisaged that asylum seekers could be required to contribute to expenses associated with their stay for up to three months and the Danish police had the power to find documents that could be relevant for asylum claims. However, as has been underscored, this law was apparently never enforced¹⁵. Admittedly, the most appalling issue of the recent amendment to the Aliens Act is the possibility for the police to confiscate asylum seekers' assets worth 10,000 Danish kroner (more than 1,340 Euro), such as cash or jewellery, with the exception of items of special sentimental value, such as wedding rings or medals. These seized assets will be used to pay the cost of reception, including accommodation or healthcare services.

Apart from Denmark, similar practices are common to other EU Member States, including those with a long tradition in receiving refugees, such as Germany, where the Federal Law on the reception of asylum seekers (*Asylbewerberleistungsgesetz*), provides that asylum seekers can be forced to contribute from their own assets and income to the cost of their reception¹⁶. Article 7 of this law exempts only 200 Euros and the goods necessary for exercising a profession or employment. However, as reported by

lum Policy: Critical Assessment Five Years After the Amsterdam Treaty, Bruxelles, 2005, p. 263 ff., p. 270, where it is argued that "the conception of European asylum legislation as an integrated system is in some quite important respects necessary to interpret its rules, including claims on protection relevant for international law". For an updated commentary on the CEAS toolbox, see especially HAILBRONNER AND THYM, *EU Immigration and Asylum Law. Commentary*, 2nd edition, Baden-Baden, 2016.

¹⁵ HARTMANN and FEITH TAN, *cit. supra* note 2.

¹⁶ Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz* - AsylbLG), 30 June 1993, available at: <<https://www.gesetze-im-internet.de/asylblg/BJNR107410993.html>>.

Groenendijk and Peers¹⁷, the practice in Germany is rather diversified as the Federal Law allows for differentiated application in the Landers.

In the Netherlands, asylum seekers are required to report whether they have own assets or income a part of which they may have to relinquish in order to contribute to their own reception costs and the reception costs of their family¹⁸.

In France, the recent reform of asylum legislation has profoundly modified the reception scheme and has included the possibility for asylum seekers to pay a financial contribution for their accommodation, should the accommodated asylum seekers have monthly resources which are above the monthly rate of the Active Solidarity Income (“*Revenu de Solidarité Active*”)¹⁹. In addition, organizations managing reception facilities are entitled to require a deposit for the accommodation provided, which will be refunded, totally or partially, when asylum seekers leave the reception facility²⁰.

Still, in Hungary, the Asylum Act provides material reception conditions free of charge only to asylum seekers who are indigent, while the Asylum Authority may decide to order the applicant to pay for the full or partial costs of material conditions and health care²¹. However, the level of resources is not established in the Asylum Act and applicants have to make a statement regarding their financial situation. Presently, this condition does not pose an obstacle to accessing reception conditions. Access to reception conditions can be reduced or withdrawn in case it can be proven that the applicant deceived the authorities regarding his or her financial situation, although the European Council on Refugees and Exiles (“ECRE”) underscores that there have not been reports that asylum seekers would not be able to access material reception conditions.

A similar practice is common to other countries in Europe, which are not part of

¹⁷ GROENENDIJK and PEERS, *cit. supra* note 6.

¹⁸ See for further see the Country Report elaborated by the European Council on Refugees and Exiles, available at: <<http://www.asylumineurope.org/reports/country/netherlands>> and consult the web site of the Central Agency for the Reception of Asylum Seekers (“COA”).

¹⁹ As of 1 April 2016 the total amount of the Active Solidary Income (“RSA”) is 524.68 Euro for a single adult.

²⁰ Articles L.744-1 to L.744-10 *Code de l'entrée et du séjour des étrangers et du droit d'asile*, as amended by the Law No. 2015-925 of 29 July 2015, in Official Journal of the French Republic, No. 174, 30 July 2015, p. 12977.

²¹ Act LXXX of 2007 on Asylum, available at: <http://njt.hu/cgi_bin/njt_doc.cgi?docid=110729.259725>, at Sec. 26(2). See also the Country Report elaborated by ECRE, available at: <<http://www.asylumineurope.org/reports/country/hungary>>.

the EU, such as Switzerland, whose legislation requires asylum seekers to report to the Swiss authorities their values from 1,000 Swiss francs (more than 2,700 Euros) in order to contribute to the cost of their asylum applications and the provision of social assistance, while refugees or beneficiaries of other forms of protection are required to pay a tax of 10 per cent on their income as a contribution to the reception costs for a ten-year period²².

This set of domestic rules requiring asylum seekers to contribute to the cost of their reception reflects a consolidated European practice. Yet, a careful analysis through the lens of international and European law is necessary to understand whether access to reception conditions can be subject to the payment of a financial contribution or fee.

3. – *International Law and the Economic Treatment of Refugees and their Property*

Most of the domestic provisions concerning the reception of asylum seekers in Europe have been influenced by the process of harmonization that has been generated by EU law in the area of asylum²³. This is the case, for instance, of the recent legislative reform in France, which was adopted in order to comply with the new CEAS legal toolbox²⁴. The latter constitutes the legislative framework that must be taken into consideration to understand whether rules and practices on the seizure of asylum seekers' assets and financial contributions to the cost of reception are admissible and in line with EU law.

Nonetheless, before delving into the analysis of EU law provisions, it is crucial to examine the international legal landscape and especially the Refugee Convention,

²² The most important norms for admission and handling of refugees are contained in the Asylum Act (*Asylgesetz*), 26 June 1998, as amended, *Systematische Rechtssammlung* [SR] 142.31, available at: <<https://www.admin.ch/opc/de/classified-compilation/19995092/201510010000/142.31.pdf>>, unofficial English translation is available at: <<https://www.admin.ch/opc/en/classified-compilation/19995092/201510010000/142.31.pdf>>, and the Foreign Nationals Act (*Bundesgesetz über die Ausländerinnen und Ausländer*), 16 December 2005, SR 142.20, available at: <<https://www.admin.ch/opc/de/classified-compilation/20020232/201510010000/142.20.pdf>>, unofficial English translation available at: <<https://www.admin.ch/opc/en/classified-compilation/20020232/201510010000/142.20.pdf>>.

²³ For a critical discussion see in particular BHABHA, "European Harmonization of Asylum Policy: A Flawed Process", *Virginia Journal of International Law*, 1994, p. 101 ff. For further references see also GUILD and MINDERHOUD (eds.), *The First Decade of EU Migration and Asylum Law*, Leiden, 2012.

²⁴ See *supra* note 14.

which, as stated by the Court of Justice of the EU, constitutes “the cornerstone of the international legal regime for the protection of refugees”²⁵, and, pursuant to Article 78(1) of the Treaty on the Functioning of the EU (“TFEU”), the whole EU policy on international protection “must be in accordance” with the Refugee Convention and other relevant treaties, specifically in the field of human rights²⁶.

International law offers a diversified set of rules likely to regulate the economic treatment of refugees. In particular, the simultaneous application of the Refugee Convention’s regime and international human rights instruments confirms that States must treat asylum seekers and their property according to the principle of non-discrimination. The two bodies of law will be subsequently analysed.

3.1. – The Refugee Convention

The Refugee Convention enshrines a number of principles regulating the treatment of refugees and their property. In particular, Article 13 and, more specifically, Article 29 on fiscal charges and Article 30 on transfer of assets are worth mentioning as they set the general framework concerning the economic treatment of refugees.

Article 13 establishes that:

“The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property”.

This provision echoes the general principle enshrined in Article 7(1) of the Refugee Convention which imposes the obligation to accord to refugees the same treatment which is accorded to aliens generally and introduces a standard of treat-

²⁵ Case C-175/08, *Aydin Salahadin Abdulla*, ECR, 2010, I-01493, para. 52.

²⁶ Art. 78(1) TFEU reads as follows:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

ment based on the principle of non-discrimination²⁷. More specifically, Article 13 requires States to respect asylum seekers' property rights on the same ground as for other foreigners, not only on tangible property but also on securities, money, bank accounts, with the exception of artistic and industrial property, which is regulated in Article 14²⁸.

As regards property rights, Article 7(1) incorporates, as stressed by Hathaway, the duty to comply with international aliens law, including the obligation to provide adequate compensation for any denial of property rights, which renders any confiscatory regime specifically applied against refugees contrary to the Refugee Convention²⁹. From this perspective, the practice of Kenya and Uganda aimed at seizing refugees' vehicles without compensation is an example of a practice that can be considered in breach of international law³⁰.

Still, as regards the economic treatment of refugees, Article 29 establishes the general rule that States Parties shall not impose on refugees charges or taxes "other or higher than those which are or may be levied on their nationals in similar situations"³¹. Article 30 confirms the right of refugees to transfer all and any type of assets which they have brought to the territory of the hosting State to another country in case of resettlement³². In the light of the drafting history of the Refugee Convention, it is clear that Article 29 reiterates the general principle of equal treatment between nationals and refugees as to the obligations stemming

²⁷ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary* by Dr. Paul Weis, Geneva, 1990, available at: <<http://www.refworld.org/docid/53e1dd114.html>>, p. 47.

²⁸ *Ibid.* p. 199.

²⁹ HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005, p. 523. For further references to the rights of aliens, see generally NASCIBENE, *Il trattamento dello straniero nel diritto internazionale ed europeo*, Milan, 1984.

³⁰ HATHAWAY, *cit. supra* note 29, p. 523.

³¹ Art. 29(1), Refugee Convention.

³² Art. 30(1), Refugee Convention, which reads as follows:

"1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted."

from tax legislation³³, this corresponds to provisions included in previous refugee law instruments, such as the 1933 Convention³⁴. Therefore, as explained by Hathaway, Article 29 follows a standard clause in tax treaties, according to which when a tax is imposed on nationals and aliens in the same circumstances, it must be in the same form, and the relative formalities should not result more onerous for foreigners than for nationals³⁵.

Contrariwise, Article 30 constitutes a novelty in the Refugee Convention, as it does not echo any former provision of the previous refugee instruments; it stems from a Belgian proposal within the Ad Hoc Committee³⁶. As noted by Grahl-Madsen in his commentary, the provision sets forth a mandatory obligation which does not allow any discretion of the national authorities as to the transfer of the assets³⁷. It is worth noting that a proposal to restrict the right of transfer to assets brought as a refugee was rejected by the Conference of Plenipotentiaries³⁸, thus the obligation refers also to assets brought by asylum seekers before the refugee status was determined. It follows from the analysis of Article 30 that under international refugee law the property of refugees is protected from any unlawful and undue seizure by the authorities of the host State, even before the refugee status is determined.

In sum, international refugee law requires that refugees and other aliens are subjected to similar treatment, though it is clear that other aliens may not be entitled to the reception conditions which asylum seekers receive. From this perspective, it is also significant to stress that the Danish government has compared the position of refugees to that of Danish citizens claiming for social assistance. Accordingly, Denmark has been applying the same logic of the domestic Active Social Policy Act, according to which social assistance will not be provided to those individuals who have assets likely to cover their economic needs over the amount of 10,000 Danish kroner per person and that are necessary to maintain a basic standard of living³⁹.

³³ UNHCR, *cit. supra* note 27, p. 199.

³⁴ Art. 13 of the Convention Relating to the International Status of Refugees (Geneva, 28 October 1933), entered into force on 22 April 1954.

³⁵ HATHAWAY, *cit. supra* note 29, p. 531.

³⁶ UN Doc. E/AC.32/L.24.

³⁷ GRAHL-MADSEN, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, UNHCR, 1963, republished in October 1997, available at: <<http://www.refworld.org/docid/4785ee9d2.html>>.

³⁸ UN Doc. A/CONF.2/SR.13, p. 7.

³⁹ Bekendtgørelse af lov om aktiv socialpolitik, LBK No. 468, 20 May 2016, available at:

Nevertheless, despite such measure can be legitimate, a more cautious approach is necessary while equating asylum seekers and citizens applying for social assistance. It must be stressed, in fact, that the Refugee Convention enshrines a number of secondary rights specifically linked with the reception of refugees, which States Parties are obliged to grant in order not to make the international system of refugee protection nugatory. Such rights, including the right to housing, work, education, primarily reflect the humanitarian nature of the international system of refugee protection and the need to facilitate the integration of refugees in the host society. Any seizure of asylum seekers' assets, if arbitrary, risks turning this legal regime into a discriminatory system likely to affect the relevance of the principle of equal treatment. To this extent, this body of law complements the main provisions enshrined under international human rights law⁴⁰, which will be shortly examined in the following subparagraph.

3.2. – *International Human Rights Law*

Apart from the specific legal regime established by the Refugee Convention, the right to property is enshrined as a human right in a few other international instruments, such as the International Convention on the Rights of Migrant Workers⁴¹ at the universal level, while at the regional level the right to property is included in the American Convention on Human Rights,⁴² the African Charter of Human and Peoples' Rights,⁴³ the Charter of Fundamental Rights of the EU,⁴⁴ and, although not enshrined in the original text of the European Convention on Human Rights ("ECHR"), such right features in the 1952 Additional Protocol I.

The latter instrument plays a pivotal role, owing to the concerns that the issue

<<https://www.retsinformation.dk/pdfPrint.aspx?id=180043>>.

⁴⁰ As to the interplay between international refugee law and international human rights law, see generally CHETAIL, "Are Refugee Rights Human Rights?: An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in RUBIO-MARÍN (ed), *Human Rights and Immigration*, Oxford, 2014, p. 19 ff.

⁴¹ Art. 15 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990), entered into force on 1 July 2003.

⁴² Art. 21 of the American Convention on Human Rights (San José, 22 November 1969), entered into force on 18 July 1978.

⁴³ Art. 14 of the African Charter on Human and Peoples' Rights (Banjul, 27 June 1981), entered into force on 21 October 1986.

⁴⁴ Art. 17 of the Charter of Fundamental Rights of the European Union, OJ C364/1, 18 December 2000.

of seizing asylum seekers' assets has raised especially in Europe. Article 1(1) of the latter Protocol reads, in fact, as follows:

“1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

Without delving into an extensive analysis on the interpretation of the right to property under the ECHR regime⁴⁵, it is worth mentioning that the provision above confirms that the right in subject is not absolute. The fact that the Refugee Convention and international human rights instruments, such as the ECHR impose a duty to respect foreign nationals and their property according to the principle of non-discrimination does not imply, in fact, that restrictions to property are not allowed in any case.

In a consistent case law, the European Court of Human Rights (“ECtHR”) interpreted the right to property as comprising three distinct rules as key components of such right, namely the general principle of peaceful enjoyment of property, the deprivation of property under certain conditions and State control over the use of property according to the general interest⁴⁶. Admittedly, pursuant to these interconnected rules any interference with the right to property must be interpreted in the light of the fair balance between the fundamental rights of individuals and the public needs⁴⁷ and any restriction to the right to property must serve a legitimate aim, including the adoption of measures of economic reform or measures designed to achieve greater social justice⁴⁸. From this perspective, it follows that such a fair balance will not have been struck where the individual property owner is made to

⁴⁵ For a more extensive analysis, see especially COLACINO, *La protezione del diritto di proprietà nel sistema della Convenzione europea dei diritti dell'uomo*, Roma, 2007.

⁴⁶ See *Sporrong and Lönnroth v. Sweden*, Application No. 7151/75 (A/52), Application No. 7152/75 (A/52), Judgment of 23 September 1982. For a general reference see especially COBAN, *Protection of Property Rights Within the European Convention on Human Rights*, Aldershot, 2002.

⁴⁷ *Sporrong*, *cit. supra* note 46, para. 69.

⁴⁸ *James and Others v. United Kingdom*, Application No. 8793/79, Judgment of 21 February 1986.

bear "an individual and excessive burden"⁴⁹. A possible restriction to the right to property for reasons related to public economy may be justified but it is hard to accept that the cost of reception conditions can constitute an important public need which can justify the seizure of asylum seekers' personal assets. Similar restrictions can, in fact, result disproportionate through the lens of international law.

Although less affected by asylum applications, unlike Germany, Hungary, Sweden, Austria and Italy⁵⁰, Denmark is certainly one of the highest spenders on the reception of asylum seekers and this has clear economic consequences. Nonetheless, refugees are not to be considered exclusively as a social and economic burden for the host society. As highlighted by the UNHCR, while it is recognized that there may be some negative aspects to the impact of a refugee influx on the economic life of a host country, the economic impact of refugees on host areas is not necessarily negative, as an economic stimulus may be generated, *inter alia*, through the local purchase of food, non-food items, shelter materials by agencies supplying relief items, disbursements made by aid workers, the assets brought by refugees themselves, as well as employment and income accrued to local population, directly or indirectly, through assistance projects for refugee areas⁵¹.

Such considerations do not aim to deny the heavy price that host societies have to pay in receiving asylum seekers, but they intend to clarify that international law sets forth a system whose primary scope is to protect people in need for protection, emphasizing how a satisfactory solution of the problem cannot be achieved by imposing undue or disproportionate obligations upon asylum seekers, without considering instead international co-operation among States⁵², also at the regional level and more specifically within the EU. In this regard, an effective system of responsibility-sharing based on solidarity mechanisms, which include the relocation of asylum seekers across the EU, is under discussion in the light of the recast process of the Dublin Regulation on the State responsible for an asylum application⁵³.

⁴⁹ *Sporrong*, *cit. supra* note 46, para. 73.

⁵⁰ See statistics on the number of (non-EU) asylum seekers in the EU and EFTA Member States, 2014 and 2015 (thousands of first time applicants), available at: <<http://ec.europa.eu/eurostat/statistics-explained/index.php/>>.

⁵¹ UNHCR Standing Committee, *cit. supra* note 11, para. 6.

⁵² Preamble of the Refugee Convention.

⁵³ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or

Without discussing in greater detail the ongoing proposals, it is worth highlighting that an effective system of relocation of asylum seekers must address the different needs for protection in the reception of asylum seekers, such as family reunification and the best interest of the child⁵⁴.

4. – *Asylum Seekers' Financial Contributions to the Costs of their Reception under EU Law*

The international legal framework does not specifically address the issue of the possible asylum seekers' obligation to contribute to their own maintenance, as the Refugee Convention and international human rights rules merely establish a not less favourable standard of treatment than that accorded to aliens generally in the same circumstance.

Nonetheless, within EU law a more detailed set of rules enshrined in the Reception Directive⁵⁵ complements the international legal framework as to the reception and treatment of asylum seekers and refugees. Despite the fact that Article 78(1) TFEU enshrines the EU commitment to develop a policy on international protection which must be consistent with the Refugee Convention and other relevant treaties, including the ECHR, the CEAS has evolved as an autonomous body of law with specific rules. It is therefore crucial to explore the regime established by the Reception Directive in order to see whether an obligation for asylum seekers to contribute to the costs of their reception is allowed under EU law and whether it is compatible or raises tensions with the international legal framework.

The current Reception Directive, which replaces former Directive 2003/9,⁵⁶

a stateless person (recast), [COM(2016) 270 final/2], 21 August 2016; see also [COM(2016) 270 final/1], 4 May 2016. For specific references on the recast process of the Dublin Regulation, see MAIANI, "The Reform of the Dublin III Regulation", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, 28 June 2016, available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2016\)571360](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)571360).

⁵⁴ See, in this regard, NICOLOSI, "Emerging Challenges of the Emerging Challenges of the Temporary Relocation Measures under EU Asylum Law", *European Law Review*, 2016, p. 338 ff. On the latter issue, see the contribution by GUALCO in this Volume, p. 175 ff.

⁵⁵ For a recent commentary on the Reception Directive, see *inter alia*, PEERS et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Vol. 3 – EU Asylum Law*, Boston/Leiden, 2015, p. 497 ff. See also HAILBRONNER and THYM, "Legal Framework for EU Asylum Policy", in ID. (eds.), *cit. supra* note 14, p. 1023 ff.

⁵⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the recep-

deals with access to reception conditions for asylum seekers while they wait for the examination of their claim and ensures access to housing, food, healthcare and employment as well as medical and psychological care. This legislative instrument is necessary for a common asylum policy in order to harmonize rules on reception conditions and offer equivalent standards of treatment across the EU, as stated in the 2009 Stockholm Programme⁵⁷.

The relevant provisions on material reception conditions are enshrined in Article 17 which establishes the obligation for Member States to provide "adequate standards of living" for applicants.

Nonetheless, this provision allows some leeway to Member States because all or some of the reception conditions can be made available to those asylum applicants who do not have sufficient means necessary to have adequate standards of living⁵⁸. Secondly and more importantly, Article 17(4) allows Member States to "require applicants to cover or contribute to the cost of the material reception conditions and of the health care", provided that the applicants have sufficient resources, for example if they have been working for a reasonable period of time. As explained in detail by Groenendijk and Peers through the analysis of the *travaux préparatoires*⁵⁹, such provisions on financial contributions by asylum seekers were also contained in former Directive 2003/9 and in the Commission's proposal for the original Directive, which carried a specific provision on financial contributions that asylum seekers may be asked to pay whether provided with material reception conditions⁶⁰. Nonetheless, the Commission pointed out that decisions on applicants' contribution should be taken "individually, objectively and impartially" and rea-

tion of asylum seekers, OJ L 31, 6 February 2003, p. 18.

⁵⁷ The Stockholm Programme - An open and secure Europe serving and protecting citizens, OJ C 115, 4 May 2010, para. 6.2, expressly states that:

"it is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination."

⁵⁸ Reception Directive, Art. 17 (3).

⁵⁹ GROENENDIJK and PEERS, *cit. supra* note 6. For a more extensive analysis of the Directive and its legislative history see also SLINGENBERG, *The Reception of Asylum Seekers under International Law*, Oxford, 2014, p. 57.

⁶⁰ European Commission, Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, 3 April 2001, [COM(2001) 181 final], Art. 19.

sons must be given in order to make possible their review⁶¹.

The proposal confirmed that the provision on financial contributions was drafted in order to meet the Council's concerns as to the requirement of "inadequate" resources of asylum seekers. During the negotiations several Member States insisted that reference should be made to the general principle of the real need of the applicant⁶², and as explained by Groenendijk and Peers, the proposal regarded the asylum seekers' income, implying that all the income above a certain threshold could be seized by a Member State⁶³. The legislative history of the Reception Directive illustrates the difficulty to accommodate Member States' suggestions until the final draft was accepted with the reference in Article 17(4) to access to the labour market for a reasonable period of time as a condition to ask asylum seekers to contribute to the cost of the material reception conditions.

Compared to former Directive 2003/9, the 2013 recast Reception Directive includes among the grounds for reducing or withdrawing material reception conditions, which the Court of Justice of the EU ("CJEU") has considered exhaustive⁶⁴, the circumstance that the applicant has concealed financial resources⁶⁵. In this regard, it must be stressed that, as emphasized by ECRE, the possibility to completely withdraw reception conditions must be taken carefully and a narrow approach must be followed, in order to ensure that applicants have sufficient resources for an adequate standard of living⁶⁶.

Overall, from the proposals elaborated during the negotiations for the Reception Directive adopted in 2003 and its later recast process, some relevant considerations clearly emerged. First, although the issue of financial contributions has been repeatedly discussed during the negotiations, no reference can be tracked as to the seizure of asylum seekers' assets and this also reflects, as mentioned before, the

⁶¹ *Ibid.*

⁶² See Council Document 11320/01 ASILE 39, 30 July 2001, p. 33.

⁶³ GROENENDIJK and PEERS, *cit. supra* note 6.

⁶⁴ In Case C-179/11, *Cimade and Gisti*, 27 September 2012, para. 57, the Court stated that "only in cases listed in Article 16 of Directive 2003/9 [corresponding to Article 20 of recast Directive 2013/33/EU] may the reception conditions ... be reduced or withdrawn". For a comparison between former Directive 2003/9 and current Directive 2013/33, see especially SLINGENBERG, *cit. supra* note 59, pp. 80-84.

⁶⁵ Reception Directive, Art. 20(3).

⁶⁶ See ECRE, Information Note on Directive 2013/33/EU, July 2015, available at: <http://www.ecre.org/wp-content/uploads/2016/07/Information_Note_Reception-2015.pdf>, p. 32.

practice of most European States with the exception of the recent Danish "Jewellery Law".

Secondly, based on the Reception Directive, Member States are allowed to ask asylum seekers a financial contribution for the cost of their reception, provided that a preliminary test is made of whether applicants possess sufficient resources to have a standard of living for their health and to enable their subsistence, as set forth in Article 17(3) of the Reception Directive. It is worth stressing that such test must be considered in the light of the system of guarantees that the Directive establishes in favour of asylum seekers, which the European Court of Human Rights ("ECtHR") in its landmark decision in *M.S.S. v. Belgium and Greece*, defined as a vulnerable group⁶⁷.

Before delving into the construction of the test in subject, which will be dealt with in the following section, it must be reiterated that the Directive establishes minimum standards on the reception of asylum seekers. Thus, despite the fact that Member States may follow a minimalist approach while implementing the Directive's provisions, the adoption of less favourable standards than those established by the Directive would not be compatible with EU law⁶⁸. Accordingly, the possible seizure of asylum seekers' assets regulated by domestic rules would infringe EU law insofar as it will introduce other conditions than those set out in the Directive. In this regard, a relevant case law issued by the CJEU confirms that many areas of asylum and migration are not governed by Member States' discretion but by a corpus of uniform EU rules. In its judgment in *Ben Alaya*, for instance, the Court pointed out that although Directives may allow Member States to exercise a measure of discretion, such discretion relates only to the conditions laid down in the relevant Directive⁶⁹.

However, it must be reminded that asylum and migration in EU law are also regulated by the principle of flexible or differentiated integration, according to

⁶⁷ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011. For comments see CLAYTON, "Asylum Seekers in Europe: *M.S.S. v. Belgium and Greece*", *Human Rights Law Review*, 2011, p. 739 ff. The major findings of the ruling in *M.S.S.* have been echoed by the CJEU in its decision in Case C-411/10, *N.S.*, ECR 2011, I-13905, paras. 88-90.

⁶⁸ The Reception Directive, Recital 28, establishes that "Member States should have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State".

⁶⁹ Case C-491/13, *Ali Ben Alaya*, 10 September 2014; see also Case C-575/12, *Air Baltic Corporation AS v. Valsts robežsardze*, 4 September 2014; Case C-84/12, *Koushkaki*, 19 December 2013.

which a Member State opts to move forward at different speeds and/or towards different objectives⁷⁰. This is, for instance, the case of Denmark that is not bound by the Reception Directive, because of its opt-out from the EU policies in the area of freedom, security and justice⁷¹. Although the principle of flexible integration has certainly allowed some progress in many areas of the EU polity, including asylum and migration, it has nonetheless fragmented or limited the outreach of EU law, determining situations in which Member States can exercise their discretionary power regardless of standards set by the EU legislation.

5. – Testing Asylum Seekers’ Resources in order to Ensure Dignified Standards of Living

The Reception Directive, as it has been argued, establishes a legal framework which aims to ensure dignified standards of living for asylum applicants within the EU⁷². Pursuant to Article 3, the scope of the Directive is, in fact, to provide material support for applicants in the territory of a Member State. Such support may be subject to the condition that asylum seekers do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence⁷³.

A test is therefore necessary in order for Member States to determine the level of material support that must be provided to asylum applicants and consider whether they have sufficient resources for a dignified standard of living. The exhaustion of this test is a precondition for Member States to consider the possibility to require applicants to contribute to the cost of their material reception.

Unfortunately, as it has been stressed, the determination of the material recep-

⁷⁰ For references, see in particular ANDERSEN and SITTE, “Differentiated Integration: what is It and How Much can the EU Accommodate?” *Journal of European Integration*, 2006, p. 313 ff.

⁷¹ For a recent discussion see WIND and ADAMO, “Is Green Better than Blue? The Danish JHA Opt-out and the Unilateral Attempt to Attract Highly Skilled Labour”, *European Journal of Migration and Law*, 2015, p. 329 ff. It must be stressed that Ireland has also opted out, while the UK has opted in and is still bound by former Directive 2003/9.

⁷² See in this regard more extensively TSOURDI, “Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity”, *Journal of Immigration, Asylum and Nationality Law*, 2015, p. 9 ff., and, more recently, ID., “EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?”, in CHETAIL, DE BRUYCKER and MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee*, Leiden, 2016, p. 271 ff.

⁷³ See Reception Directive, Art. 17(3).

tion conditions is an area with wide divergences at the national level⁷⁴, owing to the fact that the Reception Directive allows Member States to follow a minimalist approach to the Directive's provisions which has been counterbalanced by the most recent case law issued by the Court of Justice.

5.1. – The Court of Justice's Guidelines

The EU Court of Justice has been paying increasing attention to construing the most delicate provisions of the CEAS and ensuring uniform interpretation throughout the EU. After obtaining jurisdiction over migration and asylum questions in 2005, in fact, the role of the Court of Justice has been notably expanded in the area of asylum, with references for preliminary rulings seeking guidance with the interpretation of the EU asylum legislation⁷⁵.

As regards the material reception conditions, the CJEU had the opportunity to provide useful guidelines that Member States must take into account when considering whether the resources of asylum seekers are sufficient to have dignified living standards. Two recent cases are seminal in this regard. In its judgment in *Cimade and Gisti* the Court of Justice stressed that the asylum seekers may not be deprived even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State of the protection of the minimum standards laid down by the Reception Directive⁷⁶.

This line of reasoning has been more recently echoed in *Saciri*, in which the Court had the opportunity to point out that the minimum standards laid down by the Reception Directive will normally suffice to ensure dignified standards of living across all Member States⁷⁷. Still, the Court stressed that, "although the amount

⁷⁴ While referring to a number of Reports from international human rights organisms, including the Commissioner for Human Rights of the Council of Europe, and civil society organizations, TSOURDI, *cit. supra* note 72, p. 19, highlights how many asylum seekers in some Member States face a real lack of reception conditions.

⁷⁵ For references see GARLICK, "International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR", *Refugee Survey Quarterly*, 2015, p. 107 ff.; BOUTRUCHE ZAREVAC, "The Court of Justice of the EU and the Common European Asylum System: Entering the Third Phase of Harmonisation?", *Cambridge Yearbook of European Legal Studies*, 2010, p. 53 ff.. See also COLLIN, "Recent developments in asylum and immigration law before the Court of Justice", *ERA Forum*, 2009, p. 581 ff.

⁷⁶ *Cimade and Gisti*, *cit. supra* note 64, para. 56.

⁷⁷ Case C-79/13, *Saciri*, 24 February 2014, para. 35.

of the financial aid granted is to be determined by each Member State, it must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence⁷⁸. The Court set out a number of guarantees aimed at ensuring that particular attention is given to people with special needs: the resources made available must be necessary, for instance, to guarantee family unity and the best interest of the child, which therefore includes the possibility that children can be housed with their parents⁷⁹. Moreover, the allowance received must be also adequate to obtain housing, even in the private market⁸⁰.

Overall, the Court provided national authorities with yardsticks necessary to gauge the level of material support that must be available to asylum applicants in order to ensure dignified standard of living. The approach followed by the Court of Justice therefore diverges from that of certain Member States aimed at inspecting asylum seekers' resources in order to find the surplus necessary to contribute to the cost of their reception. This protective approach is even strengthened by the fact that in *Saciri* the Court made clear that no derogation from the mentioned minimum standards set out in the Reception Directive can be justified on the basis of the saturation of the reception networks⁸¹.

Another point which is worth mentioning in this context is the emphasis that the Court of Justice paid to the value of human dignity, as enshrined in Article 1 of the Charter of Fundamental Rights of the EU, which was recalled in the two mentioned leading cases concerning the Reception Directive, namely *Cimade/Gisti* and *Saciri*. The argument developed by the Court on the relevance of human dignity in reception conditions emphasizes that the CEAS in general is not only devised to offer an appropriate status of protection to third country nationals but also to guarantee adequate living standards and the enjoyment of fundamental rights⁸².

Considering the arguments developed by the Court of Justice, it would be difficult to frame the issue of the costs of reception within the paradigm based on the

⁷⁸ *Ibid.*, para. 40.

⁷⁹ *Ibid.*, para. 41.

⁸⁰ *Ibid.*, para. 42.

⁸¹ *Ibid.*, para. 50.

⁸² In this regard, see TSOURDI, *cit. supra* note 72, which highlighted the “effet utile” of the provision on human dignity, as a parameter which incorporates positive obligations of socio-economic nature, necessary to ensure the enjoyment of basic fundamental rights. For a broader analysis, see also JONES, “Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice”, *Liverpool Law Review*, 2012, p. 281 ff.

migration-development nexus. If disconnected from the purposes suggested by the Court, the test on asylum seekers' resources can serve the wrongful aim of denying access to material support based on the simple verification that an applicant has a limited amount of cash and valuables. The tenet of the legal regime designed by the Reception Directive allows, in fact, possible derogations on the basis of the existence of continuous income or funding, for instance, as clearly mentioned by Article 17(4), if applicants have been working for a reasonable period of time⁸³. Accordingly, compliance with the principle of proportionality requires that Member States implement the Reception Directive, taking into consideration the personal situation of asylum applicants and establishing a correct balance with genuine objectives of general interest. Domestic decisions concerning asylum applicants' contribution to the cost of their reception must be fair and respect general principles of EU law⁸⁴.

From this perspective, two orders of considerations are necessary: on the one hand, the test on asylum seekers' resources cannot be applied in order to determine the amount an applicant must contribute to the cost of the reception, without distorting the legitimate aim to ensure that asylum seekers have adequate living standards. Member States must be able to demonstrate that any legislative measure is applied with the intent of ensuring the highest level of protection for asylum seekers. On the other hand, and taking into account the relevance of the principle of proportionality, it seems that any measure aimed at seizing asylum seekers' assets results disproportionate, provided that a specific legal framework establishes less restrictive measures could achieve the same objective, such as limiting or curtailing access to specific benefits⁸⁵.

5.2. – The Amendments Suggested by the Proposal to Recast the Reception Directive

The debate on the controversial asylum seekers' obligation to contribute to the cost of their reception has been certainly influencing the ongoing further recast process of the CEAS legal toolbox, including the Reception Directive, which the

⁸³ See Reception Directive, Art. 17(4).

⁸⁴ See, e.g., the CJEU's judgment in Case C-141/12, *YS*, 17 July 2014. For a broader examination of the principle of proportionality in asylum procedures, see especially RENEMAN, *EU asylum procedures and the right to an effective remedy*, Oxford, 2014.

⁸⁵ GROENENDIJK and PEERS, *cit. supra* note 6.

European Commission recently triggered⁸⁶.

Unlike other EU asylum law instruments, such as the Qualification and the Procedure Directives, which will be transformed into Regulations, the European Commission did not consider “feasible or desirable to fully harmonise Member States’ reception conditions” through a Regulation, as there are still significant differences in Member States’ social and economic conditions⁸⁷.

The amendments concerning the general rules on material reception conditions include a provision which requires the observance of the principle of proportionality “when assessing the resources of an applicant, when requiring an applicant to cover or contribute to the cost of the material reception conditions or when asking an applicant for a refund...”. The provision also establishes that Member States take into account “the individual circumstances of the applicant and the need to respect his or her dignity or personal integrity, including the applicant’s special reception needs”. Moreover, it is established that “Member States shall in all circumstances ensure that the applicant is provided with a standard of living which guarantees his or her subsistence and protects his or her physical and mental health”⁸⁸.

This amendment constitutes a major breakthrough, as it seems to incorporate the Court of Justice’s major findings as to the material reception conditions from a twofold perspective. Firstly, the proposal explicitly mentions the principle of proportionality as a benchmark that Member States must abide by, when assessing the resources of an applicant. Secondly, the proposal makes a clear reference to the need to respect the dignity or personal integrity of the applicant, and requires to

⁸⁶ See European Commission, Communication to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, [COM(2016) 197 final], 6 July 2016 and the following proposals tabled by the Commission on 13 July 2016: Proposal for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU, [COM(2016) 367 final]; Proposal for a Regulation of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [COM(2016) 466]; Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), [COM(2016) 465 final]. These proposals complement that concerning the recast of Dublin Regulation, see *supra* note 53.

⁸⁷ COM(2016) 465, *cit. supra* note 86, Explanatory Memorandum, p. 6.

⁸⁸ *Ibid.*, Art. 16 (5).

take into account the individual behaviour and the particular circumstances of asylum seekers.

Nevertheless, it must be also highlighted that such breakthrough is counterbalanced by the inclusion of a series of amendments that restrict reception conditions. In this regard, draft Article 17(a) raises some concerns and results inherently contradictory as far as it provides, on the one hand, that "Member States shall ensure a dignified standard of living for all applicants", while, on the other hand, it excludes asylum seekers who are not in the Member State designated as responsible by the Dublin Regulation from reception conditions⁸⁹. As emphasized by ECRE, this limitation "contradicts the principle of entitlement to reception conditions as a corollary of asylum seeker status", as elaborated in *Cimade and Gisti*, in relation to which the Court clarified that reception conditions are made available to a person as long as he or she is an asylum seeker with a right to remain on the territory, and that asylum seekers are an indivisible class of persons⁹⁰.

It is not possible to predict the impact of the suggested amendments, owing to the ongoing negotiation process. However, it is recommended that the recast Directive will entirely incorporate the principles set by the Court of Justice in its relevant case law and solve the internal contradiction that could alter the scope of the Directive.

This would disclose the potential of new Article 16 as a necessary step forward against the risks existing beyond the political tendency to construe asylum seekers as profiteering from international protection and to depart from the migration-development nexus which distorts the humanitarian component of asylum seekers' reception.

6. – Conclusions

As highlighted in the foregoing analysis, access to reception condition for asylum seekers constitutes one of the most problematic issues for countries of destination, especially within the EU. The Jewellery Law adopted in Denmark and the practice existing in other European States reflect the increasing shift to consider asylum seekers exclusively as an economic burden for host societies. This also explains the tendency to carve out specific obligations for asylum seekers to contrib-

⁸⁹ *Ibid.*, Art. 17(a) and Art. 19.

⁹⁰ See ECRE, Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465, October 2016, p. 6.

ute to the costs of their reception.

In an attempt to review the legality of such measures, this analysis has focused on the international legal framework and the CEAS toolbox in order to contextualize the relevant domestic practice at the European level.

As an established rule of international law, aliens, including refugees and asylum seekers, must be treated in full respect for the principle of non-discrimination, especially in cases of limitations to the right to enjoyment of property⁹¹. From this perspective, the seizure of asylum seekers' assets as a contribution to the cost of their reception may potentially infringe international law in that it disproportionately targets a specific part of the population and the most vulnerable group of aliens, namely refugees and asylum seekers.

From a different point of view, EU law has specifically and exhaustively established the conditions under which the reduction or possible withdrawal of material reception conditions is possible. The Court of Justice of the EU has clarified in a consistent case law that minimum reception conditions serve the primary scope of ensuring that applicants have access to adequate living standards⁹². It would be contrary to the spirit of offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*, as stated in Article 78 TFEU, to arbitrarily deny, limit or withdraw access to reception conditions.

Apart from determining an infringement of the rules enshrined in the Reception Directive, the risk of discriminatory treatment, owing to disproportionate restrictions to access to material reception conditions, may expose States to legal actions before relevant human rights adjudicators, including the European Court of Human Rights, for a disproportionate interference with the fundamental right to property.

Ultimately, even though domestic provisions concerning the possible asylum seekers' contribution to the cost of their reception may play the symbolic role of a deterrent against any pull factor, they risk construing asylum seekers as profiteering from the international refugee protection regime. As a consequence, such a legislative tendency may undermine the exercise of the right to asylum, which is to be understood, as recently maintained by the Supreme Court of Ireland, as "an auton-

⁹¹ In this regard see also JENNINGS and WATTS (eds.), *Oppenheim's International Law, Volume 1 Peace*, 9th edition, Oxford, 2008, p. 912.

⁹² See *Cimade and Gisti* case, *cit. supra* note 64; and *Saciri* case, *cit. supra* note 77.

omous right to a status, refugee status, which is a fundamental right"⁹³.

Still, the added value of these measures might be also questioned from an economic perspective for at least two reasons which will facilitate the reach of a conclusion as to the migration-development nexus. First, the political logic beyond the adoption of measures concerning the asylum seekers' contributions to their own maintenance seems to ignore the fact that refugees will more than likely use their own assets within the host State, as there is no reason to expect that a refugee will prefer to depend on the social assistance provided by the host State. Second, the economic advantage that can be generated by the measures aimed at seizing asylum seekers' assets would be minimal compared to the enormous costs that States face in order to maintain an efficient asylum system with adequate reception facilities.

As confirmed by the UNHCR, host countries have to pay a high price for receiving asylum seekers⁹⁴. However, the "negative" impact of migratory flows urges States, especially in Europe, to mitigate, to the extent possible, such impact by establishing mechanisms of regional and international cooperation. At a very critical time for the sustainability of the CEAS, in fact, the tendency to establish an obligation for asylum seekers to contribute to the cost of their reception will not erase the flaws of the CEAS, it will rather reiterate the grim picture originally emerging from the developing EU asylum policy, in which, according to Colin Harvey "[t]he asylum seeker is routinely constructed as a threat to the area of freedom, security and justice"⁹⁵.

⁹³ Supreme Court of Ireland (Ireland), *T.D. v Minister for Justice Equality and Law Reform* [2014] IESC 29, 10 April 2014, para. 143.

⁹⁴ UNHCR Standing Committee, *cit. supra* note 11.

⁹⁵ HARVEY, *Seeking Asylum in the UK: Problems and Prospects*, London, 2000, p. 331.

VIII.

**UNACCOMPANIED MINORS SEEKING FOR
PROTECTION IN THE EUROPEAN UNION:
WILL A FAIR AND ADEQUATE ASYLUM SYSTEM
EVER SEE THE LIGHT?**

*Elena Gualco**

SUMMARY: 1. Introduction. – 2. Coping with an “Enhanced Vulnerability”: the Case of Unaccompanied Asylum Seeking Minors. – 3. Accommodating Migrants and Promoting the Development of the Host Country: Two Birds with One Stone? – 4. The Protection of Asylum Seeking Minors in Europe: an Overview. – 4.1. The Protection of Unaccompanied Minors Under the European Convention on Human Rights. – 4.2. The European Union: the Quest to Accommodate and Protect Unaccompanied Asylum Seeking Minors. – 5. Rethinking the Common European Asylum System to Provide an Effective Response to the Migration Challenge. – 5.1. The Current Deficiencies of the CEAS and the Struggle to Ensure the Protection of Unaccompanied Asylum Seeking Minors. – 5.2. Reforming the CEAS to Foster the Best Interest of the Child: a (Possible) Step Forward. – 6. New Proposals, Old Problems: Will an Adequate Asylum System Ever See the Light?

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1. – Introduction

In recent years¹, irregular migration - especially by the Mediterranean Sea - has become a huge phenomenon that all European States have the duty to deal with². What has been defined as a “migration crisis”³ consists in mass influx of people fleeing their countries and seeking for protection in Europe. Several elements interfere with the actual capacity of the EU and its Member States to cope with this issue.

First, the migration management entails overwhelming costs⁴, leading to the perception that irregular migration is a mere burden for the destination country. The mass influx of migrants is indeed perceived as having negative implications (for instance in terms of jobs’ losses and the increase of criminality⁵), and lacking any social and/or economic advantage.

Second, the migration crisis represents an actual challenge to the European States’ commitment to protect human rights under the European Convention of Human Rights and the European Union Charter of Fundamental Rights.

Moving from these remarks, the aim of the present investigation is twofold: the paper will firstly explain the potential benefits that the destination countries could descend from migration. Secondly, the paper will highlight the criticisms of the current Common European Asylum System (“CEAS”)⁶ and assess the positive and

¹ See the recent Monthly Report of the EU Agency for Fundamental Rights (“FRA”), *Monthly data collection on the current migration situation in the EU*, July 2016. See also FRA, *FRA Annual Report, Asylum and migration into the EU in 2015, 2016*, available at: <http://fra.europa.eu/en/publication/2016/fundamental-rights-report-2016>.

² See the Statement adopted at the Special Meeting of the European Council on 23 April 2015, where that of migrants seeking for protection crossing the Mediterranean Sea has been described as a “humanitarian emergency”. Furthermore, see TINO and CAUDRON, “Flux migratoires et politique commune dans l’Union européenne”, *federalismi.it*, 10/2013, p.1 ff.

³ See the report of the UK Home Affairs Committee, “Mass Migration” (3 August 2016) HC paper No. 24, available at: <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/24/2402.html>.

⁴ On the necessity to rethink the implementation of the Refugee Convention to help States in understanding and enjoying the benefits of migration, see HATHAWAY, “A Global Solution to a Global Refugee Crisis”, *European Papers*, 2016, p. 93 ff.

⁵ RATHA, MOHAPATRA and SCHEJA, “Impact of Migration on Economic and Social Development. A review of Evidence and Emerging Issues”, Policy Research Working Paper 5558, The World Bank Development Prospectus Group Migration and Remittance Unit & Poverty Reduction And Economic Management Network, February 2011, p. 1 ff., p. 11.

⁶ The Common European Asylum System has been created since 1999 and it currently comprises the following acts: the European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common

negative implications of the recent proposals for its reform.

In order to both disclose the positive implications of migration in the host countries and highlight the shortcomings of the current European asylum system, the present paper will specifically tackle the category of unaccompanied minors seeking protection in Europe.

2. – Coping with an “Enhanced Vulnerability”: the Case of Unaccompanied Asylum Seeking Minors

The choice to specifically focus on unaccompanied minors is grounded on several reasons. First of all, the percentage of minors asking for asylum within the European Union is increasing: in 2015, 7% of all asylum applications in the European Union were lodged by unaccompanied children⁷.

Secondly, when the asylum seekers are unaccompanied minors, the struggle in balancing the States’ control over the entry of non-nationals with refugees’ fundamental rights increases, as long as States are bound by additional rules imposing them to take into account minors’ best interest⁸.

The need to respect both the vulnerability of minors and the *non-refoulement* principle lies on the observation that children are “twice weak”: on the one side, notwithstanding their refugee *status*, minors should receive protection by interna-

procedures for granting and withdrawing international protection, OJ 2013, L 180/60 (“Revised Asylum Procedure Directive”); the European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down minimum standards for the reception of applicants for international protection, OJ 2013, L 180/96 (“Revised Reception Conditions Directive”); the European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011, L 337/248 (“Revised Qualification Directive”); the European Parliament and Council Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013, L 180/108 (“Revised Dublin Regulation”); the European Parliament and Council Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of “Eurodac” for the comparison of fingerprints, OJ 2013, L 180/78 (“Revised Eurodac Regulation”).

⁷ See European Asylum Support Office (“EASO”), *Annual Report on the Situation of Asylum in the European Union 2015*, July 2016, p. 109.

⁸ See Arts. 3, 12 and 22, of the United Nations Convention on the Rights of the Child (New York, 20 November 1989), entered into force on 2 September 1990. On this topic see also European Parliament, Directorate General for Internal Policies, *EU Framework of Law for Children’s Rights*, 2012, PE462.445.

tional and national law because of their vulnerable age, which prevents them from being autonomous and independent⁹. On the other side, they should receive protection because they are asylum seekers¹⁰.

In this regard it has been argued that asylum seeking children “should be treated as children first and migrants second”¹¹, meaning that it is necessary to take into prior consideration the significant vulnerability of the claimants.

As a consequence, the State being responsible for an asylum application has to deal with some additional issues, such as the necessity to *i*) provide a representative taking the side of the minor’s claim; *ii*) take into account the minor’s point of view and - notwithstanding her/his age assessment - consider his/her experience as a relevant element in the asylum procedure; *iii*) assess the possibility of reunifying the minor with his/her relatives; *iv*) ponder the concrete impact that the eventual deportation of the minor will have on his/her life; *v*) opt for the child’s detention only as a last resort measure and only by adopting additional safeguards¹².

Moving from these latter remarks, specific rules focusing on asylum seeking minors have been and shall be created in order to implement the respect of their rights and promote their integration within the host country¹³.

⁹ European Court of Human Rights, *Rahimi v. Greece*, Application No. 8687/08, Judgment of 5 April 2011, para. 87, where the Court stressed that States have a positive obligation to protect and provide care for extremely vulnerable individuals, such as unaccompanied minors, regardless of their status as illegal migrants, nationality or statelessness. The particular vulnerability of unaccompanied children is emphasized also by the Committee on the Rights of the Child, General Comment No. 6, 2005, CRC/GC/2005/6, paras. 23 and 24.

¹⁰ Art. 3(1), United Nations Convention on the Rights of the Child. On this topic HODGKIN and NEWELL, *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Publications, 2007, pp. 1-229.

¹¹ See WARREN and YORK, “How children become ‘failed asylum-seekers’”, Kent Law Clinic, University of Kent, March 2014.

¹² KTISTAKIS, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter. A handbook for legal practitioners*, Council of Europe Publishing, 2013, p. 37. See, European Court of Human Rights, *Rahimi v. Greece*, *cit. supra* note 9, para. 109; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006.

¹³ As pointed out by WHITTAKER, *Asylum seekers and refugees in the contemporary world*, Abingdon/New York, 2006, p. 40, the achievement of an effective integration involves several issues, such as language, family reunion, accommodation, health care and education. On this topic, see also SPENCER and HUGHES, “Fundamental rights for irregular migrants: legal entitlements to healthcare and school education across the EU28”, *European Human Rights Law Review*, 2015, p. 604 ff., p. 608; SMYTH, “Is the Right of the Child to Liberty Safeguarded in the Common European Asylum System?”, *European Journal of Migration and Law*, 2013, p. 111 ff.

Against this backdrop, the situation of unaccompanied asylum seeking minors seems to be a good case study to assess the adequacy of the system implemented within the European Union. As it will be explained in the following sections, on the one side, States can attain further social and economic advantages when accommodating migrant minors. On the other side, the failure of the CEAS - both in terms of efficiency and respect of fundamental rights - is particularly striking with regard to minors' applications.

3. – Accommodating Migrants and Promoting the Development of the Host Country: Two Birds with One Stone?

Before entering the analysis of the current CEAS and its foreseen amendment, it has to be clarified whether the several concerns raised by destination countries could be justified.

To answer this question, it is essential to assess whether the presumption that irregular migration has only negative effects on host countries can be rebutted. Therefore, the arguments usually invoked by Member States must be tackled.

Among them, the increase of criminality is one of the most exploited considerations. Despite the absence of a proven relationship between the number of irregular migrants and the number of crimes, the general trend within the European political debate is to argue that irregular migrants have to be considered as a threat for internal security.

At this regard, it is first of all essential to understand the nature of the link between migration and criminality. On the one side, it should be stressed that irregular migration in itself does not impact on criminality: the large majority of migrants crossing the European borders every day are seeking a decent future for themselves and their families, not to start criminal activities. However, on the other side, it has to be observed that the significant vulnerability of irregular migrants exposes them to the risk of being exploited by and eventually absorbed into criminal networks. In other words, criminality could indirectly take advantage of irregular migration.

Dealing with two sides of a same coin, a strong capacity of accommodating asylum seekers, from their very first arrival until the assessment of their claim, is therefore essential to ensure the respect of migrants' human rights, but also to prevent migrants from being targeted within criminal activities.

Another *refrain* issue connected to migration flows deals with the social impact of migration on the destination countries: in particular, migrants' needs for health¹⁴ and social services are perceived as burdens by the host States. In this respect, the risk that the migrants' assistance would eventually affect EU citizens' rights is a shared belief¹⁵.

Furthermore, migrants are usually accused of jeopardizing the balance of the national labour market, essentially because they are willing to bear undeclared work and lower employment rates¹⁶.

Against this backdrop, however, both the economic¹⁷ and social sustainability of refugees flow could be demonstrated. Focusing on the social development of the destination country, at least two points shall be recalled.

First of all, although in the short term migrants' employment seems to have a negative effect on the labour market, in the medium and long term, migrants' working force appears to be an essential component within the labour market. Given that migrants accept low-skilled jobs (that usually the natives are no longer inclined to carry out), not only they fill the "gap" of the labour market, but they could give their contribution to the public finance, by paying taxes and social security obligations. The achievement of such a goal, however, requires the State to provide a rapid and effective accommodation of migrants. Otherwise, as already underlined, both the undeclared work and the related migrants exploitation would prevail¹⁸.

A second benefit connected to migration has a long-term effect on the destination State, being nevertheless of a fundamental importance. In fact, as underlined by the European Commission itself¹⁹, migration is the key to fight the actual challenge towards the ageing of the EU population and its demographic decrease.

As to migrant minors', the improvement of their conditions and their effective

¹⁴ The right to accede to healthcare has been recognised as a component of the human dignity: see European Committee on Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision of 3 November 2004.

¹⁵ See TINO and CAUDRON, *cit. supra* note 2.

¹⁶ AIYAR et al., *International Monetary Fund Staff Discussion Note. The Refugee Surge in Europe: Economic Challenges*, January 2016, p. 4; BELL, "Irregular Migrants: Beyond the Limits of Solidarity?", in ROSS and BORGMANN-PREBIL (eds.), *Promoting Solidarity in the European Union*, 2010, Oxford, p. 151 ff.

¹⁷ DULLIEN, *Paying the Price: the cost of Europe's refugee crisis*, European Council on Foreign Relations, April 2016.

¹⁸ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - "A European Agenda on Migration", 13 May 2015, [COM(2015) 240 final], p. 9.

¹⁹ *Ibid.*, p. 14.

integration within the host community definitely has a long-term positive impact on the development of both the host and the sending countries. Focusing on the former, minors' integration leads to an additional benefit. The burden a State takes on to ensure unaccompanied minors an adequate education²⁰ is usually compensated when minors become workers: unlike adult migrants, who spent a significant period of their life in another country, minors are expected to grow up and live in the country where they found asylum. As a consequence, under the destination country perspective, giving minors an adequate education means investing in their potentialities as future workers. This being the case, migrant minors will not only repay the costs of their education, but also provide additional financial incomes for the State which granted them asylum.

Notwithstanding the important contribution that migrants - and minors among them - could bring to the financial, social and cultural development of European societies, its effective accomplishment depends on States' capacity to ensure migrants' integration since their arrival. Otherwise, not only irregular migration would constitute a mere economic and social cost for the destination State, but it could also lead to the further negative consequences (e.g. the exploitation by criminal networks) already outlined.

4. – The Protection of Asylum Seeking Minors in Europe: an Overview

The previous paragraph has clarified that the creation of adequate mechanisms to accommodate unaccompanied children seeking for protection in Europe is of paramount importance first to ensure Member States' compliance with the respect of fundamental rights, second to let them benefit from the social and economic benefits of migration.

²⁰ The right to education is guaranteed both by Art. 17 of the European Social Charter and Art. 2, Protocol No. 1 ECHR. With regard to the former provision, despite the wording of the appendix of the ESC(r) which limits its application to migrants lawfully resident within a contracting State, the European Committee of Social Rights (*COHRE v. Italy*, Complaint No. 58/2009, Decision of 25 June 2010, para. 33) has clarified that "the part of population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r)". With those words, KTISTAKIS, cit. *supra* note 12, p. 59. Therefore, the protection foreseen by Art. 17 of the European Social Charter applies to all migrants, whether regular or not, under the age of 18 years old. In this regard, see also SPENCER and HUGHES, cit. *supra* note 13, p. 612; DE GROOF and LAWERS (eds.), *No person shall be denied the right to education. The influence of the European Convention of human rights in the right to education and rights in education*, Oisterwijk, 2004, pp. 29-33.

Entering the analysis of the European legal framework²¹, the protection of asylum seeking minors is tackled by both the Council of Europe²² and the European Union. These two international organisations share the common attempt to implement the living conditions of unaccompanied minors, although necessarily following different approaches.

4.1. – The Protection of Unaccompanied Minors Under the European Convention on Human Rights

When focusing on the Council of Europe, the preliminary observation has to be made that the European Convention on Human Rights (“ECHR”) does not include a specific provision on asylum seekers²³. It is not surprising that, at the time when the Convention was created, the European States did not perceive migration flows as a relevant topic under a fundamental rights perspective. Nevertheless, the necessity to protect migrants’ fundamental rights has progressively become an issue that the European States have to face and the ECHR has to deal with.

Hence, as in other fields of law, the intervention of the European Court of Human Rights has been of a paramount importance to let the protection of refugees and asylum seekers become effective under the ECHR.

In addition to the recognition of the *non-refoulement* principle²⁴, the European Court of Human rights has specified that other articles, namely Articles 3, 4 and 8 ECHR, can be triggered within asylum related cases.

²¹ On migration law under the ECHR and the EU, see FRA, *Handbook on European law relating to asylum, borders and immigration*, 2014, available at: <<http://fra.europa.eu/en/theme/asylum-migration-borders>>.

²² See TONELLI, “Irregular migration and human rights: a Council of Europe perspective”, in BOGUSZ et al. (eds.), *Irregular migration and human rights: theoretical, European and international perspectives*, Leiden/Boston, 2004, p. 301 ff.

²³ KTISTAKIS, *cit. supra* note 12, p. 17.

²⁴ *Saadi v. Italy* (Grand Chamber), Application No. 37201/06, Judgment of 28 February 2008, para. 127; *Chahal v. the United Kingdom* (Grand Chamber), Application No. 22414/93, Judgment of 15 November 1996, para. 79. At this regard, see also the *Guidelines on human rights protection in the context of accelerated asylum procedures*, established by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers’ Deputies. Furthermore, the European Court of Human Rights has also recognized the existence of an indirect *non-refoulement* principle, prohibiting any transfer to States in turn susceptible of transferring the person to a third country where he/she is at risk (*M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011). On this judgment see MORENO-LAX, “Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*”, *European Journal of Migration and Law*, 2012, p 1 ff.

Article 3 ECHR, covering the prohibition of torture, has been applied in several cases²⁵, where the European Court of Human Rights has stressed first of all its absolute nature and secondly that the right enshrined by Article 3 is a fundamental value of each democratic society²⁶.

Insofar as Article 4 of the ECHR foresees the prohibition of slavery and forced labour, the European Court of Human Rights has recognized its applicability anytime where the exploitation of migrants leads to human trafficking or forced labour²⁷.

As to Article 8 ECHR, the right to respect private and family life has received a broad and enhanced interpretation by the European Court which usually applies Article 8 to protect the irregular migrants' residence right against the unlawful removal to a third country²⁸.

The activism of the European Court of Human Rights in the field of migration law is absolutely beneficial under several points of view. First, it stresses that – regardless of the uniformity and efficiency of the CEAS – European States have the duty to protect asylum seekers' rights under the European Convention of Human Rights. Secondly, its case law is extremely helpful in clarifying the ambiguities of the current CEAS: given the broad discretion that Member States currently have, the decisions of the European Court of Human Rights can set common – although minimal – levels of protection.

Notwithstanding the merits of the European Court of Human Rights case law,

²⁵ See, *Mahmundi and others v. Greece*, Application No. 14902/10, Judgment of 24 October 2012. With regard to unaccompanied asylum seeking minors, see *Rahimi v. Greece*, *cit. supra* note 9, where the European Court of Human Rights ruled on the detention and lack of care of a 15 years old unaccompanied minor, who, after entering Greece, was first put in detention for two days and then left to live in the streets. Hence, short periods of detention do not exclude the applicability of Art. 3 ECHR. See also *Mohammad v Greece*, Application No. 70586/11, Judgment of 11 December 2014. Finally, *Sh. D. and others v. Greece and others*, Application No. 14165/16, now pending before the European Court of Human Rights. On this topic, see GOODWIN-GILL and MCADAM, *The Refugee in International Law*, Oxford, 2007, pp. 310-323.

²⁶ See HAILBRONNER (ed.), *EU Immigration and Asylum Law. Commentary on EU regulations and directives*, München/Oxford, 2010, pp. 15-18.

²⁷ See European Court of Human Rights, *Guide on Article 4 of the European Convention on Human Rights. Prohibition of slavery and forced labour*, 2nd Ed., Council of Europe/European Court of Human Rights, 2014.

²⁸ BELL, *cit. supra* note 16, pp. 151-165. Within the national case law, see the enhancement of the right to family life by the UK Upper Tribunal in the case *The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v the Secretary of State for the Home Department*, Judgment of 22 February 2016, JR/15401/2015.

however, the achievements made can only prevent the migration crisis from exacerbating, but it is not up to the ECHR to provide a long term and an *ad hoc* mechanism to accommodate asylum applications and protect migrants' human rights. Hence, it follows from this latter remark that the best (and the only!) body holding the competence to elaborate adequate reception mechanisms for unaccompanied asylum seeking minors is the European Union.

4.2. – *The European Union: the Quest to Accommodate and Protect Unaccompanied Asylum Seeking Minors*

In 1999, the European Union has been given the competence to fight against irregular migration as well as to protect the rights of migrants in relation to exploitation and trafficking²⁹. The EU action in this field has progressively improved, thanks to the adoption of both directives and regulations which form the CEAS³⁰.

Furthermore, at the constitutional level of the European Union, the Charter of Fundamental Rights³¹ offers a direct protection to asylum seekers. In its Article 18, the Charter foresees that “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention ... and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union ...”, while Article 19 of the Charter re-affirms the principle of *non-refoulement*.

With respect to the fundamental rights of minors, further articles acquire relevance.

First, Article 14 of the Charter states that everyone has the right to education: in this regard, it is important to recall that this right is likely to be jeopardized anytime a child is put in a form of detention. Furthermore, Article 21 of the Charter is devoted to prohibit any discrimination on grounds of - *inter alia* - age; whereas Article 24 specifically refers to minors: this latter provision enounces the “best interest of child” princi-

²⁹ See Arts. 79 and 83 of the Treaty on the Functioning of the European Union (“TFEU”). On this topic, see ACOSTA ARCARAZO and GEDDES, “The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy”, *Journal of Common Market Studies*, 2013, p. 179 ff.; BALDACCINI, GUILD and TONER (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, 2007; HAILBRONNER, *Immigration and Asylum Law and Policy of the European Union*, The Hague, 2000; GEDDES, *Immigration and European Integration. Towards fortress Europe?*, Manchester, 2000, pp. 110-130.

³⁰ On this topic see, *ex multis*, GUILD and MINDERHOUD, *The First Decade of EU Migration and Asylum Law*, Leiden, 2012.

³¹ Charter of Fundamental Rights of the European Union, OJ C 202, 7 June 2016.

ple and stresses the duty to provide minors with protection and care³².

As a latter observation concerning the Charter, it has to be underlined that, after the entry into force of the Treaty of Lisbon, the relevance of the Charter has exponentially grown³³. Not only Article 6 TEU³⁴ now states that the Charter has the same value as the Treaties, which makes the former legally binding³⁵, but the EU Court of Justice seems particularly devoted in enhancing its role³⁶. In a recent decision concerning the migration field, for instance, the Court of Justice has excluded that Protocol No. 30 of the Treaty of Lisbon - which, as it is known, limits the application in the United Kingdom and Poland of the social rights covered by the Charter - is suitable to affect the implementation of the EU asylum law³⁷.

5. – Rethinking the Common European Asylum System to Provide an Effective Response to the Migration Challenge

The observations highlighted in the previous sections explain why reception procedures are essential tools to shift from the negative implications of migration to its positive effects. In this perspective, it is therefore essential to tackle the current rules within the Common European Asylum System to assess whether they foresee adequate mechanisms, not only to accommodate but also to progressively integrate migrant minors arriving in the European Union.

³² In connection to the duty of care and protection, Art. 32 of the Charter, which prohibits child labour, can be recalled.

³³ See PEERS et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary)*, Volume 3: EU Asylum Law, 2nd Rev. Ed., 2015, pp. 27-63.

³⁴ Treaty on the European Union, OJ C 326, 26 October 2012, p. 13.

³⁵ See PEERS et al., *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014.

³⁶ Case C-617/10, *Åkerberg Fransson*, 26 February 2013; case C-399/11, *Melloni*, 26 February 2013. In this connection, see APPANAH, “Charte des droits fondamentaux de l’Union européenne et Convention européenne des droits de l’homme: entre cohérence et légitimation. A propos des arrêts Åklagaren c/ Hans Åkerberg Fransson et Stefano Melloni c/ Ministerio Fiscal rendus par la Cour de justice le 23 février 2013”, *Revue générale de droit international public*, 2014, p. 333 ff.; HANCOX, “The meaning of ‘implementing’ EU law under Article 51(1) of the Charter: Åkerberg Fransson”, *Common Market Law Review*, 2013, p. 1411 ff.; SARMIENTO, “Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe”, *Common Market Law Review*, 2013, p. 1267 ff.

³⁷ See Joined Cases C-411/10 and C-493/10, *N.S.*, ECR, 2011, p. I-13905.

5.1. – *The Current Deficiencies of the CEAS and the Struggle to Ensure the Protection of Unaccompanied Asylum Seeking Minors*

Notwithstanding its purposes, the current Common European Asylum System has proven to be inadequate in providing an efficient and uniform accommodation of asylum seekers, in particular when the asylum requests come from unaccompanied minors. As a matter of fact, since the Dublin regulation and the directives constituting the Common European Asylum System have been adopted, a number of practical deficiencies have progressively emerged³⁸.

Therefore, in its Communication “Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe”³⁹, the European Commission has expressed the need to rethink the European Union asylum rules in the light of an improved solidarity among Member States⁴⁰. As a general observation, it has to be underlined that the current reception mechanism seems more devoted to tossing back States’ responsibility and accommodating national prerogatives, rather than to achieving unaccompanied minors’ best interest and fundamental rights⁴¹.

With regard to the several issues arising from its application, the rules on the allocation of responsibility constitute a first example. The rationale behind Article 8 of the so-called Dublin III regulation⁴² is twofold. First, these rules stimulate Member States’ commitment to protect their external borders. By assuming that a State should be responsible for managing the irregular entry into its territory, the State’s failure to protect its borders triggers the obligation to address migrants’ claims⁴³.

³⁸ In this respect, see NASCIMBENE, “Refugees, the European Union and the ‘Dublin System’. The Reasons for a Crisis”, *European Papers*, 2016, p. 101 ff.

³⁹ Communication from the Commission to the European Parliament and the Council of the 6 April 2016 - “Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, [COM(2016) 197 final].

⁴⁰ See MUNARI, “The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime”, *Diritti Umani e Diritto Internazionale*, 2016, p. 517 ff.; FAVILLI, “L’Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell’ ‘emergenza’ immigrazione”, *Quaderni Costituzionali*, 2015, p. 785 ff.; MITSILEGAS, “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, 2014, p. 181 ff.; BELL, *cit. supra* note 16.

⁴¹ In this regard, an opposite opinion seems to be supported by the German Federal Administrative Court, according to which “the provisions on responsibility for unaccompanied minors in Article 6 of the Dublin II Regulation are protective of the individual, as they not only govern relationships between Member States but (also) serve to protect fundamental rights” (Judgment of 16 November 2015, 1 C 4.15).

⁴² Regulation (EU) No 604/2013 of 26 June 2013, *cit. supra* note 6.

⁴³ See DEN HEIJER, RIJPMAN and SPIJKERBOER, “Coercion, prohibition, and the great expectations: the continuing failure of the Common European Asylum System”, *Common Market Law Review*, p. 607 ff., p. 615.

Second, the allocation of responsibility rules have been designed to address migration claims following a uniform and consistent approach: the “first lodged rule” in particular has been conceived to prevent overlaps or gaps in processing asylum applications. However, when triggered towards vulnerable people, such as minors, the first lodged rule usually clashes with the obligation to ensure minors’ best interest and take into account their vulnerability⁴⁴.

In this connection, the Court of Justice of the European Union highlighted that secondary movements clearly facilitate children disappearance or smuggling. Accordingly, it stated that the best interest of the child implies that a minor’s transfer to another Member State shall in principle be avoided every time it would expose the child to an unreasonable risk of being subjected to a degrading treatment⁴⁵. Furthermore, ruling upon Article 6 of the so-called Dublin II regulation⁴⁶, the Court specified that, if the minor submits two or more asylum requests, this provision should be interpreted in the sense that “the Member State in which that minor is present after having lodged an asylum application there is to be designated the ‘Member State responsible’”⁴⁷.

A second criticism of the current Common European Asylum System is linked to the identification procedure and the age assessment.

At this regard, it has first of all to be recalled that the European Court of Human

⁴⁴ With specific regard to unaccompanied minors, see PEERS, “The Dublin Regulation: Is the End Night? Where Should Unaccompanied Children Apply for Asylum?”, EU Law Analysis, 21 January 2016, available at: <<http://www.eulawanalysis.blogspot.it>>.

⁴⁵ See Case C-4/11, *Kaveh Puid*, 14 November 2013, para. 36:

“where the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria set out in Chapter III of Council Regulation (EC) No 343/2003 ... the Member State which is determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another Member State can be identified as responsible in accordance with one of those criteria or, if it cannot, under Article 13 of the Regulation”.

⁴⁶ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003, L 50, p. 1. Its Art. 6 is now Art. 8 of the Dublin III regulation, No. 604/2013, *cit. supra* note 6.

⁴⁷ Case C-648/11, *M.A. and Others*, 6 June 2013, para. 66.

Rights has declared the illegitimacy of the so-called pushback operations and the related identification procedures carried out on board⁴⁸. Accordingly, both the identification procedures and the age assessment must be performed within the territory of a Member State.

Secondly, insofar age assessment is the first step to follow in order to understand whether the asylum seeker is entitled to receive additional care, the methods implied to assess the claimants' age have to be fair and accurate. Notwithstanding the obligation to give applicants the benefit of the doubt⁴⁹, the techniques applied within the Member States vary significantly and they are usually inaccurate⁵⁰. Furthermore, Article 25 of the Asylum Procedure Directive⁵¹ allows Member States to accomplish medical examinations for the purpose of the age assessment, whenever, "following general statements or other relevant indications, Member States have doubts concerning the applicant's age to assessments". In this respect, it has to be stressed that, first of all, medical examination should be always avoided since it certainly affects minors' well-being. Secondly, that the huge discretion given to Member States towards the suitability of the medical examination exacerbates the imbalances within the CEAS.

A third shortcoming issuing from the "concrete application" of the CEAS is related to a further phase of the asylum application: the appointment of a guardian. Given the absence of any deadline for such an assignment⁵², not only Member States follow different time schedules, but most of them deal with significant delays in assigning legal representatives. As a consequence, and allegedly pursuing the aim of keeping children safe from traffickers⁵³, Member States usually put un-

⁴⁸ *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012. On this issue, see BORELLI and STANFORD, "Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights", *Review of International Law and Politics*, 2014, p. 29 ff.

⁴⁹ See European Council on Refugees and Exiles, *Detriment of the Doubt: Age Assessment of Unaccompanied Asylum-Seeking Children*, AIDA Legal Briefing No. 5, December 2015.

⁵⁰ See FELTZ, *Age assessment for unaccompanied minors. When European countries denied children their childhood*, *Doctors of the Word – Médecins du monde International Network*, 28 August 2015. See also, European Court of Human Rights, *Mohammad v Greece*, *cit. supra* note 25.

⁵¹ Directive 2013/32/EU of 26 June 2013, *cit. supra* note 6.

⁵² Art. 31 of the Directive 2011/95/EU of 13 December 2011 *cit. supra* note 6, merely stresses that such an appointment must be completed "as soon as possible" after the granting of international protection.

⁵³ See, PEERS et al. (eds.), *cit. supra* note 33, p. 250.

accompanied minors in various forms of detention⁵⁴.

Hence, stressing the necessity to improve the solidarity among Member States and trying to avoid the breakdown of the CEAS, in its recent proposals the European Commission has addressed most of the criticisms concerning the situation of asylum seeking minors.

5.2. – Reforming the CEAS to Foster the Best Interest of the Child: a (Possible) Step Forward

Between May and July 2016, six different proposals, tackling each normative instrument of the CEAS, have been presented. Within the three proposals adopted in May 2016⁵⁵, the proposal focusing on the recast of the Dublin III regulation⁵⁶ pursues the improvement of minors' guarantees. As regard the proposals of July 2016, two approaches are suggested. First, the Commission highlights the necessity to amend the reception condition directive, promoting a recast of such a normative instrument⁵⁷. Secondly, the European Commission goes further, by suggesting the adoption of two new regulations⁵⁸, replacing respectively the Asylum Procedure Di-

⁵⁴ See *IM v. France*, Application No. 9152/09, Judgment of 2 May 2012, where the European Court of Human Rights noticed that asylum seekers in detention have to cope with significant obstacles in successfully pursuing their claims.

⁵⁵ On 4 May 2016 the Commission has adopted the following Proposals: the Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [COM(2016) 270 final]; the Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, [COM(2016) 271 final]; Proposal for a Regulation of the European Parliament and the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), [COM(2016) 272 final].

⁵⁶ Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *cit. supra* note 55.

⁵⁷ Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), of the 13 July 2016, [COM(2016) 465 final].

⁵⁸ Proposal for a Regulation of the European Parliament and of the Council on standards for the qual-

rective⁵⁹ and the Qualification Directive⁶⁰.

Notwithstanding the various concerns that also this foreseen reform entails⁶¹, the recent initiatives have at least the merit of supporting the adoption of two regulations instead of recasting the current directives. Regulations appear to be the right normative instrument to be employed in the field of migration and asylum law insofar as their direct and general application⁶² within Member States would achieve the degree of consistency that has always been lacking. Therefore, as regards the choice of the legal instrument to be adopted, the Commission proposals have to be welcomed as they would eventually impose common rules on Member States and potentially remove the broad discretion that Member States currently rely on.

Entering the analysis of the provisions on asylum seeking children, the suggested reform aims at introducing several changes.

A first major amendment focuses on the establishment of strict deadlines: as already stressed, the inadequacy of the current CEAS is definitely connected with the lack of a time schedule pending on Member States when dealing with asylum seekers. Instead of a general reference to the Member States' duty to accommodate unaccompanied minors' claims, the new proposals insert a five days deadline covering the appointment of both a legal representative when an asylum application is made⁶³, and a guardian when the international protection is granted⁶⁴.

Although the deadline in allocating guardians has the beneficial effect of imposing

ification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, of the 13 July 2016, [COM(2016) 466 final]; Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, of the 13 July 2016, [COM(2016) 467 final].

⁵⁹ Directive 2013/32/EU of 26 June 2013, *cit. supra* note 6.

⁶⁰ Directive 2011/95/EU of 13 December 2011, *cit. supra* note 6.

⁶¹ See *infra* Section 6.

⁶² See Art. 288 TFEU.

⁶³ Art. 22(1), Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, *cit. supra* note 58, and Art. 23, Proposal for a directive laying down standards for the reception of applicants for international protection (recast), *cit. supra* note 57.

⁶⁴ Art. 36, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, *cit. supra* note 58.

on Member States an obligation to act efficiently towards the protection of minors from the moment in which the asylum claim is made, a critical issue still needs to be solved. To accomplish their duty, guardians need not to be overwhelmed by the number of charges they are required to deal with at the same time. In this respect, even if Article 22 of the Proposal for a procedures regulation stresses the necessity that each guardian shall be responsible for a reasonable number of minors⁶⁵, the concept of reasonableness may vary among Member States, due to the huge gap in terms of number of applications⁶⁶.

As a further amendment, the right of children to be heard and informed is tackled under two points of view.

First of all, the Commission proposal for a procedures regulation stresses the right of each child to be personally interviewed⁶⁷, unless such an opportunity does not comply with his/her best interest. Considering that Article 14 of the Directive 2013/32 leaves to Member States the discretion to determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview, it seems that the provision suggested in the proposal for an Asylum Procedure Regulation⁶⁸ would both increase minors' guarantees and implement the consistency within the Member States' approach.

Minors' right to be informed is also tackled by Article 5 of the proposed recast of Directive 2013/33⁶⁹. According to the new version of Article 5, the European Union Agency for Asylum will develop a standard template reporting all the essential information about the application process which should be written in a language understandable for the applicant. To accommodate minors, the second para-

⁶⁵Art. 22, Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, *cit. supra* note 58, stating, in its para. 5, that "the responsible authorities shall not place a guardian in charge of a disproportionate number of unaccompanied minors at the same time, which would render him or her unable to perform his or her tasks effectively". Secondly, in its para. 6, Art. 22 recalls that "the guardian shall inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, about how to prepare himself or herself for the personal interview".

⁶⁶ See European Council of Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, [COM(2016) 467], November 2016, p. 26.

⁶⁷ Art. 21, Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, *cit. supra* note 58.

⁶⁸ *Ibid.*.

⁶⁹ Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), *cit. supra* note 57.

graph of Article 5 foresees the possibility to adapt the template to their special needs, as well as to supply the information orally.

Even though this latter provision would require a proactive approach by Member States, it seems that the creation of a standard template could be considered an essential achievement, in terms of both uniformity and adequacy of the reception process.

Within the recast of the Dublin III Regulation⁷⁰, the Proposal faces the element having mostly affected the efficiency and the quality of the asylum decisions so far: the allocation of responsibility rule.

In this regard, the proposal envisages new rules for determining the Member State responsible for examining the applications lodged by unaccompanied minors. According to the new version of Article 8, as a special guarantee for minors, their transfer to the responsible Member State (or to the Member State of allocation) should be subordinated to the assessment of the child's best interest. In order to guide such an assessment, Article 8 specifies that the Member State where the minor is supposed to be transferred has to meet the requirements foreseen in other provisions of the CEAS⁷¹.

Finally, the new version of Article 10(4) gives the responsibility upon the asylum claim and the child's protection to the Member State where the minor has *first* lodged his/her application, unless it is demonstrated that the best interest of the minor would be infringed. This new wording, however, does not seem to comply with the decision of the Court of Justice of the European Union in *M.A.*⁷², where the Court specified that "as a rule, unaccompanied minors should not be transferred to another Member State"⁷³. Insofar as the suggested provision foresees a presumption against the applicant, i.e. the asylum seeking minor, it seems that its implementation would indeed jeopardize the rationale behind the decision of the Court of Jus-

⁷⁰ Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *cit. supra* note 55.

⁷¹ Specifically, Art. 14, Directive 2013/33/EU, *cit. supra* note 6, which protects minors' right to schooling and education, and Art. 24, which foresees special provisions for unaccompanied asylum seeking children. Furthermore, Art. 25, Directive 2013/32/EU, *cit. supra* note 6, recognizes specific guarantees for unaccompanied minors.

⁷² Case C-648/11, *M.A. and Others*, *cit. supra* note 47.

⁷³ *Ibid.*, para. 55.

tice of the European Union⁷⁴.

6. – New Proposals, Old Problems: Will an Adequate Asylum System Ever See the Light?

As already underlined, the recent proposals try to address the several dysfunctions preventing the CEAS from being an adequate system of accommodation of asylum seeking minors. Some of the issues that have emerged within the application of the current CEAS, however, still need to be solved. In addition to the improvements that have been highlighted in the previous section, the Commission proposals raise several concerns regarding specific topics which have either not been tackled⁷⁵, or not properly addressed.

Focusing on the latter case, the proposal for the adoption of a Regulation on the asylum procedures restricts the Members States' possibility to apply both the accelerate examination⁷⁶ and the border procedure⁷⁷ when dealing with unaccompanied minors. Following the suggestions of the majority of stakeholders, the draft subordinates the applicability of the accelerate examination and the border procedure to the requirement of providing minors with an adequate support⁷⁸. Although both procedures are considered to have a backup function, they cannot provide the necessary guarantees to accommodate the vulnerability of minors. Under this point of view, a better approach would have been to exclude from the field of application of both borders and accelerate procedures minors' claims, instead of leaving to Member States the discretion on how to trigger such mechanisms⁷⁹.

Furthermore, even though the Proposals admit the possibility of detaining chil-

⁷⁴ European Council on Refugees and Exiles, *ECRE comments for a Commission proposal for a Dublin IV Regulation*, [COM (2016)270], October 2016, pp. 10-13.

⁷⁵ Such as the possibility to trigger, at least with regard to unaccompanied minors, the mechanisms foreseen by the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7 August 2001, p. 12.

⁷⁶ Art. 40, Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, *cit. supra* note 58.

⁷⁷ *Ibid.*, Art. 41.

⁷⁸ *Ibid.*, Art. 19(2).

⁷⁹ See European Council on Refugees and Exiles, *ECRE Comments on the proposal for an Asylum Procedures Regulation*, *cit. supra* note 66, pp. 49 – 51.

dren to protect them from trafficking or to give the national authorities enough time to carry out the asylum procedures, it seems that the only consistent approach with the best interest of the child principle would have been to permanently prohibit minors' detention⁸⁰.

A final aspect which has not been addressed properly concerns the age assessment and the medical examination. Apart from the obvious consideration that the fairness of this technique impacts on the overall asylum procedure, the Commission Proposal presents several weaknesses. First of all, the Proposal introduces the principle of mutual recognition towards the age assessment without taking into due account that the assessment procedures vary significantly within Member States⁸¹. Secondly, the Proposal omits to reinforce the idea that medical examination should be employed only as a last resort measure: not only medical age assessment techniques are not scientifically reliable⁸², but they do also frustrate minors' psychological well-being.

The analysis carried out in the present paper shows two main issues: on the one hand, the inadequacy of the current Common European Asylum System, on the other hand, the need to "build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration"⁸³.

The purpose highlighted by the European Commission can be achieved only if two specific conditions are met. First, the implementation of strong collaboration mechanisms between Member States to ensure the uniform accommodation of migrants and to avoid the risk to overwhelm border States' reception capacity⁸⁴. Second, the introduction of uniform asylum rules to foster the protection of migrants' fundamental rights: as the case of minors clearly demonstrates, the lack of consistency is likely to entail poor quality asylum decisions⁸⁵.

As a further step towards the achievement of a fair and efficient EU asylum system, the recent proposals have to be appreciated insofar as the amendments and the innovations suggested by the European Commission appear to bring some improvements.

⁸⁰ *Ibid.*, p. 50.

⁸¹ Art. 24(6), Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, *cit. supra* note 58.

⁸² European Council on Refugees and Exiles, *ECRE Comments on the proposal for an Asylum Procedures Regulation*, *cit. supra* note 65, pp. 26-27.

⁸³ "A European Agenda on Migration", *cit. supra* note 18, p. 2.

⁸⁴ DEN HEIJER, RIJPMAN and SPIJKERBOER, *cit. supra* note 43, pp. 623-642.

⁸⁵ WARREN and YORK, *cit. supra* note 11.

Nevertheless, at least with regard to unaccompanied asylum seeking children, it seems that the Proposals still underestimate the impact of some core issues, which - if not fruitfully addressed - will definitely undermine the goal sought by the European Commission.

IX.

**SOMETHING OLD, SOMETHING NEW,
SOMETHING BALANCED, SOMETHING BLUE: THE
EU BLUE CARD DIRECTIVE, BRAIN DRAIN, AND
THE ECONOMIC DEVELOPMENT OF THE EU
AND THE SENDING COUNTRIES**

*Alessandro Rosanò**

SUMMARY: 1. Introduction. – 2. The EU Blue Card Directive. – 3. The Main Flaws of the EU Blue Card Directive and the Revision Proposal Presented by the Commission. – 4. Focusing on the Development of Sending Countries: Article 13 of the Cotonou Agreement. – 5. Conclusions.

1. – Introduction

Coined in the sixties to refer to the migration of British nationals to the United States, the term “brain drain” has been used since then to describe the migration of skilled manpower either from developing countries to developed ones or from the

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former to more developed ones¹.

Many authors have dealt with this topic² and it has been underlined that developing countries must face a number of negative effects spreading from brain drain as they incur costs of training and maintaining the emigrants during their unproductive years while rich countries benefit from their skills: thus, there is a loss of resources that makes rich countries richer and poor countries poorer³.

On the other hand, this phenomenon has been seen by others in terms of free movement of one factor of production, meaning that skilled manpower decides to go where it is more likely to be properly used and earn more money. That would have a positive effect on developing countries as their unemployment rate would drop and the welfare of non-emigrants would be maximized⁴.

Other authors have focused on free choices made by any individuals: they leave simply because they are allowed to do so and they want to do so, and they cannot be deprived of such a freedom⁵.

However, at the international level, brain drain has been constantly seen as an issue, as it is confirmed – for instance – by the Plan of Action of the World Population Conference held in Bucharest in 1974. At Paragraph 57, one can read that

¹ Over time, the usage of the term “brain drain” has been criticized and it has been proposed that new, more neutral terms be used, such as “brain exchange”, “transfer of talent”, or “reverse transfer of technology”. For the same reason, the movers should be referred to as “professional transients” (for some references, see SALT and FINDLAY, “International Migration of Highly-Skilled Manpower: Theoretical and Developmental Issues”, in APPEYARD (ed.), *The Impact of International Migration on Developing Countries*, Paris, 1989, p. 160 ff., MUNDENDE, “The Brain Drain and Developing Countries”, in APPEYARD (ed.), *ibid.*, p. 183 ff.).

² For an overview, see ADAMS, *The Brain Drain*, New York, 1968; KANNAPPAN, “The Brain Drain and Developing Countries”, *International Labour Review*, 1968, p. 1 ff.; BALDWIN, “Brain Drain or Overflow?”, *Foreign Affairs*, 1970, p. 358 ff.; BHAGWATI, “The Brain Drain”, *International Social Science Journal*, 1976, p. 691 ff., BRANDI, “La storia del brain drain”, *Studi emigrazione*, 2004, p. 775 ff.; ID., “Le migrazioni delle alte professionalità tra mobilità internazionale e brain drain”, *Affari sociali internazionali*, 2006, p. 69 ff.; BOERI et al. (eds.), *Brain Drain and Brain Gain: The Global Competition to Attract High-Skilled Migrants*, Oxford, 2012.

³ See WATANABE, “The Brain Drain from Developing to Developed Countries”, *International Labour Review*, 1969, p. 401 ff.; WARD, “European Migratory Labor: A Myth of Development”, *Monthly Review*, 1975, p. 24 ff.

⁴ On the topic, see GRUBEL and SCOTT, “The International Flow of Human Capital”, *American Economic Review*, 1966, p. 268 ff.; ID., *The Brain Drain: Determinants, Measurements and Welfare Effects*, Waterloo, 1977.

⁵ ZAHLAN, “The Brain Drain Controversy”, in *International Population Conference*, Leige, 1977, pp. 319-327.

“since the outflow of qualified personnel from developing to developed countries seriously hampers the development of the former, there is an urgent need to formulate national and international policies to avoid the ‘brain drain’ and obviate its adverse effects, including the possibility of devising programmes for large-scale communication of appropriate technological knowledge mainly from developed countries to the extent it can be properly adjusted and appropriately absorbed”⁶.

Suggested policies concerned, on the public-sector side, the implementation of educational and manpower planning, investments in scientific and technical programmes, and the conclusion of bilateral and multilateral agreements in order to regulate migration and protect both migrants and the interests of sending countries. On the private-sector side, it was stressed that foreign investors should employ and train local personnel while also using local research facilities⁷.

The topic has become paramount since the last twenty years to say the least for the European Union (“EU”), too. Since the beginning of the nineties it has been highlighted that the decline in birth rate in Western Europe would generate shortages of well-trained workers, making selective immigration a necessity rather than a choice⁸. EU institutions have struggled to find solutions that both meet the needs of the European labour market and preserve the economic and social environment of sending countries.

For instance, the European Council meeting, which took place in Tampere in October 1999, underlined the need to ensure fair treatment of third-country nationals legally residing on the territory of the Member States as well as the need for a more efficient management of migration flows and the need for approximation of national legislations regarding the conditions for admission and residence of third-country nationals. In that regard, it was said that both the economic and demographic developments within the EU and the situation in the countries of origin should have been taken into account⁹.

In the Hague Programme, the European Council focused on legal migration as

⁶ World Population Plan of Action from the United Nations World Population Conference, Bucharest, 19-30 August 1974, para. 57.

⁷ *Ibid.*, paras. 58 and 62.

⁸ See for instance RITZEN and VAN DALEN, “The Economic Consequences of Selective Immigration Policies”, in ZIMMERMANN (ed.), *Migration and Economic Development*, Berlin/Heidelberg, 1992, p. 260 ff.

⁹ European Council, “Conclusions of the Presidency of the European Council”, Tampere, 15-16 October 1999, available at: <http://www.europarl.europa.eu/summits/tam_en.htm>.

an instrument to enhance the knowledge-based economy in Europe, advance economic development, and establish partnerships with third countries. Thus, the European Commission was invited to present a policy plan on legal migration which should have regarded, *inter alia*, admission procedures capable of responding to demands for migration labour in the labour market. At the same time, it was acknowledged the importance of developing policies which link migration, development cooperation and humanitarian assistance in partnership, and dialogue with countries and regions of origin¹⁰.

Migration and development were key issues in the Stockholm Programme, too. In fact, the European Council underlined the need to take further steps to maximize the positive and minimize the negative effects of migration on development: meaning that efforts should have been made to promote concerted mobility and migration with countries of origin, and to promote the development of working opportunities and improved livelihood options in third countries in order to minimize the brain drain. Also, a reference to the connection between climate change, migration, and development was made¹¹.

Finally, in the Conclusions of the Ypres European Council, the priority was set to better manage migration in all its aspects, especially by addressing shortages of specific skills and attracting talent. The European Council called for a comprehensive approach in order to optimize the benefits of legal migration while tackling illegal migration at the same time¹².

This leads to taking into account the framework of the EU External Migration Policy, which is the Global Approach to Migration and Mobility (“GAMM”) developed by the European Commission in order to address these matters in a balanced manner. According to the Commission, an adaptable workforce with the necessary skills which can cope with the demographic and economic changes must be secured. At the same time, migrants must be integrated into the labour market. That is why four thematic priorities, which were labeled as four pillars, were identified: legal migration and mo-

¹⁰ European Council, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, The Hague, 13 December 2004, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>>.

¹¹ European Council, “The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens”, Stockholm, 15-17 July 2009, available at: <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN)>.

¹² European Council, “Conclusions of the European Council”, Ypres, 26-27 June 2014, available at: <<http://www.consilium.europa.eu/en/meetings/european-council/2014/06/26-27/>>.

bility; irregular migration and trafficking of human beings; international protection and asylum policy; and maximizing the development impact of migration and mobility. For what concerns the first and the fourth pillar, the Commission underlined how good governance of migration can bring developmental benefits to sending countries as well as to receiving countries, as it can foster foreign direct investment and trade links, especially due to the role played by diaspora communities. So, migration may contribute to the development of sending countries. However, brain drain must be counteracted and brain circulation must be promoted.

In regards to setting the operational priorities for the first pillar, the European Commission stressed the need to offer employers wide opportunities to find the best individuals for vacancies on the global labour market and offer employment possibilities for talented people from around the globe. For what concerns the fourth pillar, it was considered that “downsides, such as brain drain, social costs and dependence on foreign labour markets, also need to be tackled jointly in partnerships” in order to facilitate circular migration and support capacity-building in partner countries. With regard to this kind of issues, many pieces of legislation – such as the Directives on seasonal workers¹³ and on intra-corporate transferees¹⁴, the Single Permit Directive¹⁵ and the Directives on researchers¹⁶ and students¹⁷ –

¹³ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28 March 2014, p. 375.

¹⁴ Directive 2014/66/EU of the European Parliament and the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27 May 2014, p. 1.

¹⁵ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 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 third-country workers legally residing in a Member State, OJ L 343, 23 December 2011, p. 1.

¹⁶ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3 November 2005, p. 15.

¹⁷ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupils exchange, unremunerated training or voluntary service, OJ L 375, 23 December 2004, p. 12. On the Directives that concern third-country nationals and the EU labour market, see TREVISANUT, “Le condizioni d’ingresso e la tutela dei migranti nell’ordinamento dell’Unione europea”, in CALIGIURI, CATALDI, and NAPOLETANO (eds.), *La tutela dei diritti umani in Europa: tra sovranità statale e ordinamenti sovranazionali*, Padova, 2010, p. 337 ff. For an historical overview on EU law and labour migration, see RYAN, “The European Union and Labour Migration: Regulating Admission or Treatment?”, in BALDACCINI, GUILD, and TONER (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford/Portland, 2007, p. 489 ff.

have been identified as necessary to tackle them. Among these legal tools, one should consider the EU Blue Card Directive which was defined as “the first direct EU response to shortages of highly skilled workers”¹⁸.

So, this paper provides an analysis of the EU Blue Card Directive (par. 2) and the revision proposal presented by the Juncker Commission (par. 3), assessing whether they can offer proper solutions that take into account the needs of both the EU and the sending countries. As far as the fight against brain drain is concerned, the paper focuses on Article 13 of the Cotonou Agreement (par. 4) as a provision that seems to counteract the idea that the needs of the EU labour market shall always prevail. The final paragraph (par. 5) stresses that the EU Member States should do more in this regard and seeks to identify a legal basis in the EU Treaties that would make it possible to reform the EU Blue Card Directive in a sense consistent with the objective of reduction and eradication of poverty.

2. – The EU Blue Card Directive

The so-called EU Blue Card Directive was adopted in 2009 in order to enhance a knowledge-based economy and advance the economic development of Europe while at the same time facing labour market shortages, demographic needs, and growing international competition to innovate. It should be regarded as an instrument whose purpose is to make migration work for development¹⁹.

¹⁸ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Global Approach to Migration and Mobility”, [COM(2011) 743 final], 18 November 2011, available at: <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A52011DC0743>>. One should remember that some general statements regarding this matter can be found in the EU Treaties. In fact, pursuant to Art. 3(5) of the Treaty on European Union (“TEU”), the EU shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty, and the protection of human rights; pursuant to Art. 79(2)(a) and (b) of the Treaty on the Functioning of the European Union (“TFEU”), the European Parliament and the Council shall adopt measures with regard to the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification, and the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.

¹⁹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18 June 2009, p. 17. See generally PETRACCI, “Migrazione per ricerca scientifica ed alte qualifiche verso procedure differenziate”, *Il lavoro nella giurisprudenza*, 2009, p. 1109 ff.; SCHIAVONE, “Carta Blu UE e sanzioni per l’impiego di clandestini”, *Lavoro e previdenza oggi*, 2009, p. 1062 ff.; GÜMÜS, “EU Blue Card Directive: The Right

Pursuant to Article 1, the Directive sets out the conditions of entry and residence for more than three months in the territory of the Member States of third-country nationals for the purpose of highly qualified employment, and of their family members, and the conditions for their entry and residence in Member States other than the first Member State²⁰.

Article 2 provides some fundamental definitions, most of all with regard to the concepts of third-country national, highly qualified employment, higher professional qualifications, and higher education qualification. While the first notion is quite an easy one to define – as a third-country national simply is a person who is not a citizen of the Union²¹ – the others prove more difficult.

Highly qualified employment refers to the employment of a person, who in the Member State concerned, exercises genuine and effective work for, or under the direction of, someone else, is paid, and has the required adequate and specific competence, as proven by higher professional qualifications.

Under the heading of higher professional qualifications fall any qualifications attested by evidence of higher education qualifications or attested by at least five years of professional experience of a level comparable to higher education qualifications.

Higher education qualification refers to any diploma, certificate, or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme, provided that the studies needed to acquire it lasted at least three years.

Step in the Right Direction?”, *European Journal of Migration and Law*, 2010, p. 435 ff.; ROSENTHAL, “La direttiva europea sui lavoratori altamente qualificati: elementi di cittadinanza sociale o di cittadinanza mercantile?”, in TRIGGIANI (ed.), *Le nuove frontiere della cittadinanza europea*, Bari, 2011, p. 425 ff.

²⁰ Pursuant to Art. 3(4), the Directive shall be without prejudice to the right of the Member States to issue residence permits other than an EU Blue Card, provided that such residence permits shall not confer the right of residence in the other Member States as provided for in the Directive.

²¹ However, one should be aware that pursuant to Art. 3(2), the Directive shall not apply with regard to third-country nationals who are beneficiaries of temporary protection or international protection, beneficiaries of protection in accordance with national law, international obligations, or practice of Member States, researchers within the meaning of Directive 2005/71/EC, family members of Union citizens, third-country nationals who enjoy long-term resident status in a Member State in accordance with Directive 2003/109/EC, third-country nationals who enter a Member State under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons, seasonal workers, third-country nationals whose expulsion has been suspended for reasons of fact or law, and third-country nationals who are covered by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

In order to obtain an EU Blue Card, the applicant needs to meet the criteria set out under Article 5: more specifically, they have to present a valid work contract or a binding job offer for highly qualified employment of at least one year in a Member State, documents attesting fulfillment of the national conditions regarding the exercise by Union citizens of the regulated profession specified in the work contract or binding job offer or, in the case of unregulated professions, documents attesting the relevant higher professional qualifications, a valid travel document, and evidence of having or having applied for a sickness insurance. Also, the applicant must not be considered to pose a threat to public policy, public security, or public health. Finally, under Article 5(3), the gross annual salary resulting from the monthly or annual salary specified in the work contract or binding job offer must not be inferior to at least 1.5 times the average gross annual salary in the Member State concerned.

Pursuant to Article 7(2) and (4), the standard period of validity of the EU Blue Card is comprised between one and four years and during that period, the holder is entitled to enter, re-enter, and stay in the territory of the Member State issuing the EU Blue Card and to the rights recognized in the Directive.

As provided under Article 8, an application can be refused by the Member States whenever the applicant does not meet the conditions set out in Article 5, the documents presented have been fraudulently acquired, or falsified or tampered with or the employer has been sanctioned for undeclared work or illegal employment. Under the same provision, at Paragraphs 2 and 4, the Member States may assess the situation of their labour market in order to verify whether a vacancy can be filled by national or EU workforce and they can reject an application in order to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin.

For what concerns the rights recognized to the EU Blue Card holder, Article 12 provides that for the first two years of legal employment in the concerned Member State, access to the labour market is restricted to the exercise of paid employment activities which meet the conditions for admission set out in Article 5 and changes in employer is subject to the authorization in writing of the competent national authorities. After the first two years, the Member States may grant equal treatment with nationals as regards access to highly qualified employment.

In the event of temporary unemployment, the EU Blue Card is withdrawn when the period of unemployment exceeds three consecutive months or when it occurs more than once during the period of validity of an EU Blue Card. During that peri-

od, the EU Blue Card holder can seek and take up employment under the conditions set out in Article 12 and is allowed to stay in the Member State until the necessary authorization has been granted or denied (Article 13).

EU Blue Card holders enjoy equal treatment with nationals of the Member State issuing the Blue Card with regards to working conditions, freedom of association and affiliation, education and vocational training, recognition of diplomas, certificates and other professional qualifications, social security, pensions, access to and supply of goods and services made available to the public, including procedures for obtaining housing, as well as information and counseling services afforded by employment offices, and free access to the entire territory of the Member State concerned, within the limits provided for by national law (Article 14).

Family reunification is possible under Article 15: residence permits for family members are granted within six months from the date on which the application was lodged at the latest, and the duration of validity of the residence permits of family members is the same as that of the residence permits issued to the EU Blue Card holder insofar as the period of validity of their travel documents allows it²².

As provided under Articles 16 and 17, an EU Blue Card holder can cumulate periods of residence in different Member States in order to meet the criteria regarding the long-term resident status and the issuance of a long-term residence permit²³.

After eighteen months of legal residence in the first Member State as an EU Blue Card holder, the person in question and his or her family members may move to another Member State for the purpose of highly qualified employment, provided that the EU Blue Card holder or his employer presents an application for an EU Blue Card to the competent national authorities within one month after entering the territory of the second Member State (Article 18). The member of his family may accompany or join him, provided that they submit an application for a residence permit within one month after their entry (Article 19).

²² See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in OJ L 229, 30 April 2004, p. 158.

²³ See Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, in OJ L 16, 23 January 2004, p. 44, and Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, in OJ L 157, 15 June 2002, p. 1.

For what concerns data analysis, on the one hand, pursuant to Article 20, the Member States must communicate to the Commission statistics on the volumes of third-country nationals who have been granted an EU Blue Card, volumes of third-country nationals whose EU Blue Card has been renewed or withdrawn, and volumes of admitted family members²⁴. On the other hand, pursuant to Article 21, every three years, the Commission must report to the European Parliament and the Council on the application of the Directive in the Member States.

The Member States were supposed to transpose the Directive by 19 June 2011 (Article 23)²⁵.

3. – The Main Flaws of the EU Blue Card Directive and the Revision Proposal Presented by the Commission

The EU Blue Card Directive soon showed its flaws. As it has been underlined by the European Commission, only 31% of highly-educated migrants to OECD countries chose the EU as a destination²⁶ and in its first two years of application, only 16,000 Blue Cards were issued and 13,000 were issued by Germany only²⁷: so, its scope has been really limited²⁸. It does not provide sufficient rights to potential

²⁴ Data regarding the impact of the implementation of the Directive in terms of brain drain and brain waste should be transmitted by the Member States to the Commission in accordance with Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No. 311/76 on the compilation of statistics on foreign workers, OJ L 199, 31 July 2007, p. 23 (see para. 22 of the Whereas).

²⁵ Truth be told, only four Member States (the Netherlands, Czech Republic, Spain, and Estonia) implemented the Directive on time and the Commission had to bring infringement proceedings against all the others, which were all closed by 2013. On the implementation of the EU Blue Card Directive, see GRÜTTERS and STRIK (eds.), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk, 2013.

²⁶ See European Commission, “Delivering the European Agenda on Migration: Commission presents Action Plan on Integration and reforms ‘Blue Card’ scheme for highly skilled workers from outside the EU”, 7 June 2016, available at: <http://europa.eu/rapid/press-release_IP-16-2041_en.htm>.

²⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions - “A European Agenda on Migration”, [COM(2015) 240 final], 13 May 2015, p. 15, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf>

²⁸ See Directorate-General for Internal Policies of the European Parliament, “Exploring New Avenues for Legislation for Labour Migration to the European Union – Study for the LIBE Committee”, 2015, pp. 69-70, available at: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536452/IPOL_STU\(2015\)536452_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536452/IPOL_STU(2015)536452_EN.pdf)>.

beneficiaries and their family, it does not seem to add anything to highly-qualified national migration schemes²⁹, and it does not apply to entrepreneurs and service providers, who are more likely to create innovative business³⁰.

From a more general point of view, the Directive only sets minimum standards and leaves much leeway to Member States through “may-clauses” and references to national legislation³¹. That applies particularly with regard, *inter alia*, to brain drain and negative effects which may impact sending countries as a consequence of the enforcement of the Directive. As stated above, under Article 8(4), the Member States may reject an application for an EU Blue Card in order to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin. As it is easy to understand, a provision as such does not obligate the Member States to do anything in order to help sending countries. On the contrary, given that the mechanism to attract foreign workers has not worked properly so far, it is highly unlikely that the Member States take the needs of the sending countries into account, putting aside their own. Thus, it seems easy to understand why no Member State has entered into an agreement with a third country regarding this matter and only Belgium, Cyprus, Germany, Spain, Luxembourg, and Malta have transposed the option to reject an application in order to ensure ethical recruitment in such sectors, but no rejections on these grounds have been reported³². This may result in serious harm to the sending countries’ long-term economic growth, increase brain drain, and make it more difficult for sending countries to

²⁹ *Ibid.* Austria, Belgium, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovak Republic, Slovenia, Spain, and Sweden have their own national schemes.

³⁰ *Ibid.* As underlined in DESIDERIO and DOMÈNECH, “Migrant Entrepreneurship in OECD Countries. Part II”, in OECD, *Migrant Entrepreneurship in OECD Countries*, 12 July 2011, p. 145, “[m]igrants contribute actively to the creation of new firms in the OECD. In relative terms, migrants are more entrepreneurial than natives in most OECD countries. In Belgium and in Spain, the proportion of individuals that became self-employed in 2007-08 was almost the double the proportion of natives. In the United States, the United Kingdom, France, and the Czech Republic, as well migrants are more likely to start a new business. In Austria, Germany, Greece, and Italy, migrants are almost as entrepreneurial as natives”.

³¹ *Ibid.*

³² European Commission, Communication from the European Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (‘EU Blue Card’), [COM(2014) 287 final], 22 May 2014, p. 5, available at: [http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com\(2014\)0287_/com_com\(2014\)0287_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0287_/com_com(2014)0287_en.pdf).

improve their innovation capital³³.

In light of the above, one should consider the statement made by Jean-Claude Juncker when he was campaigning as a candidate for the President of the European Commission:

“I want to promote a new European policy on legal migration. Such a policy could help us to address shortages of specific skills and attract talent to better cope with the demographic challenges of the European Union. I want Europe to become at least as attractive as the favourite migration destinations such as Australia, Canada and the USA. As a first step, I intend to review the ‘Blue Card’ legislation and its unsatisfactory state of implementation”³⁴.

As a matter of fact, some amendments and modifications are needed, most of all in order to correct the above-mentioned flaws and introduce a mechanism that could grant access to the whole EU labour market, and not only to that of a single Member State. So, in September 2015, the Commission anticipated a reform of the EU-Blue-Card legal scheme³⁵ and, on 7 June 2016, a proposal for the revision of the EU Blue Card Directive was presented³⁶.

For what concerns Article 2, two general definitions have been added: those regarding higher professional skills and business activity. The former refers to skills attested by at least three years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer. The latter means a temporary activity related to the business interests of the employer, such as attending internal

³³ KANCS and CIAIAN, “The Impact of the EU Blue Card Policy on Economic Growth in the African Sending Countries”, *South African Journal of Economics*, 2010, p. 225 ff., p. 226.

³⁴ JUNCKER, “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission”, 15 July 2014, available at: http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf.

³⁵ European Commission, Communication to the European Parliament, the European Council, and the Council: Managing the refugee crisis: immediate operational, budgetary, and legal measures under the European Agenda on Migration, [COM(2015) 490 final/2], 29 September 2015, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_managing_the_refugee_crisis_en.pdf.

³⁶ European Commission, “Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of highly skilled employment”, COM(2016) 378 final, 7 June 2016, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf.

and external business meetings, attending conferences and seminars, negotiating business deals, undertaking sales or marketing activities, performing internal or client audits, exploring business opportunities, or attending and receiving training.

The main difference between former Article 3 and the new one is that, under the latter, the Member States shall not issue any other permit than an EU Blue Card to third-country nationals for the purpose of highly skilled employment³⁷.

Focusing on the criteria for admission, the duration of the work contract or the binding job offer is reduced from twelve months to six and the salary threshold shall be between 1.0 and 1.4 times (and not 1.5 anymore).

Pursuant to Article 8(2), the Member States shall set a standard period of validity for the EU Blue Card, which shall be at least 24 months. If the work contract covers a shorter period, the EU Blue Card shall be issued at least for the duration of the work contract plus three months. Where an EU Blue Card is renewed, its period of validity shall be at least 24 months.

Under the newly-introduced Article 12, Member States may decide to provide for recognition procedures for employers, providing clear and transparent information to them about, *inter alia*, the conditions and criteria for approval, the period of validity of the recognition and the consequences of non-compliance with the conditions – including possible withdrawal and non-renewal – as well as any sanction applicable.

For what concerns labour market access, EU Blue Card holders shall have full access to highly skilled employment in the Member State concerned. Member States may require that a change of employer or other changes affecting the fulfillment of the criteria for admission are communicated in accordance with procedures laid down by national law, but the communication procedure shall not suspend the right of the EU Blue Card holder to pursue the employment. Also, EU Blue Card holders may engage in self-employed activity in parallel to the activity in highly skilled employment (Article 13). Temporary unemployment does not affect the right of residence as an EU Blue Card holder but it cannot last for more than three months or occur more than once during the validity of the EU Blue Card (Article 14).

The provisions regarding equal treatment, family members, and EU long-term residence for EU Blue Card holders (Articles 15, 16, 17, and 18) largely correspond to those under Directive 2009/50/EC but a new provision regarding business

³⁷ So, it seems that the EU is seeking to overcome national schemes in order to better harmonize this field of law.

activity in a second Member State has been added. It provides that a third-country national who holds a valid EU Blue Card is entitled to enter and stay in another Member State for the purpose of carrying out a business activity for up to 90 days in any 180-day period. The second Member State shall not require any authorization for exercising the business activity other than the EU Blue Card issued by the first Member State (Article 19).

After twelve months of legal residence in the first Member State as an EU Blue Card holder, the third-country national shall be entitled to enter a second Member State for the purpose of highly skilled employment on the basis of the EU Blue Card and a valid travel document (Article 20). The members of the family shall be authorized to accompany them and to enter and stay in the second Member State based on the valid residence permits obtained as family members of an EU Blue Card holder in the first Member State (Article 21).

The provisions regarding ethical recruitment (Article 9), the statistics that Member States shall communicate to the Commission (Article 24), and reporting by the Commission to the European Parliament and the Council (Article 25) have been confirmed.

4. – Focusing on the Development of Sending Countries: Article 13 of the Cotonou Agreement

It is quite clear that the EU is focused on its internal economic and demographic issues rather than on those of other countries. In fact, the revision proposal aims at making the EU labour market more attractive to non-EU citizens by providing them more rights and opportunities than it has been so far under the EU Blue Card Directive. The imbalance that this kind of approach may determine in the sending countries is not taken into any account as the provision regarding ethical recruitment has not been changed at all, still being a may-clause. Thus, one may wonder whether the needs of the EU labour market shall always prevail or if another approach is possible.

As a matter of fact, one may consider the so-called Cotonou Agreement³⁸ in order to provide an answer. Signed on 23 June 2000, the Cotonou Agreement is a

³⁸ Partnership Agreement 2000/483/EC between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 317, 15 December 2000, p. 3. The Convention entered into force in April 2003 and was revised in 2005 and 2010.

treaty made between the EU and the African, Caribbean, and Pacific Group of States (“ACP”) created by the Georgetown Agreement in 1975. It is the successor of the Lomé Convention and it deals with a number of topics such as development, trade, international investments, human rights, and governance. In the Preamble as well as in Article 1(1), the Contracting Parties have affirmed their commitment to eradicate poverty, achieve sustainable development, and integrate the ACP Countries into the world economy³⁹.

Under Article 13(1), the Parties reaffirm their obligations and commitments in international law to respect human rights and eliminate all forms of discrimination. Protection of migrants and prevention of illegal migration are taken into account in order to make it possible for migration to work for development fairly, without prejudice to the fundamental rights of every human being. This provision might be read together with the one under Paragraph 2, where four objectives have been set: *a)* fair treatment of third-country nationals who reside legally on the Contracting Parties territories; *b)* integration policy aiming at granting them rights and obligations comparable to those of national citizens; *c)* enhancement of non-discrimination in economic, social, and cultural life; and *d)* implementation of measures against racism and xenophobia. Thus, notwithstanding the demographic and economic nature of the issues at stake, it is made clear that any initiatives that might be taken shall be consistent with general principles which are not merely economic in nature since their purpose is to defend migrants as human beings. On the other hand, Paragraph 3 is focused on migrants as workers as it provides that the treatment accorded by EU Member States to workers of ACP countries shall be free from any discrimination based on nationality with regards to working conditions, remuneration and dismissal, and the same shall be done by ACP countries with regard to EU workers.

Going back to the first Paragraph, it is also stated that migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership. This

³⁹ On the Cotonou Agreement, see ARTS, “ACP-EU Relations in a New Era: The Cotonou Agreement”, *Common Market Law Review*, 2003, p. 95 ff.; CORDINI, “Accordi di cooperazione e vincoli di democratizzazione dell’Unione europea: le convenzioni di cooperazione e di associazione da Lomé a Cotonou”, *Il diritto dell’economia*, 2004, p. 7 ff.; DEL VESCOVO, “Aiuto comunitario allo sviluppo nel quadro dell’Accordo di Cotonou”, *La comunità internazionale*, 2005, p. 51 ff.; DEVISSCHER, “Legal Migration in the Relationship between the European Union and ACP Countries: The Absence of a True Global Approach Continues”, *European Journal of Migration and Law*, 2011, p. 53 ff.

seems to refer to a political dialogue that should be regarded as a holistic policy-making and agenda-setting tool through which it might be possible to work out legal solutions to the standing problems. That is confirmed by the establishment of the ACP-EU Joint Parliamentary Assembly whose duties are, *inter alia*, to promote democratic processes through dialogue and consultation and to raise public awareness of development issues (Article 17). As far as the topic tackled in this paper is concerned, it is worth remembering a Resolution that was adopted by the Assembly in December 2015 in which they deplored “the tendency to prioritize the fight against irregular migration, while giving insufficient attention to legal routes for those on the move and migrating by reaping the mutual benefits of circular migration”. Then, the Assembly called for

“a better framework for legal migration and mobility – including circular and temporary migration schemes – and for better information, protection, and pre-departure training, and the establishment of further safe and legal migration channels and humanitarian corridors by issuing more visas, in particular humanitarian visas, to migrants from countries beset by conflicts or humanitarian crises, and by facilitating family reunification and legal migration channels for workers”⁴⁰.

For what concerns the development of ACP countries, Article 13(4) is the most important one. It states that:

“The Parties consider that strategies aiming at reducing poverty, improving living and working conditions, creating employment and developing training contribute in the long term to normalising migratory flows. The Parties will take account, in the framework of development strategies and national and regional programming, of structural constraints associated with migratory flows with the purpose of supporting the economic and social development of the regions from which migrants originate and of reducing poverty. The Community shall support, through national and regional Cooperation programmes, the training of ACP nationals in their country of origin, in another ACP country or in a Member State of the European Union. As regards training in a Member State, the Parties shall ensure that such action is geared towards the vocational integration of ACP nationals in their countries of origin. The Parties shall develop cooperation programmes to facilitate the access of students from ACP States to education, in particular through the use of new communication technologies”.

⁴⁰ ACP-EU Joint Parliamentary Assembly, “Resolution on Migration, Human Rights, and Humanitarian Refugees”, 7-9 December 2015, para. 18, available at: http://www.europarl.europa.eu/intcoop/acp/2015_acp2/pdf/ap101.984en.pdf.

It is quite easy to understand that the Parties are referring to brain drain and the need to overcome that issue, without mentioning them⁴¹. Thus, since they have the proper means to do so, the EU Member States shall support the training of ACP nationals which could take place either in their country of origin, in another ACP country, or in an EU Member State. Nevertheless, the focus is set on the country of origin and its need for manpower in order to support its own development: not only the country of origin is mentioned as the first possible place where the training could take place, but also training in a Member State should be aimed at facilitating the re-installation of ACP nationals in the labour market of the sending countries. Also, it is quite interesting how the role played by new communication technologies is stressed: in fact, they should work as means that ensure to students from ACP countries a European education without obliging them to leave their countries. That would then reduce the risk that, when they are in Europe, they decide to stay and not go back, depriving their countries of fundamental assets.

With regard to the provision of Article 13(4), one may think of the ACP Science and Technology Programme (“ACP S&T”) which is an ACP-EU cooperation programme funded by the EU and implemented by the ACP Secretariat whose aim is to promote innovation and develop appropriate technologies to fight and eradicate poverty in ACP countries. By tackling issues such as energy shortages, climate change, and food insecurity, the ACP S&T seeks to overcome the scientific and technological divide between ACP countries and the rest of the world, strengthen the scientific knowledge in those countries, and support growth and socio-economic development⁴².

One may also consider the EDULINK II Programme, which is funded by the EU and supports higher education in ACP countries both with regard to the management sector and the strictly academic field⁴³.

⁴¹ Two references to brain drain can be found in the Agreement. Pursuant to Art. 80, “[w]ith a view to reversing the brain drain from the ACP States, the Community shall assist ACP States which so request to facilitate the return of qualified ACP nationals resident in developed countries through appropriate re-installation incentives”. The joint declaration on Art. 13 reads as follows: “The Parties agree to strengthen and deepen their dialogue and cooperation in the area of migration, building their approach on the following three pillars of a comprehensive and balanced approach to migration: Migration and Development, including issues relating to diasporas, brain drain and remittances; Legal migration including admission, mobility and movement of skills and services; and Illegal migration, including smuggling and trafficking of human beings and border management, as well as readmission”.

⁴² See <<http://www.acp-hestr.eu/acp-st-about-contact>>.

⁴³ See <<http://www.acp-hestr.eu/edulink-about-contact>>.

5. – *Conclusions*

Sometimes, even EU law and politics experts are forgetful of a significant statement that was made in the so-called Schuman Declaration. In the words of the former French Minister of Foreign Affairs,

“This production [i.e., the coal and steel production] will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent”⁴⁴.

As paternalistic as it sounds, this statement was and still is the expression of a sense of awareness regarding the role played by Europe in promoting an alternative way of development which should have concerned not only the European continent, but the world as a whole, starting from the poorest regions. A peculiar form of responsibility was and still is intertwined in those words and the EU and its Member States should remember that⁴⁵.

As stated above, according to the traditional literature on the topic, brain drain as an exodus of human capital is a curse for developing countries and must be countered, while according to some more recent analyses⁴⁶ brain drain would be offset by brain-drain-induced brain gain. In fact, brain drain implies that skilled individuals leave developing countries in order to earn higher wages in developed (or more developed) countries. That would lead to more investments in education in developing countries which would result in a rise in welfare and growth. As fascinating as it sounds, this idea has been criticized for a number of reasons, most of all

⁴⁴ See <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en>.

⁴⁵ Of course, the Schuman Declaration is not a legally binding document, but one cannot deny its truly political nature as the document that made it possible for the European integration process to start. Therefore, although it does not pose legal obligations, it should still be regarded as the expression of the basic values of the EU as a political entity. So, every achievement should try to be as consistent as possible with those values in order not to betray the dreams and will of our founding fathers. On this point, see also the contribution by GATTA in this Volume, p. 13 ff.

⁴⁶ MOUNTFORD, “Can a Brain Drain Be Good for Growth in the Source Economy?”, *Journal of Development Economics*, 1997, p. 287 ff.; VIDAL, “The Effect of Emigration on Human Capital Formation”, *Journal of Population Economics*, 1998, p. 589 ff.; STARK, “Rethinking the Brain Drain”, *World Development*, 2004, p. 15 ff.

because in a brain-drain-induced scenario, both skilled and unskilled workers⁴⁷ are more likely to migrate and less likely to stay in order to obtain higher wages: thus, that would mean a situation where public and private expenditures on education increase but States can count on less incomes from taxes, resulting in a negative impact on welfare and growth⁴⁸.

Also, it has been denied that this kind of situation leads to a scenario where knowledge flows from one country to another, as the cross-border mobility of knowledge is larger within countries than between regions located in different areas of the world⁴⁹.

Finally, one should be aware that these analyses seem entirely to shift the burden of brain drain on developing countries, relieving developed countries of any responsibility. It has been observed that different kinds of measures might be implemented in order to deal with this problem. While for some – preventive or restrictive measures – it would be up to developing countries to adopt them, for others developed countries should face their responsibilities. For instance, they could encourage temporary rather than permanent settlement (restorative measures), or they could repay the costs incurred by sending States in training and educating the migrants, or tax the migrants in order to support the sending States (compensatory measures)⁵⁰.

The purpose of making migration work for development, reconciling Europe's economic and demographic needs with the developmental needs of third countries,

⁴⁷ Migration of low and semi-skilled workers has not been tackled in this paper. However, one must be aware that this phenomenon has a greater impact on poverty reduction in developing countries than emigration of professionals, most of all for three reasons. First of all, these workers come from lower income communities, who benefit more directly from migration. Secondly, their withdrawal from home-country labour markets opens more opportunities for replacement workers at home. Finally, these migrants tend to remit more per person than high-skill professionals (see KATSELI et al., *Policies for Migration and Development: A European Perspective*, Paris, 2006, p. 13).

⁴⁸ See for instance SCHIFF, "Brain Gain: Claims about its Size and Impact on Welfare and Growth Are Greatly Exaggerated", in ÖZDEN and SCHIFF (eds.), *International Migration, Remittances & the Brain Drain*, Houndmills/New York, 2006, p. 201 ff., pp. 220-221. So, all things considered, it seems that remittances are the only positive outcome spreading out of brain drain. This does not seem to be enough as it does not let developing countries to overcome their situation of dependency from developed countries. Remittances do not compensate the loss of human capital since developing countries cannot count on the abilities and working force of highly skilled individuals.

⁴⁹ KANCS and CIAIAN, *cit. supra* note 33, p. 241.

⁵⁰ See MUNDENDE, *cit. supra* note 1, p. 188-189 and D'OLIVEIRA E SOUSA, "The Brain Drain Issue in International Negotiations", in APPLEYARD (ed.), *cit. supra* note 1, pp. 203-205.

has not yet been achieved. While the security dimension has largely been discussed and tackled⁵¹, the issues regarding migration and development have only been considered from a policy-making point of view and serious measures have lacked. As a general rule, they are not legally binding and where they are, they are mainly in the interest of the EU and its Member States⁵².

The needs of the sending countries labour markets are hardly taken into account under both the EU Blue Card Directive and the revision proposal. In fact, the provision concerning ethical recruitment has not been modified as in both cases it provides that the Member States may reject an application for an EU Blue Card in order to ensure ethical recruitment in sectors suffering from a lack of qualified workers in the countries of origin. Therefore, it does not pose any obligations on the Member States to consider the effects that brain drain may have on sending countries since it provides that the Member States may reject the applications on grounds of ethical recruitment: which basically means that they are free not to do that and stay focused only on the needs of their national labour markets.

Under Article 13 of the Cotonou Agreement, the EU shall support the training of ACP nationals through national and regional cooperation programmes which means that the EU is under the obligation of providing such training and cooperation programmes in order to face the brain-drain-related issues and compensate the negative effects spreading from such a situation. A measure as such should be regarded as being compensatory in nature and positively assessed as it obligates the EU to take steps – and responsibility – in order to solve the brain-drain-related issues.

Thus, for what concerns the EU Blue Card mechanism and the revision proposal, a provision as such would have been useless as it would have simply reproduced an obligation that already binds the EU under the Cotonou Agreement. Nev-

⁵¹ See MARIN and SPENA, “The Criminalization of Migration and European (Dis)Integration, *European Journal of Migration and Law*, 2016, pp. 147-156.

⁵² Nevertheless, one should remember that some States have entered into bilateral agreements whose purpose is to attract highly-qualified workers. For instance, France signed some agreements on concerted management of migratory flows and labour migration with Senegal, Gabon, Congo, Benin, Tunisia, Mauritius, Cape Verde, Burkina Faso, Cameroon, and Russia, while the Netherlands signed an agreement with India. Also, agreements on facilitated access to the labour market by qualified and unqualified work force were concluded by Poland with Belarus, Georgia, Moldova, Russia, and Ukraine, and by Slovenia with Bosnia-Herzegovina (see European Migration Network Study, “Attracting Highly Qualified and Qualified Third-Country Nationals”, 2013, p. 50, available at <http://extranjeros.empleo.gob.es/es/redeuropeamigracion/Estudios_monograficos/EMN_Synthesis_Report_Attracting_Highly_Qualified_EN.pdf>).

ertheless, the Member States should be bound to do something, too. Thus, the provision regarding ethical recruitment should be rephrased in order to obligate the Member States to take into account the ongoing labour market situation in the countries of origin. In this regard, a proper legal basis to do so may be found in Article 208 TFEU since it provides that Union development cooperation shall have as its primary objective the reduction and, in the long term, the eradication of poverty. Since a may-clause may hamper the EU initiatives in the field and the Member States must facilitate the achievement of the Union's tasks as provided for in Article 4(3) TEU, Article 8(4) of the EU Blue Card Directive could be rephrased in order to actually obligate the Member States to reject an application for an EU Blue Card to ensure ethical recruitment in the countries of origin.

All things considered and provided that it is very difficult to find a balance between the needs of the EU and its Member States, the needs of the developing countries and migrants' personal choices, the best solution seems to be the one that relies on temporary recruitment of personnel in the sending countries which should be associated to training programmes and skill-replenishment programmes that should take place in those countries. That would facilitate the mobility of knowledge and skills in a way that could be consistent with the interests of all the actors considered.

X. MORE DEVELOPMENT OF THIRD STATES AND LESS MIGRATION TOWARDS THE EU MEMBER STATES: IS THIS A NEW DUAL AIM OF THE EU PARTNERSHIP AND COOPERATION AGREEMENTS?

*Martina Guidi**

SUMMARY: 1. Introduction. – 2. The Evolution of EU Development Cooperation. – 3. The “Broad Notion” of Development Cooperation Including Migration Validated by the EU Court of Justice. – 4. The Insertion of Migration Clauses in the EU Agreements with Third Countries. – 5. The Focus of the EU Migration Policy in its External Dimension. – 6. Policy Coherence for Development... or for Migration Management? – 7. The “New Partnership Framework” with Third Countries under the European Agenda on Migration. – 8. Prospects Optimization: Addressing a “Sustainable” Development-Migration Nexus.

1. – Introduction

The global political agenda of over a decade has been focused on the link between migration and development¹. Countries and international organizations increasingly

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¹ MCGREGOR et al., “A New Global Partnership for Development: Factoring in the Contribution of

look at migration as a phenomenon capable of having a substantial positive impact on development. This is the “development-focused” approach proposed by the World Bank and United Nations Dialogue, according to which migration is seen as a means to promote development objectives in the interests of the countries of origin².

In the framework of recent external relations of the European Union (“EU”), the perspective is quite different: the link between development and migration resulted in a sort of “instrumentalisation of development cooperation”³, as a way to better control immigration and alleviate migratory pressure on EU Member States of arrival or destination. Development cooperation and financial aid to third States are used by the EU to control and reduce migration pressures in the long term, with “positive actions” – I might say – despite the EU and its Member States are showing in this regard more attention to the close link between development and “not-migration”. Development aid, assistance and economic incentives or other benefits are surely useful to address the

Migration”, IOM Migration Research Series, Geneva, 2014, available at: <http://publications.iom.int/system/files/pdf/mrs50_20may2014.pdf>.

² UN, “High Level Dialogue on International Migration and Development”, 14-15 September 2006, available at: <<http://www.un.org/esa/population/migration/hld>>. See OMELANIUK, “Making the Connections between Migration and Development”, in OMELANIUK (ed.), *Global Perspectives on Migration and Development: GFMD Puerto Vallarta and beyond*, Dordrecht, 2012, p. 1 ff.

³ This is the expression used by HOLLAND, “The EU and the Global Development Agenda”, in CARBONE (ed.), *Policy Coherence and EU Development Policy*, London/New York, 2013, p. 21 ff. On the Migration–Development nexus in general, see CASO, “Migrazioni e sviluppo: la politica europea”, ISPI Policy Brief No. 58, July 2007, available at: <http://www.ispionline.it/documents/pb_58_2007.pdf>; CHETAIL (ed.), “La dialectique migration et développement dans la politique de l’Union européenne à l’égard des pays tiers: paradoxes et paradoxes du dialogue Nord-Sud”, in MAES, FOLETS and DE BRUYCKER (eds.), *External Dimensions of European Migration and Asylum Law and Policy*, Bruxelles, 2011, p. 551 ff.; CHOU, “EU and the Migration–Development Nexus: What Prospects for EU-wide Policies?”, University of Oxford COMPAS, Working Paper 37, 2006, available at: <<http://www.compas.ox.ac.uk/publications/working-paper.shtml>>; NYBERG-SORENSEN, VAN HEAR and ENGBERG-PEDERSEN, “The Migration-Development Nexus: Evidence and Policy Options”, *International Migration*, 2002, p. 40 ff.; PASTORE, “‘More Development for Less Migration’ or ‘Better Migration for more Development’? Shifting Priorities in the European Debate”, *MigraCtion Europa: Periodical analysis bulletin on migration policies in Europe*, Centro Studi di Politica Internazionale, Special Issue, December 2003, available at: <<http://www.cespi.it/PASTORE/MigSpecial3.PDF>>; ID., “Cooperation with Sending and Transit Countries: Beyond Sticks and Carrots?”, Policy brief for the Dutch Presidency Conference on Asylum, Migration and Frontiers, September 2004, available at: <http://www.cespi.it/PASTORE/pastore_083104.pdf>; ID., “Europe, Migration and Development. Critical Remarks on an Emerging Policy Field”, August 2007, available at: <<http://www.cespi.it/PDF/Pastore-MigrationandDevelopment.pdf>>; RESLOW, “Migration and Development? An Assessment of Recent EU Initiatives”, *Journal of Contemporary European Research*, 2010, p. 3 ff.; ZANFRINI, “Migration and Development: Old and New Ambivalences of the European Approach”, Paper Ismu, December 2015, available at: <http://www.ismu.org/wp-content/uploads/2015/12/Zanfrini_paper_eng_dic_2015.pdf>.

root causes of forced migration in developing or less-developed countries, or to open legal channels of migration⁴. Actions “at the source” of migration flows often consisting in the promotion of economic, social and political development of the countries of origin, and financial aid to the latter, should result in a corresponding reduction, if not elimination, of migration influx towards Europe⁵.

The EU institutions want to “optimize” the migration and development nexus, so that the synergy between international (legal) migration and (economic, social and political) development of third countries of origin of migrants yields positive, reciprocal effects. The promotion of a real economic, political and social development in the countries of origin and transit of migrants through cooperation and practical action is the only way to reduce “at the source” international migration⁶. In this regard, the European Council of Seville (21 and 22 June 2002) underlined that the intensification of economic cooperation, developing trade, development assistance and conflict prevention are all means to promote economic prosperity in the countries concerned and thereby to reduce the underlying causes of migration flows⁷. Although the proposal to explicitly attach development aid to the willingness of third States to cooperate in the control of migration was formally rejected,

⁴ VOGLER and ROTTE, “The Effects of Development on Migration: Theoretical Issues and New Empirical Evidence”, *Journal of Population Economics*, 2000, p. 485 ff.

⁵ Such an approach is criticized by GENT, “The Root Causes of Migration: Criticising the Approach and Finding a Way Forward”, Working Paper No.11, 2002, Sussex Centre for Migration Research, available at: <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=mwp11.pdf&site=252>>; YOUKHANA, BRAUN and BORGEMEISTER, “Addressing the Root Causes of Forced Migration”, available at: <http://www.zef.de/uploads/tx_zefnews/AnnualReport_14-15_Lead_Article.pdf>.

⁶ NASCIBENE, “L’approccio globale nella gestione dell’immigrazione: la politica della UE alla luce dell’attuazione del Programma dell’Aja”, *Il Diritto dell’Unione Europea*, 2008, p. 433 ff.; NIESSEN, “International Migration and Relations with Third Countries: The European Union”, Migration Policy Group, May 2004, available at: <http://www.migpolgroup.com/wpkn/wp-content/uploads/2016/10/144.EU_InternationalMigrationandRelationswiththirdcountries_2004.pdf>; PAPAGIANNI, *Institutional and Policy Dynamics of EU Migration Law*, Leiden/Boston, 2006; REES and SMITH (eds.), *International Relations of the European Union*, London, 2008; TRAUNER, “Migration Policy: an Ambiguous EU Role in Specifying and Spreading International Refugee Protection Norms”, in FALKNER and MULLER (eds.), *EU Policies in a Global Perspective: Shaping Or Taking International Regimes?*, Abingdon/New York, 2013, p. 149 ff.; VAN SELM, “Immigration and Asylum or Foreign Policy: the EU’s Approach to Migrants and Their Countries of Origin”, in LAVENEX and UCARER (eds.), *Migration and the Externalities of European Integration*, Lanham, 2002, p. 143 ff.

⁷ Migration issues are part of overall political and economic relations with a series of key partners. Closer cooperation is sought with non-EU countries that share interests with and are ready to make mutual commitments with the EU and its Member States.

the final conclusions of the Seville European Council confirmed a certain degree of “conditionality”. The EU Member States opted for an increase of “complementarity” and integration of the EU external relations with other policies⁸, connecting in particular association agreements and cooperation policies for migration management⁹. They agreed that all future EU association and cooperation agreements would include a clause on joint management of migratory flows and compulsory readmission in cases of illegal immigration.

The link between development and migration is explicitly and more clearly underlined in the main instruments of external migration policy recently adopted by the EU, i.e. the Global Approach to Migration and Mobility (“GAMM”)¹⁰, the European Agenda on Migration¹¹ and the new “Partnership Framework with Third Countries”¹². According to one of the four thematic priorities of the GAMM, the EU aims at maximizing the positive impact of migration and mobility on development, specifically empowering peoples’ contribute to sustainable development in countries of origin, transit and destination, in the framework of a more “migrant-centred” action.

Migration management is also a major priority of a series of regional initiatives, such as Partnerships on Migration and Mobility (so-called processes, such as the Rabat, the Prague and the Khartoum ones) and other mechanisms of cooperation with its proper funds to support Africa, East Europe or Middle East Third Coun-

⁸ See Communication from the Commission to the Council and the European Parliament of 3 December 2002 – “Integrating Migration Issues in the European Union’s Relations with Third Countries”, [COM (2002) 703 final], p. 24.

⁹ On the subject ADEPOJU, VAN NOORLOOS and ZOOMERS, “Europe’s Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review”, *International Migration*, 2009, p. 42 ff.; RYAN and MITSILEGAS (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston, 2010.

¹⁰ That is the overarching framework launched in 2005 relating to the EU external migration and asylum policy. A more strategic phase started in 2011 in order to make the GAMM even more integrated with EU external actions and development cooperation with third countries.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions – “A European Agenda on Migration”, [COM(2015) 240 final], 13 May 2015, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1481069754834&uri=CELEX%3A52015DC0240>>.

¹² Communication from the Commission on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 7 June 2016, [COM(2016) 385 final], available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1481069853235&uri=CELEX:52016DC0385>>. See further para. 7.

tries¹³. In addition, the EU also offers financial and structural support to countries in conflict and with high numbers of displacement and refugees¹⁴.

In the following paragraphs I examine the recent “migration clauses” provided in the EU development cooperation agreements or framework partnership and then the specific instruments of EU external migration policy. The first aim is to understand if the migration-development nexus is recently turned into a link between more development of third States and less migration towards the EU Member States, expressed in some provisions of the EU international agreement with countries of origin and transit of migration flows, and in recent praxis. If so, the second question to solve regards the consistency of such clauses and praxis aimed at pursuing migration policy objectives with the specific objectives of development cooperation policy and the respective EU Treaties provisions.

2. – The Evolution of EU Development Cooperation

The main object of EU development policy is poverty eradication or reduction and achievement of internationally agreed development goals, i.e. Millennium Development Goals (“MDGs”) and Sustainable Development Goals (“SDGs”) in order to support sustainable development. This policy has progressively expanded so much, that nowadays the European Union is considered the main player in the world in development aid supporting needy third countries¹⁵.

¹³ See the Regulation (EU) No. 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund (AMIF), amending Council Decision 2008/381/EC and repealing Decisions No. 573/2007/EC and No. 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ L 150/168, 20 May 2014. Among its four specific objectives the AMIF aims at supporting legal migration to the Member States in accordance with their economic and social needs and promoting the effective integration of Third-country nationals, and enhancing fair and effective return strategies with a view to countering illegal immigration. D’ALFONSO, “EU Funds for Asylum, Migration and Borders”, European Parliamentary Research Service, 11 February 2014, available at: [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130663/LDM_BRI\(2014\)130663_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130663/LDM_BRI(2014)130663_REV1_EN.pdf).

¹⁴ For example, since the beginning of the conflict in Syria the European Union and its member states have provided more than €6 billion in humanitarian aid and financial assistance. In particular, the EU Regional Trust Fund in Response to the Syrian crisis – the “Madad Fund” – provides for a more coherent, faster and integrated response to the crisis by merging various EU financial instruments and contributions from Member States into one single flexible and quick mechanism with a target volume of € 1 billion expected to be reached by the end of 2016. Further information available at: http://ec.europa.eu/enlargement/neighbourhood/countries/syria/madad/index_en.htm.

¹⁵ See the financial support to third States that the EU provides in the context of the associations

Development cooperation policy is one of the fundamental dimensions of the Union's external action and has a dual legal standing: *a*) the Treaty on European Union ("TEU") and the Treaty on the functioning of the European Union ("TFEU"), as amended by the Treaty of Lisbon, entered into force in 2009¹⁶; *b*) development cooperation agreements or, more recently, "global cooperation framework agreements"¹⁷ with developing countries, which is different from partnership or association, typically concluded with countries in the framework of the EU "neighbourhood" policy¹⁸, the Mediterranean region and Eastern Europe.

Over time, the EU development cooperation has evolved from the traditional treaty-based policy approach, requiring that all EU policies contribute to development objectives, to a more complex "global cooperation" framework. Because of the need to maximize its impact so as to address the root causes of migration, external relations between the Union, its Member States and third States take the form of a global partnership and cooperation framework, which would not be reducible to one simple aspect of development cooperation. The agreements concluded with less-developed third countries, in recent practice, have evolved considera-

mainly through the European Development Fund, according to the Regulation (EU) No. 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, OJ L 77/44, 15 March 2014; the Commission Decision of 24 November 2014, [C(2014) 8589 final], on the adoption of an individual measure in favour of intra-ACP cooperation to be financed from the European Development Fund Bridging Facility; and the Decision (EU) No. 2015/334 of the Council of 2 March 2015 amending the Internal Agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies, OJ L 58/75, 3 March 2015.

¹⁶ Art. 21 of the TEU refers twice to the promotion of "sustainable development" as one of the objectives of the EU international relations and external action: the first time in letter d), specifically related to developing countries and poverty eradication, and also in letter f).

¹⁷ See *infra*. With reference to a specific Framework Agreement, BIONDI, "The Externalization of the EU's Southern Border in Light of the EU/Libya Framework Agreement. A Lawful Alternative or a Neo-Refoulement Strategy?", *Vienna Journal of International Constitutional Law*, 2012, p. 144 ff.

¹⁸ See Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014, establishing a European Neighbourhood Instrument, OJ L 77/27, 15 March 2014. On the EU neighbourhood policy instruments and prospects before this regulation entered into force, FERRERO-WALDNER, "The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument", *European Foreign Affairs Review*, 2006, p. 139 ff., and STANCOVA, "Integrating the EU Migration Policy into the EU Neighbourhood Policy: the Origins and Prospects", ECPR fifth Pan-European Conference in Porto, 24-26 June 2010, available at: <<http://www.jhubc.it/ecpr-porto/virtualpaperroom/139.pdf>>.

bly from a basic system of social assistance to the present comprehensive and detailed agreements. In their implementation, much less asymmetric – in other terms, more balanced – relationships are established and, not only the developing country, but all the Contracting Parties obtain mutual benefits.

Because of this, contrary to what is traditionally expected, some doubt arose whether obligations provided in these framework agreements continue to be binding even once development targets are met and even if the third State can no longer be considered in need of aid from the EU. An example of this situation is the “cooperation agreement on partnership and development”, concluded between the EC and India in 1994. Due to the multiplicity of sectors concerned, one could have assumed that it had a substantially different nature from the typical development cooperation treaty. Nonetheless, it was classified by the Court of Justice of the European Union (“CJEU”) as a development cooperation agreement for all purposes¹⁹.

Many provisions of such agreements have an “interlocutory” character, concerning the commitment of the parties to undertake a “constant” dialogue on issues such as, for example, the promotion of human and social development, inclusive economic growth and environmental sustainability, capacity building for greater integration into the world economy and the international trading system, reforms of the public sectors, or implementation of international principles and guarantee of the aid’s effectiveness. Two great themes emerge from the various preambles: the common intent to preserve the inclusive nature of the mutual relations of Contracting Parties and respect for democratic principles and human rights²⁰.

First, therefore, the Parties of such agreements express an intention to derive mutual benefits, highlighting areas of interest and shared values²¹, which is also the cooperation in the field of migration and development. Second, the same Parties

¹⁹ That agreement was concluded for five years and automatically renewed from year to year except the possibility of denunciation, in accordance with its Art. 29.

²⁰ See VILLANI, “Il diritto allo sviluppo: diritto umano e dei popoli”, in VILLANI (a cura di), *A tutti i membri della famiglia umana. Per il 60° anniversario della Dichiarazione universale*, Milano, 2008, p. 123 ff., and in particular p. 136 ff. about the “principle of conditionality”, according to which the effectiveness of development assistance or cooperation agreements concluded by the EC, was conditional on respect for human rights.

²¹ Such an agreement deals with concerns, for example, related to the promotion of economic and social progress for the benefit of their populations and the eradication of poverty, and to the achievement of the MDGs, the promotion of sustainable development and the fight against climate change, increased cooperation in the field of Justice and security cooperation in favour of migration and development, the application of minimum social standards and trade.

include areas of cooperation echoing a number of commitments aimed at ensuring international peace and security. In this perspective, questions of common concern of the Parties are the fight against terrorism, drug trafficking, serious violations of international humanitarian law, weapons of mass destruction and illicit trade in small arms and light weapons. The CJEU itself considered possible and legitimate to include the fight against proliferation of small arms and light weapons among the instruments for pursuing objectives of development cooperation policy²².

This “treaty-making way” reflects the current EU approach to development cooperation policy. Often in recent “framework” or “global” agreements the objective of contributing to the development of the third State is less explicit in comparison to the “classic” development cooperation agreements. The multidimensional objectives of development cooperation, as provided in the pre-Lisbon EC Treaty, were evident: not only sustainable economic and social development of those countries, their gradual integration into the global economy and the eradication of poverty, but also development, consolidation of democracy and the rule of law, and protection of human rights and fundamental freedoms, as well as respect of the EC (now the EU) commitments within the framework of the United Nations and other international organizations²³.

Through its development cooperation policies, the European Commission has tried to improve the dialogue and strengthen partnerships on migration with third Countries through three types of policies and interventions: *a*) planned interventions in the framework of the cooperation programmes with third countries directly related to migration; *b*) other actions falling within the general framework of relief and reconstruction; *c*) the EU policy on development cooperation and general development programmes, suitable to reduce migratory pressures indirectly by virtue of poverty reduction and the promotion of sustainable growth and development. As regards the latter category – development cooperation policies and programmes adopted by the EU – according to the European Commission, the EC development

²² Case C-91/05, *Commission v. Council*, ECR, 2008, p. I-3651.

²³ On the external relations of the EC, see CANNIZZARO, “Le relazioni esterne della Comunità: verso un nuovo paradigma unitario”, *il Diritto dell’Unione Europea*, 2007, p. 223 ff. With reference to the EU, see DANIELE (a cura di), *Le relazioni esterne dell’Unione europea nel nuovo Millennio*, Milano, 2001; HILL and SMITH (eds.), *International Relations and the European Union*, Oxford, 2011, II ed.; KEUKELEIRE and MACNAUGHTAN, *The Foreign Policy of the European Union*, New York, 2008; MARSH and MACKENSTEIN, *The International Relations of the European Union*, Harlow, 2005.

cooperation policy has already contributed to the reduction of migration by eliminating some root causes at the origin of migration flows and thus shortening the duration of the “migration peaks”²⁴.

While, in accordance with Article 21 TEU, development cooperation agreements must pursue the objectives referred to in that provision, the predominant purpose of such agreements continues to be development cooperation, which cannot be reduced to the mere grant of financial assistance. The Partnership and Cooperation Agreements (“PCAs”) are indeed agreements with the predominant purpose of development cooperation and confirm the multifaceted dimension of development cooperation with third States. The Council points out the profound changes in the nature of the agreements nowadays negotiated by the European Union with third countries, which now establish more extensive forms of cooperation and envisage effective implementation in the various sectors concerned. Following the same line of reasoning, the Council maintains that the recitals and provisions relating to the observance of human rights, of democratic principles and of the rule of law, and concerning the possible suspension of the agreement owing to the failure to respect such rights or principles, also serve to indicate that PCAs are not a measure that can be reduced to development cooperation policy.

Development cooperation is defined so broadly at EU level, that it is perhaps more difficult to show that, alongside the large number of sectors it can encompass, there remains an objective or there is more than one objective both distinct from those pursued by development cooperation and inseparably linked to the measure in question. Development cooperation, as now defined by EU law, is a multifaceted policy. Within the meaning of the European Consensus on Development, the essential objective of EU development cooperation is the eradication of poverty

²⁴ See BENEDETTI, “EU Policy and Law Concerning Migration – Critical Examination”, in DEVETAK and SIRBU (eds.), *EU Migration Policy and its Reflection in Third Countries: Belarus, Moldova, Russia, Ukraine*, Institute for Ethnic and Regional Studies, Maribor, 2012, p. 108 ff., available at: <http://www.project-bridge.eu/datoteke/Actions2012/BRIDGE-EU_MIGRATION_POLICY.pdf>; BOSWELL, “The ‘External Dimension’ of EU Immigration and Asylum Policy”, *International Affairs*, 2003, p. 619 ff.; CALOZ-TSCHOPP and DASEN (eds.), *Globalization, Migration and Human Rights: A New Paradigm for Research and Citizenship*, Bruxelles, 2007; CARDWELL, *EU External Relations and Systems of Governance. The CFSP, Euro-Mediterranean Partnership and Migration*, London/New York, 2009; CARRERA, DEN HERTOG and PARKIN, “EU Migration Policy in the Wake of the Arab Spring. What Prospects for EU-Southern Mediterranean Relations?”, MEDPRO Technical Report No. 15, August 2012, available at: <https://www.ceps.eu/system/files/MEDPRO_TR_15_EU_Migration_Policy_in_wake_of_Arab_Spring.pdf>.

in the context of sustainable development, the latter including good governance, human rights and political, economic, social and environmental aspects²⁵.

As correctly explained by the Council, the European Union's practice in its relations with less developed countries has evolved significantly and has progressed from being a mere system of financial assistance to the establishment of comprehensive and more elaborate agreements in which reference to "mutual" advantages is not mere diplomatic language, and the relationship put in place is much less lopsided and is, thus, more balanced²⁶. It is, however, for that reason that, while I can certainly acknowledge the multi-faceted nature of development cooperation, I find it, by contrast, more difficult to regard the legal basis for development cooperation alone as sufficient, when so many and varied areas are covered by the same agreement.

It is nonetheless necessary to examine whether, among the numerous and diverse areas envisaged by the PCA, its provisions concerning transport, the environment and the readmission of nationals of third States *contribute* – within the meaning of the case law of the Court – “to the objectives of economic and social development” of development cooperation policy and have *the principal objective* of implementing that policy or whether, on the contrary, they prescribe in concrete terms the implementation of cooperation in those specific areas with the result that they constitute, in reality, *distinct objectives* which are neither secondary nor indirect in relation to the objectives of development cooperation. In my opinion, the clauses relating to migration and in particular those regarding readmission have typical (and exclusive) purposes of migration policy²⁷, purposes quite distinct from the ones of development policy.

²⁵ BROBER and HOLDGAARD, “Demarcating the Union's Development Cooperation Policy after Lisbon: *Commission v. Council (Philippines PCFA)*”, *Common Market Law Review*, 2015, p. 547 ff.

²⁶ Opinion of Advocate General Mengozzi delivered on 23 January 2014, Case C-377/12, *Commission v. Council*, para. 43.

²⁷ About the evolution of the EU migration policy after the Lisbon Treaty see ADINOLFI, “La politica dell'immigrazione dell'Unione europea dopo il Trattato di Lisbona”, *Rivista di diritto pubblico europeo*, 2011, p. 13 ff.; AZOULAI and DE VRIES (eds.), *Migration and EU Law and Policy*, Oxford, 2014.

3. – The “Broad Notion” of Development Cooperation Including Migration Validated by the EU Court of Justice

Recently, the CJEU has ruled on the correct legal basis of a PCA, including provisions on readmission, transport and environmental protection²⁸. It observed that it does not contain a reference, in its title, to development²⁹. That has given the impression of the establishment of a comprehensive cooperation structure not subject to limitation, since a “framework agreement” is at issue³⁰. In this regard, the EU Council argued that “external relations between the Union, its Member States and third States take the form of a global partnership and cooperation which would not be reducible to simple aspect of development cooperation”³¹. Such cooperation and partnership would make it impossible to distinguish in the ensuing treaties a main prevailing sector out of one or more sectors which are accessories³².

²⁸ EU Court of Justice (Grand Chamber), Case C-377/12, *Commission v. Council*, Judgment of 11 June 2014, paras. 37, 42, 43, 47, 49, and 59. That specific case regards the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, on the one part, and the Republic of the Philippines, on the other part (“EU-Philippines PCA”).

²⁹ Art. 29 of the EU-Philippines PCA, which falls within the title on economic and development cooperation and other sectors, is exclusively concerned with development cooperation. Pursuant to that article, the primary goal of such cooperation is “to encourage sustainable development that will contribute to the reduction of poverty and to the attainment of internationally agreed development goals”. The Parties undertake to engage in regular dialogue on that topic with regard, inter alia, to the promotion of human and social development, the attainment of sustained inclusive economic growth, the promotion of environmental sustainability, the enhancement of capacities to integrate into the world economy and the international trading system, the promotion of public sector reform and compliance with the international principles governing the delivery and effectiveness of aid.

³⁰ Made up of 58 articles, the EU-Philippines PCA is divided into eight titles concerning, respectively, its nature and scope, political dialogue and cooperation, trade and investment, justice and security cooperation, cooperation on migration and maritime labour, economic and development cooperation and other sectors, the institutional framework, and, lastly, the final provisions.

³¹ Opinion Mengozzi, *cit. supra* note 26, para. 18.

³² *Ibid.*, para. 43. Whilst acknowledging the multidimensional nature of development cooperation, Mengozzi pointed out difficulty in finding enough legal basis for development cooperation when so many different sectors are under the same agreement. The current practice is marked, as stated by the European Commission, by much confusion. For example, the Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Arts. 179 and 181a of the Treaty establishing the European Community, OJ 2006 L 262, p. 24, was adopted on the basis of Arts. 179 and 181a of the EC Treaty. The Council decision of 21 December 2011 on the signing, on behalf of the European Union, and provisional application of certain provisions of the Partnership and Cooperation Agreement between the European Union and its Member States, of

The CJEU has not merely confirmed its pre-Lisbon case law³³, but has also re-framed the principle, that the EU development policy after the Lisbon Treaty is not limited to measures directly aimed at the eradication of poverty under Article 208 TFEU, but also pursues the objectives referred to in Article 21(2) TEU, such as the one, set out in letter d), of fostering the sustainable economic, social and environmental development of developing countries³⁴.

One of the key questions regards Article 26 of the PCA under review, that is part of Title V, headed “Cooperation on Migration and Development”. Article 26(1) reaffirms the importance of the management of migratory flows and the Parties’ intention to establish a mechanism for dialogue and consultation in all migration-related issues, which must *inter alia* be included in national development strategies. Cooperation in that field is based, under Article 26(2) of the PCA, on the push-pull factors of migration, the development and implementation of national legislation and practices with regard to protection and the rights of migrants, the development and implementation of legislation and national practices regarding international protection, admission rules and the rights and status of persons admitted, the establishment of a policy to prevent the presence on their territory of a national of the other party who does not fulfil or no longer fulfils the conditions of entry, stay or residence on the territory of the party concerned, the fight against the smuggling and trafficking in human beings, the return of persons under humane and dignified conditions, issues of mutual interest in the field of visas and security of travel documents and of border management and, finally “*migration and development* issues”³⁵.

the one part, and the Republic of Iraq, of the other part, OJ 2012 L 204, p. 18, was adopted on the basis of Arts. 79(3), 91, 100, 192(1), 194, 207 and 209 TFEU in conjunction with Art. 218(5) TFEU. The Council decision of 14 May 2012 on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part, OJ 2012 L 134, p. 4, was adopted on the basis only of Arts. 79(3), 207 and 209 TFEU in conjunction with Art. 218(5) TFEU. The Council Decision of the same day on the signing, on behalf of the Union, of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, OJ 2012 L 137, p. 1, was, for its part, adopted on the basis only of Arts. 79(3), 91, 100, 207 and 209 TFEU in conjunction with Art. 218(5) TFEU.

³³ In particular, Case C-268/94, *Portugal v. Council*, ECR, 1996, p. I-6177.

³⁴ See BARTOLONI, “La cooperazione allo sviluppo dell’Unione europea con Paesi terzi: da politica contro la povertà a cooperazione globale?”, *Diritti Umani e Diritto Internazionale*, 2014, p. 663 ff.

³⁵ Emphasis added.

Article 26(3) of the PCA imposes on each of the contracting parties the obligation to readmit their own nationals who are in a situation of illegal entry, stay or residence on the territory of one of the other parties. That readmission must be carried out upon request of the contracting party concerned “without undue delay once nationality has been established and due process ... carried out”³⁶. As regards the relationship of those topics to development cooperation, the CJEU has stated that provisions relating to readmission of nationals of the Contracting Parties of a “Framework Agreement on Partnership and Cooperation” fall within development cooperation policy if they do not contain obligations so extensive, that they may be considered to constitute objectives distinct from those of development cooperation – that are neither secondary nor indirect in relation to the latter objectives – and so as to contribute to furthering pursuit of the objectives referred to in Articles 21(2)(d) TEU and 208(1) TFEU³⁷.

The CJEU adopts a “broad notion of development cooperation” (as defined in the above cited European Consensus) into which migration and in particular the fight against illegal migration – together with transport and environmental protection – are integrated. Conversely, in a previous judgment the same Court had affirmed that an objective concerning the fight against terrorism and international crime falls outside the framework of the development cooperation policy. It has noted that, as far as financial and technical assistance are concerned, support for the national institutions of developing countries does not constitute an end in itself, but an instrument for strengthening their capacity to administer development policies and projects in the fields stated, which do not include the fight against terrorism and international crime³⁸.

³⁶ Provision is also made for the making available of the necessary documents and for communication between the competent authorities of the requesting State and the requested State. Reference is also made to the case where a person is deprived of their identity document. Finally, Art. 26(4) of the EU-Philippines PCA shows that the parties have agreed to conclude a readmission agreement as soon as possible, which must at least include a provision on the readmission of nationals of other countries concerned by the PCA and of stateless persons.

³⁷ According to the CJEU, “the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterisation of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation” (para. 39).

³⁸ CJEU (Grand Chamber), Case C-403/05, *European Parliament v. Commission*, ECR, 2007, p. I-9045, paras. 61 and 68.

The Court of justice – rather hastily, in my opinion – has included readmission among the areas covered by the broad notion of development cooperation. This insertion is justified, according to the Court, because “migration, including the fight against illegal immigration, transport and the environment are integrated into development policy as defined in the European consensus” and these are part of the series of activities pertaining to development and aimed at implementing the MDGs and take account of economic, social and environmental aspects of poverty eradication in the context of sustainable development³⁹.

While it seems *a priori* possible to consider that a measure which is intended to combat illegal immigration also contributes to the attainment of development objectives, it remains doubtful whether such a link can be established with regard to the aforesaid readmission clauses. In my view, it is not as self-evident as the Court made it out, that the provisions relating to readmission of citizens of the Contracting Parties “contribute to the achievement of the objectives of development cooperation” and “do not contain obligations of a reach to believe that they constitute objectives distinct from those of development cooperation, which are neither secondary nor indirect compared them”⁴⁰. The implicit motivation for such a position is probably to be found in the awareness that development cooperation is often the incentive, the leverage used by the EU and its Member States to obtain commitment to the conclusion of readmission agreements by third States. The CJEU thus legitimizes this questionable practice.

4. – The Insertion of Migration Clauses in the EU Agreements with Third Countries

In order to better explain the practice I criticize, it is useful to examine in detail the various types of so-called “migration clauses” provided in many of the EU partnership, cooperation or association agreements. As noted above, the European Union has decided to systematically include discussions about the migration-development nexus, where appropriate, in the negotiation of its agreements with third States⁴¹. Following the Tampere European Council⁴², in particular, the “mixed

³⁹ Case C-377/12, *Commission v. Council*, *cit. supra* note 28, para. 48 ff.

⁴⁰ *Ibid.*, paras 55 and 59.

⁴¹ CELLAMARE, “A proposito del partenariato per la mobilità tra Tunisia e UE”, *Sud in Europa*, May 2014, p. 5 ff.; HAMOOD, “EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Mi-

agreements” – that is, concluded by the EC/EU and its Member States (within the framework of their respective competences) with third States – of partnership and cooperation have already included standard clauses providing a reciprocal obligation of collaboration and cooperation for prevention and control of illegal immigration next to the readmission of irregulars⁴³.

According to the conclusions of the above mentioned Seville European Council, the European Commission referred in particular to Article 13 of the “Cotonou agreement” with the African, Caribbean and Pacific (“ACP”) countries⁴⁴ as a full and fair “model-clause”, a source of inspiration for the provisions on migration to be included in each subsequent agreement negotiated by the EC and now by EU with any third State. Article 13 is the first example of “migration clause”, that is more of a “readmission clause”⁴⁵ as it contains specific provisions on cooperation on migration issues, with regard to reciprocal obligations of joint management of migration flows, prevention and fight against illegal migration, next to compulsory readmission of irregulars⁴⁶. For example, in Article 13(4), EU-ACP partnership

grants?”, *Journal of Refugee Studies*, 2008, p. 19 ff.; IPPOLITO and TREVISANUT (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation*, Cambridge, 2015; MALAKOOTI, “Mixed Migration into Libya: Mapping Migration Routes from Africa to Europe and Drivers of Migration in Post-Revolution Libya”, *Migration Policy Practice*, 2013, p. 18 ff.

⁴² It was at Tampere that the European Council met in special session in October 1999 to give a kick-start to the EU’s justice and home affairs (“JHA”) policies. The main themes covered by the EU Tampere summit were a common EU asylum and migration policy, a genuine European area of justice, a Union-wide fight against crime and a stronger external action. The objective of the latter is to stop drugs, smuggled and stolen goods, and illegal immigrants entering the European Union, by cooperating with neighbouring countries and countries of transit and origin.

⁴³ In this regard, CHERUBINI, “La cooperazione fra Unione europea e paesi del Nordafrica nella lotta all’immigrazione irregolare”, in ANGHELONE and UNGARI (a cura di), *Atlante geopolitico del Mediterraneo*, Rome, 2014, p. 15 ff., pp. 22-24.

⁴⁴ The Partnership Agreement between the members of the African, Caribbean and Pacific (ACP) Group of States, of the one part, and the European Community and its Member States, of the other part, (hereinafter referred to as “the Cotonou Agreement”) was signed in Cotonou on 23 June 2001, edited for the first time in Luxembourg on 25 June 2005 and amended for the second time in Ouagadougou, Burkina Faso, on 22 June 2010 (Decision 2010/648/EU of 14 May 2010).

⁴⁵ The so-called “readmission clause” involves the mutual commitment of the Contracting Parties to readmit “without further formalities” its nationals to its territory in case of their illegal stay in the territory of the other Part.

⁴⁶ The dialogue on migration between the EU and the Group of African, Caribbean and Pacific (EU-ACP) pays special attention to strengthening the operational aspects of the application of Art. 13 of the Cotonou Agreement. As regards bilateral cooperation, a political dialogue on migration was initiated with a series of strategic countries, which has, for example, created the “EU migration missions”, based on

agreement, the Parties consider that strategies for poverty reduction, the improvement of living and working conditions, job creation, education and training contribute in the long term to normalising migratory flows⁴⁷. The Parties are aware of the need to address structural issues associated with migration, namely poverty and poor economic and social development of the regions of origin of migrants. Their efforts in the area of development cooperation and national and regional programmes should therefore aim to reduce the first and the second, knowing that the normalization of migratory flows would be an “indirect” benefit.

More explicit clauses referring to the priority given to the objective of containment and control of migration flows are instead provided in the association agreements later concluded by the EU within the framework of the Euro-Mediterranean partnership⁴⁸. They are inserted under the chapter relating to “Dialogue and cooperation in the social field” – other than the one about “Cooperation for the prevention and control of illegal immigration” – but significantly the reduction of migratory pressure, “in particular by improving living conditions, creating jobs and income-generating activities and developing training in the areas of origin of migrants” is the first in the list of the priority objectives of cooperation⁴⁹.

Provisions regarding cooperation on migration are generally focused on multiple aspects that are interconnected: the “push and pull factors” of migration, devel-

Arts. 8 and 13 of the Cotonou Agreement.

⁴⁷ PILLITU, *La tutela dei diritti dell'uomo e dei principi democratici della Comunità e dell'Unione europea con gli Stati ACP*, Turin, 2003.

⁴⁸ CASSARINO (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Middle East Institute, Special edition Viewpoint, 2010, available at: <<http://www.statewatch.org/news/2010/sep/eu-unbalanced-reciprocities-middle-east-institute.pdf>>; MARTIN, “A Radically Changing Political Landscape in the Southern Mediterranean? The Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries”, 2011, available at: <<http://www.statewatch.org/analyses/no-136-southern-med.pdf>>; VILLANI, “La responsabilità dell’Unione europea nell’area mediterranea”, *Studi sull’integrazione europea*, 2009, p. 551 ff.; ZAPATA-BARRERO, “The External Dimension of Migration Policy in the Mediterranean Region: Premises for Normative Debate”, *Revista del Instituto Español de Estudios Estratégicos*, No. 2 / 2013, available at: <http://dcpis.upf.edu/~ricard-zapata/~ricard-zapata/External_dimension_migration_policy_2_2013.pdf>.

⁴⁹ See, for example, Art. 65(a) of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (concluded by Decision 2004/635/EC of 21 April 2004) and Art. 65 of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, on the one part, and the Republic of Lebanon, on the other part (concluded by Decision 2006/356/EC of 14 February 2006).

opment and application of laws and practices concerning the protection and rights of migrants, the development and application of national laws and practices relating to international protection of migrants admission rules, the rights and status of persons admitted, the definition of a policy combating illegal immigration or illegal stay of citizens of one Contracting Party into the territory of the other, the fight against trafficking in human beings, the return in terms of respect for human dignity, the issues of mutual interest regarding visas and travel document security and border management, and also the synergies between migration and development.

Such different types of “migration clauses” inserted in recent EU international agreements⁵⁰ and relating to management of migratory flows, contrast to smuggling of persons and readmission of third-country nationals⁵¹, define a new form of conditionality⁵². Certainly, migration can have a positive impact on development and poverty reduction as well as, on the other hand, the development (of a State) determines the most

⁵⁰ It may be useful to compare the above cited clauses with the ones referred to “Cooperation on migration, asylum and border management” under the title regarding “Freedom, security and justice”, provided in the recent EU association agreements concluded in the framework of the Eastern Partnership, as a specific dimension of the European Neighbourhood Policy. Examples of this kind of provisions are inserted in the association agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part, OJ L 161/3, 29 May 2014; in the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Georgia, on the other part, OJ L 261/4, 30 August 2014; and in the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and the Republic of Moldova, on the other part, OJ L 260/4, 30 August 2014. For a detailed analysis of the different “migration clauses” provided in several agreements of association, cooperation or partnership concluded by EU with third countries, see GUIDI, “L’Unione europea alla ricerca della sinergia ‘ottimale’ tra migrazione e sviluppo nell’ambito della cooperazione internazionale”, in CHERUBINI (ed.), *Le migrazioni in Europa. UE, Stati terzi e Migration Outsourcing*, Rome, 2015, p. 23 ff., paras. 10, 14 and 15.

⁵¹ The readmission consists in procedures under which non-EU nationals apprehended in an irregular situation are readmitted to the State of origin or transit. For this purpose the EU generally conclude *ad hoc* agreements with third countries. See OTTAVIANO, “Gli accordi di riammissione dell’UE” in CHERUBINI (ed.), *cit. supra* note 50, p. 97 ff.; and LILIENKAMP and SALIBA, “EU Readmission Agreements Facilitating the Return of Irregular Migrants”, EPRS, April 2015, available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554212/EPRS_BRI\(2015\)554212_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554212/EPRS_BRI(2015)554212_EN.pdf).

⁵² As regards the “traditional” clause providing human rights conditionality, see CHERUBINI, “I valori dell’Unione europea nella politica di cooperazione allo sviluppo”, in SCISO, BARATTA and MORVIDUCCI (eds.), *I valori dell’Unione europea e l’azione esterna*, Turin, 2016, p. 120 ff.; HORNG, “The Human Rights Clause in the European Union’s External Trade and Development Agreements”, *European Law Journal*, 2003, p. 677 ff.; LEINO, “European Universalism? – The EU and Human Rights Conditionality”, *Yearbook of European Law*, 2005, p. 329 ff.; UBEDA DE TORRES, “La evolución de la condicionalidad política en el seno de la Unión Europea”, *Revista de Derecho Comunitario Europeo*, 2009, p. 49 ff.

effective long-term solution to irregular and forced migration (as expressed by the nexus between migration and development). Some of the provisions relating to migration could contribute to the objectives of development cooperation by focusing rather on the protection of migrants, by considering how to ensure equal treatment and the integration of non-nationals in a lawful situation or even how authorization to reside might be granted for compassionate and humanitarian reasons. Such clauses on cooperation in the field of migration management by virtue of their potential positive effects are certainly in line with the human right to development.

To some extent I can also agree that, in substance, the fight against smuggling – as well as the contrast to all forms of organised crime – can contribute to achieve some purposes of political and legal development (i.e. internal security, legality, rule of law) of the third State⁵³. Current EU external actions in this field, under Regional Protection Programmes (“RPPs”) or Regional Development and Protection Programmes (“RDPPs”), focus on capacity building to tackle criminal smuggling and human trafficking networks within Third Countries of origin and transit⁵⁴. As pointed out by the European Parliament, the Union and its Member States must be selective in their support for third-countries’ law enforcement agencies, taking into

⁵³ The fight against illegal immigration, while constituting an objective of international cooperation justified by transnational security, seems to contribute very little in itself to the development of the third country of origin or transit of migrants. It can be useful insofar as it is an instrument to combat organized crime and, therefore, indirectly the safeguard or the enforcement of legality, public order and public security.

⁵⁴ EISELE, *The External Dimension of the EU’s Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective*, Leiden/Boston, 2014; GAMMELTOFT-HANSEN, “Outsourcing Migration Management: EU, Power, and the External Dimension of Asylum and Immigration Policy”, DIIS Working Paper No. 2006/1, Danish Institute for International Studies, 2006, available at: <<http://www.diis.dk/en/research/outsourcing-migration-management>>; ID., “Extraterritorial Migration Control and the Reach of Human Rights”, in CHETAIL and BAULOZ (eds.), *Research Handbook on International Law and Migration*, Cheltenham, 2014, p. 113 ff.; GEDDES, “Migration as Foreign Policy? The External Dimension of EU Action on Migration and Asylum”, SIEPS Report n. 2, Swedish Institute for European Policy Studies, 2009, available at: <<http://www.sieps.se/sites/default/files/528-2009-2rapport.pdf>>; GUIRAUDON (ed.), *The External Dimension of Immigration and Asylum Policies in Europe*, Oxford, 2007; GUIRAUDON and LAHAV (eds.), *Immigration Policy in Europe: The Politics of Control*, Abingdon/New York, 2013; MARTENCZUK, “Migration Policy and EU External Relations”, in AZOULAI and DE VRIES (eds.), *Migration and EU Law and Policy*, Oxford, 2014, p. 69 ff.; PEERS, “Irregular Immigration and EU External Relations”, in BOUGSZ et al. (eds.), *Irregular Immigration and Human Rights: Theoretical, European and International Perspectives*, Leiden/Boston, 2004, p. 193 ff.; TARAN, “EU Migration Policy, International Law and External Relations: Are Interests Defining Standards?”, in MAES, FOGLETS and DE BRUYCKER (eds.), *External Dimensions of European Migration and Asylum Law and Policy*, Bruxelles, 2011, p. 501 ff.

account the record of those agencies in breaching the human rights of migrants⁵⁵.

On the contrary, it seems really difficult to me to acknowledge a “genuine link” between the objectives pursued by development cooperation and readmission clauses, or, in other terms, to consider that the obligation to readmit its own nationals (who are in a situation of illegal entry, stay or residence on the territory of one of the other parties) truly contributes to sustainable development of the third State⁵⁶. According to the CJEU jurisprudence, a measure falls under development cooperation policy if it contributes to the objectives of economic and social development, while does not fall within the scope of EU competence attached to such cooperation a measure that, even if contributing to economic and social development of some developing countries, has the primary purpose of implementing another Union policy⁵⁷.

Provisions on readmission depart from the development cooperation’s first concern – steady progress in development in the third country – to fulfil one of the EU policy objectives and to serve its own interests (i.e. the commitment by the contracting third country to take back its own nationals who are illegally resident in the EU Member States territories). Readmission clauses are focused on EU external migration policy interests: the rationale is the safeguard of the Union and its Member States from the deficiencies of the contracting third State with regard to management of migratory flows.

Such clauses inserted in various types of EU partnership agreements constitute important leverage for the Council to obtain from the contracting third Parties something in return, which it would find difficult to obtain by other means (i.e. out

⁵⁵ RIJPM and CREMONA, “The Extra-Territorialisation of EU Migration Policies and the Rule of Law”, European University Institute Working Papers, Law 2007/01, available at: <http://cadmus.eui.eu/bitstream/handle/1814/6690/LAW_2007_01.pdf?sequence=1>.

⁵⁶ The European Commission considers that such clauses deal with readmission as an aspect of development cooperation, the fight against illegal immigration being an objective of that cooperation. In any event, they are no more than a declaration of the intention to conclude, in the future, a readmission agreement and merely restates the basic principles of international law, whereas readmission agreements concluded by the European Union go much further by putting those principles into concrete terms and by laying down detailed rules on the readmission procedure, the scope, means of evidence, etc. (Opinion Mengozzi, *cit. supra* note 26, para. 15). On the other side, European Parliament notes that readmission agreements are one of various instruments under the GAMM, next to regional dialogues, bilateral dialogues, mobility partnerships, common agendas for migration and mobility, visa facilitation agreements, visa exemption agreements, RPPs and RDPPs (resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, (2015/2095(INI)), para. 92, available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0102+0+DOC+XML+V0//EN>>).

⁵⁷ Case C-91/05, *Commission v. Council*, *cit. supra* note 22, paras. 66-72.

with the scope of cooperation – in this case development cooperation – offered by the EU)⁵⁸. In my opinion, the insertion of such clauses in particular in development cooperation agreements provides a kind of conditionality that is contrary to the core spirit of Article 208 TFUE, as the development agreements implementation is subordinated to an obligation conflicting with the purpose of third countries sustainable development.

Moreover, as readmission is embodied in a sort of denial of migration (i.e. forced return in the countries of origin or departure) in ways that sometimes create doubts about the violation of some human rights of migrants, it may also give rise to a conflict of norms between readmission clauses and provisions on the protection of human rights. Therefore, in order to maintain compatibility between obligations provided the same agreement, readmission should be properly applied by granting that human rights of migrants are respected. It is inadmissible to imply that States are authorized to derogate from human rights protection when holding behaviours in compliance with their obligation to readmit.

5. – The Focus of the EU Migration Policy in its External Dimension

Recently, the crisis in the North Africa and the Middle East has produced a growing flow of forced migration, including across the Mediterranean and other routes towards Europe. Subject to unprecedented external migratory pressure driven by conflict, instability and poverty, the EU has taken since 2013 a series of internal and external actions to tackle this long-term situation, one of them being gradual integration of the development policy instruments into migration policy. In response to the protracted crisis situation, enhanced investments and more targeted development cooperation with countries of origin or transit mainly sound as measures addressed to reducing the so-called “push factor” of unwanted immigration⁵⁹.

⁵⁸ Opinion Mengozzi, case C-377/12, *cit. supra* note 26, para. 70. In his opinion, “it must be held that the readmission clause ... although it contains legal obligations, does not have the effect of making readmission an objective distinct from that pursued by the PCA but, on the contrary, constitutes in the specific context of the negotiation of the development cooperation agreements an objective which is not autonomous, and is thus of a *secondary* or *indirect* nature” (para. 72).

⁵⁹ The European Commission stresses the key role of development cooperation in tackling issues such as poverty, insecurity or unemployment – the main root causes of irregular migration and forced displacement – in the European Agenda on Migration, together with the fight against smugglers and human traffickers.

In the 2014 “Rome Declaration”⁶⁰, the European Commission has identified as the first of three priority areas for cooperation the strengthening of the link between migration and development (the other two being prevention/contrast of illegal immigration and international protection)⁶¹. A firm political commitment to undertake a regional dialogue on migration and mobility, in order to address the root causes of massive (including irregular) migratory flows in a global, shared, deepened and “balanced” way was reiterated by the EU, its Member States and the countries of the Horn of Africa. There are various ways in which the EU attempts to achieve this goal⁶².

The 2015 European Agenda on Migration addresses the root causes of irregular migration and forced displacement, and calls for a “comprehensive approach” aimed at preventing further loss of lives at sea and reinforcing overall cooperation with the key third countries of origin and transit⁶³. In the extraordinary European Council of Brussels (23 April 2015) the Member States have committed themselves to increase EU support to African countries of origin or transit (among others, Egypt, Tunisia, Sudan, Mali, Niger) in monitoring terrestrial migration routes and border controls⁶⁴. In this context, it was also reiterated the need to start “regional protection and development programs”⁶⁵ for North Africa and the Horn of Africa.

Such measures are not expression of humanitarian *impetus*; rather, they are in-

⁶⁰ Declaration of the Ministerial Conference of the Khartoum Process (EU-Horn of Africa Migration Route Initiative), Rome, 28 November 2014, available at: <<http://italia2014.eu/media/3785/declaration-of-the-ministerial-conference-of-the-khartoum-process.pdf>>.

⁶¹ See the Remarks by Federica Mogherini, EU High Representative on Foreign and Security Policy, and Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship on the conferences for the Rabat Process and the Khartoum Process, European Commission Statement 14/2251, Rome, 28 November 2014, available at: <http://europa.eu/rapid/press-release_STATEMENT-14-2251_en.htm>.

⁶² For a more detailed examination see GUIDI, *cit. supra* note 50.

⁶³ NASCIBENE and DI PASCALE, “The Arab Spring and the Extraordinary Influx of People who Arrived in Italy from North Africa”, *European Journal of Migration and Law*, 2011, p. 341 ff.

⁶⁴ The commitment to intensify under the Rabat process and Khartoum political cooperation and dialogue with those countries, and with the African Union, on all issues related to illegal migration was also assumed.

⁶⁵ Development cooperation and regional protection programmes aim at strengthening the capacity of reception of refugees and displaced persons, applicants for international protection, from its neighbours. For example, consider that, despite the considerable increase in pressure to the European Union, about four million Syrians have taken refuge in neighbouring countries (UNHCR has recorded 2.2 million in Lebanon, Jordan, Egypt and Iraq, while Turkey reports have welcomed 1.7 million).

strumental to the prevention of irregular migration⁶⁶. The EU response to the mass influx of immigrants and protection-seekers consists, on one side, in increasing controls at the EU Member States external borders⁶⁷ and, on the other side, in supporting the stabilization and development of third countries, as well as their capacity-building for better migration and border management, the latter traditionally considered as official development assistance (“ODA”)⁶⁸.

6. – *Policy Coherence for Development... or for Migration Management?*

Despite the declared comprehensive understanding of maximizing the positive impact of migration on development, the measures described above – that I define “negative” as they constitute a disincentive to any type of migration⁶⁹ – do not seem the right way to manage migration as a development enabler in line with the UN Post-2015 Development Agenda and the specific Sustainable Development Goal (SDG) 10.7 targeted to “facilitate safe, regular and responsible migration”⁷⁰.

⁶⁶ For a broad reflection on the “neglected” humanitarian needs, see DE VITTOR, “I risultati del Consiglio europeo straordinario sull’emergenza umanitaria nel Mediterraneo: repressione del traffico di migranti o contrasto all’immigrazione irregolare?”, SIDIBlog, 27 April 2015, available at: <<http://www.sidiblog.org/2015/04/27/i-risultati-del-consiglio-europeo-straordinario-sullemergenza-umanitaria-nel-mediterraneo-repressione-del-traffico-di-migranti-o-contrasto-allimmigrazione-irregolare>>, and LUTTERBECK, “Policing Migration in the Mediterranean”, *Mediterranean Politics*, 2006, p. 59 ff.

⁶⁷ CECCORULLI, “‘Securitizing’ Migration Crises: The European Union, North Africa and Transatlantic Regional Cooperation”, in FIORAMONTI (ed.), *Regions and Crises: New Challenges for Contemporary Regionalisms*, Basingstoke, 2012, p. 126 ff.; MARINAI, “La cooperazione tra Stati nelle diverse fasi della lotta all’immigrazione irregolare”, in CALAMIA, DI FILIPPO and GESTRI (eds.), *Immigrazione, diritto e diritti: profili internazionalistici ed europei*, Padua, 2012, p. 543 ff.; RYAN and MITSILEGAS (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston, 2010.

⁶⁸ “Official development assistance” is a term coined by the Development Assistance Committee (“DAC”) of the Organisation for Economic Co-operation and Development (“OECD”) to measure aid. ODA is defined as government aid designed to promote the economic development and welfare of developing countries. Loans and credits for military purposes are excluded (further information available at: <<https://data.oecd.org/oda/net-oda.htm>>). The EU and its Member States have provided more than half of the total ODA reported in 2015 by members of the OECD-DAC.

⁶⁹ A key EU internal action in this area is the reinforcement of the Frontex and its standards for border management, and EU coordination of coast guards (that is the new European border and coast guards, from mid-October 2016), while paying less attention to humanitarian assistance to refugees and migrants across the region.

⁷⁰ International Organization for Migration (“IOM”), “A New Global Partnership for Development: Factoring in the Contribution of Migration”, 2014, available at: <<http://publications.iom.int/books/mrs-ndeg50-new-global-partnership-development>>; IOM, World Bank and European Commission, “Final Conclusions of

Rooted in Article 208 TFEU, the commitment for all EU policies – migration policy included – to build synergies with EU development objectives, the so-called “Policy Coherence for Development” (“PCD”)⁷¹, is part of the European Consensus on Development⁷², as well as the 2011 Agenda for Change. Under the terms of the European consensus, the attainment of the MDGs requires the implementation of “many development activities ... including migration and development”; an in-depth political dialogue will take place on “the fight against illegal migration”. The objective is “to make migration a positive factor for development”, which must constitute “the most effective long-term response to forced and illegal migration”. The European Commission is also called, *inter alia*, to include migration and refugee issues in country and regional strategies and partnerships with interested countries⁷³.

Over time, the notion of development cooperation adopted by the EU institutions and Member States has changed and has come to include different objectives, in particular the ones of the external dimension of the EU migration policy⁷⁴. EU policy documents display a progressive but clear transformation of the conceptualization of the link between recently rather focused on avoiding a negative impact of migration policies on development and migration. While in the beginning they were maximizing the development impact of migration and mobility – the classic

the Conference on Migration and Development”, Brussels, 15-16 March 2006, available at: http://www.migrationdevelopment.org/fileadmin/data/conference/conclusions/Conclusions_FINAL_EN_01.pdf.

⁷¹ See SIITONEN, “Theorising Politics Behind Policy Coherence for Development (PCD)”, European Journal of Development Research, 2016, p. 1 ff.

⁷² Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy – “The European Consensus”, OJ 2006 C 46, p. 1.

⁷³ *Ibid.*, paras. 12, 17, 38, 40, and 110. LAVENEX and KUNZ, “The Migration–Development Nexus in EU External Relations”, Journal of European Integration, 2008, p. 439 ff.

⁷⁴ See BALDACCINI, “The External Dimension of the EU’s Asylum and Immigration Policies: Old Concerns and New Approaches”, in BALDACCINI, GUILD and TONER (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, 2007, p. 378 ff.; BETTS and MILNER, “The Externalisation of EU Asylum Policy: The Position of African States”, Centre on Migration, Policy and Society, Working Paper No. 36, Oxford, 2006, available at: https://www.compas.ox.ac.uk/media/WP-2006-036-Betts-Milner_EU_Asylum_Policy_Africa.pdf; CHOLEWINSKI, *The External Dimension of EU Immigration Policy*, in MAES, FOLETS and DE BRUYCKER (eds.), *External Dimensions of European Migration and Asylum Law and Policy*, Bruxelles, 2011, p. 485 ff.; DEN HEIJER, “Europe Beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control”, in RYAN and MITSILEGAS (eds.), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston, 2010, p. 169 ff.; GEIGER and PÉCOUD (eds.), *The Politics of International Migration Management*, New York, 2010.

PCD approach, still highlighted in GAMM – the discourse has, and has slipped towards “instrumentalization” of development cooperation for migration management purposes, leveraging aid to “encourage” better cooperation on return and re-admission⁷⁵.

Development cooperation, together with the implementation of readmission agreements concluded by the EU or by the Member States with third countries, is conceived as a means to facilitate the return of “irregular economic migrants” and not for its proper purpose, i.e. poverty reduction and the contribution to the development of third countries. The European Commission and the High Representative are expressly “invited” to use all means, including development cooperation [sic], for facilitating the readmission of irregulars in the countries of origin and transit, in close cooperation with the International Organization for Migration⁷⁶.

A new “more for more” approach, attaching development aid to migration control, emerges in recent praxis. More financial aid continues to be paid by the EU to third States that are more willing to control and prevent illegal migration flows⁷⁷. In other words, poor countries that want to receive more development aid or other “facilities” are “forced” to cooperate in these activities. In my opinion, it must be rejected in any case an approach based on such a nexus between migration management and development aid, in the sense of directing major aid towards third countries of origin or transit of the main migration flows, that have appeared willing to cooperate to control migration and to conclude readmission agreements⁷⁸. Even if these objec-

⁷⁵ Concerning the use of development cooperation as leverage to improve cooperation on migration issues, the European Commission affirms that efforts are made “to ensure that the use of conditionality in the migration dialogue does not negatively impact development cooperation” in its 2015 EU report on Policy Coherence for Development, 3 August 2015, [SWD(2015) 159 final], available at: http://ec.europa.eu/europeaid/sites/devco/files/policy-coherence-for-development-2015-eu-report_en.pdf.

⁷⁶ Conclusions of the extraordinary European Council (see *supra* note 64-65 and accompanying text), para. 3(f), (g), (k) and (l).

⁷⁷ After the Valletta summit, held in November 2015 between the EU, African countries, international and regional institutions, for example, the EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa was established. See APAP, “European Neighbourhood Policy: Southern Neighbourhood-Migration Issues”, European Parliamentary Research Service (EPRS), December 2015, available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/573888/EPRS_BRI\(2015\)573888_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/573888/EPRS_BRI(2015)573888_EN.pdf).

⁷⁸ Proposals in such a sense came from a couple of Member States. Therefore it has to be rejected the proposal to include in the agreements between the EU and the southern Mediterranean countries, both bilateral and multilateral level, conditionality clauses under which the provision of technical assistance or aid from the EU is made conditional upon to the respect of specific and verifiable commitments in the

tives are *per se* lawful and appropriate in the field of the migration policy external dimension, the instrumentalization of development aid to attain them is neither right-ful nor consistent with the Treaties provision regarding the specific targets of EU policy on development cooperation. Such a distortion of the migration-development nexus into a link between more development and less migration is wrong and doomed to fail⁷⁹: it is not capable to meet the objectives of none of the two EU poli-cies, because it contaminates their respective areas and tools.

7. – *The “New Partnership Framework” with Third Countries under the European Agenda on Migration*

A tool of the external dimension of EU migration policy are the so-called “mi-gration compacts”, provided in a proposal for establishing “a new Partnership Framework with Third Countries under the European Agenda on Migration”⁸⁰, communicated in June 2016, addressing the political, social, economic and envi-ronmental factors which constitute the root causes of migration. The ultimate aim of this initiative, as it was explained, is to achieve a comprehensive partnership with third countries to better manage migration in full respect of humanitarian and human rights obligation.

The idea of the new Partnership Framework is that the EU must use all means available to respond in a meaningful way to the actual humanitarian “crisis of refu-gees and migrants”. Development and neighbourhood policy tools would be used

prevention and fight against illegal immigration, terrorism and organized crime. Such a proposal was ad-vanced by the EU Affairs Committee of the Italian Chamber of Deputies, in an opinion of 27 July 2011 regarding the Joint Communication of the European Commission and the High Representative of the Un-ion for Foreign Affairs and Security Policy – “A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean” of 8 March 2011, [COM(2011) 200 final].

⁷⁹ In the same vein, DE HAAS, “Turning the Tide? Why ‘Development Instead of Migration’ Policies are Bound to Fail”, Working Papers No. 2, 2006, International Migration Institute, available at: <<https://www.imi.ox.ac.uk/pdfs/wp/wp-02-06.pdf>>.

⁸⁰ “Establishing a New Partnership Framework with Third Countries under the European Agenda on Mi-gration”, also called “migration compacts”, is a concrete proposal for reinforcing cooperation with Third Coun-tries on better migration management, presented in the European Commission’s communication of 7 June 2016, [COM(2016) 385 final], available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_external_aspects_eam_towards_new_migration_compact_en.pdf>, endorsed by the European Council of 28 June 2016, EUCO 26/16, available at: <http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244643506_en.pdf>.

to “reinforce local capacity-building, including for *border control*, asylum, counter-smuggling and *reintegration efforts*”⁸¹. “Standing ready to provide greater support to those partner countries which make the greatest efforts, but *without shying away from negative incentives*, EU assistance and policies should be tailored to produce concrete results in stemming the flow of irregular migrants”⁸².

The short-term objectives of the compacts are to save lives in the Mediterranean Sea, to increase the rate of returns to countries of origin and transit, and to enable migrants and refugees to stay close to home and to avoid taking dangerous journeys. In the long term, the EU should continue to increase its efforts to address the root causes of irregular migration and forced displacement and to provide capacity building to the host communities and relevant institutions. This Partnership Framework “should enhance support for those in need in their countries of origin and transit”, and “help develop safe and sustainable reception capacities and provide lasting prospects close to home for refugees and their families” in third countries affected by migratory pressure. Poverty eradication – the Treaty based objective of EU development policy – is not directly addressed.

Although the legal form of the agreement is not yet known, each compact is conceived as a tailored country package, that will combine elements from different EU instruments and policies focused on achieving the same objective⁸³. As for development policy, the Commission stresses that more coherence with migration policy is needed to ensure that “development assistance helps partner countries manage migration more effectively and also incentivises them to effectively cooperate on readmission of irregular migrants”⁸⁴. Thus, even migration compacts will probably include several elements of conditionality depending on partner country cooperation on readmission and return, effective incentives and leverage created in synergy with other EU policies, in particular trade and development.

As clearly stated in the 2016 communication, the European Commission calls

⁸¹ *Ibid.*, p. 2, emphasis added.

⁸² *Ibid.*, emphasis added.

⁸³ The European Council is expecting the conclusion of a series of migration compacts with a limited number of priority countries (first Ethiopia, Mali, Niger, Nigeria and Senegal, followed by Eritrea, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan) before the end of 2016. However the first compacts will most probably be established with Jordan, as negotiations are already concluded (see press release, IP/16/2570, available at: <http://europa.eu/rapid/press-release_IP-16-2570_en.htm>) and Lebanon (the ongoing negotiations are well advanced).

⁸⁴ COM(2016) 385 final, *cit. supra* note 12, p. 9.

for the EU development policy to integrate core incentives to reward countries that fulfil their international obligation to readmit their nationals, cooperate to stop flows of irregular migration, and adequately host people fleeing persecution (and to punish those that do not, maybe). “Positive and negative incentives should be integrated in the EU’s development policy”, rewarding those countries that fulfil their international obligation to readmit their own nationals, and those that cooperate in managing the flows of irregular migrants from third countries, as well as those taking action to adequately host persons fleeing conflict and persecution. “Equally, there must be consequences for those who do not cooperate on readmission and return [sic]”⁸⁵. It sounds like a threat.

The EU migration compacts are departing from some of its long-standing principles – such as poverty eradication as the main objective of development cooperation – towards a new understanding of its overall external affairs goal, namely the protection of EU Member States’ interests. EU development aid – as well as trade preferences or visa facilitation agreement – is strongly subject to conditionality; it is a leverage to secure third-country commitments to positive outcomes in the field of return and readmission of irregular migrants.

8. – Prospects Optimization: Addressing a “Sustainable” Development-Migration Nexus

The recent EU approach, leading to the development aid serving migration-control and readmission objectives, is neither consistent with EU development policy goals, nor with those of the PCD, as it turns the development-migration nexus into a link between two distinct and different targets: more development and less migration. If the EU global or “holistic” approach⁸⁶ to external policies causes confusion about the respective targets, it is preferable a “coordinated separation” of the EU legal instruments adopted in the framework of each one of the two policies. EU development policy should remain exclusively targeted on poverty alleviation or eradication and an overall – i.e. social, political and economic – sustainable development of the poorer countries, even when the instruments of cooperation in this

⁸⁵ *Ibid.*

⁸⁶ This expression was used in the European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, *cit. supra* note 56.

area lead, at the same time, at tackling the root causes of migration⁸⁷. Addressing the actual migration challenge without jeopardizing development policy achievements and objectives should be one of the key issues of the ongoing revision of the European Consensus on Development.

The European Parliament (“EP”), together with the non-governmental organisations (“NGOs”) active in this field⁸⁸, stresses that development aid should not be used for migration control purposes⁸⁹. On one side, the EP has condemned the use of European Development Fund (“EDF”) and ODA for migration management and control in the absence of clear development objectives and has also expressed its concern that the financing of EU Trust Fund may be implemented to the detriment of development objectives⁹⁰. On the other side, the EP emphasizes that the cooperation with third countries in the GAMM framework should be focused on tackling the root causes and illegal migrant flows to Europe via existing policy instruments, such as regional and bilateral dialogue, mobility partnership and readmission agreements, among others⁹¹. It is worth remembering that one of the four thematic

⁸⁷ MARTIN, “Migration and Development: Towards Sustainable Solutions”, *Willamette Journal of International Law and Dispute Resolution*, 2007, p. 182 ff.

⁸⁸ The Concord policy paper of December 2015 (available at: http://concordeurope.org/wp-content/uploads/2015/04/SpotlightReport_Migration_2015.pdf) provides an exhaustive evaluation of recent developments in EU migration policy relating to development cooperation. According to Concord, the emphasis on border control and security undermines the achievements of the EU’s global development objectives. EU mobility partnership implementation shows that EU external migration policy is essentially used to combat irregular migration.

⁸⁹ In its resolution of 7 June 2016 on the EU 2015 Report on Policy Coherence for Development (2015/2317(INI), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0246+0+DOC+XML+V0//EN>), the European Parliament calls on the EU and the Member States not to report refugee costs as official development assistance (ODA) at the expense of the development programmes which tackle the root causes of migration. It acknowledges the need to strengthen the link between migration and development policies, but and opposes such a diversion of development aid.

⁹⁰ European Parliament, resolution of 13 September 2016 on the EU Trust Fund for Africa: implications for development and humanitarian aid. There the Parliament also stressed that the use of EUTF funds allocated from EDF and development policy budgetary instruments should fulfil ODA criteria, making sure that no development money is diverted to support security or for other purposes. The same line previously prevailed when the proposal to devote 25% of the EDF for 2014-2020 to measures to combat the migration crisis was rejected in adopting the European Parliament decision of 28 April 2016 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2014, 2015/2155(DEC), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0150+0+DOC+XML+V0//EN&language=EN>.

⁹¹ The Foreign Affairs Committee, in its report on human rights and migration in Third Countries (20

pillars of the GAMM addresses “the development impact of migration” and not the migration decrease by virtue of development.

In my opinion, it is time to realize that there is a dual roadway connecting development and migration, and lane invasions cause a high risk of accidents. Key targets in both directions of travel are safety and sustainability. Out of metaphor, the way to sustainable development of third countries does not go through containment of (irregular) migration and readmission, but through guarantees of *sustainable migration*. That, I contend, is a safe, regular, responsible and well-managed migration that allows a fair and equitable treatment of persons in the arrival States and circular returns in States of origin. Vice versa, the way to such a sustainable migration – from the point of view of people or migrants, third countries and the EU Member States – goes through the third countries’ sustainable development, consisting in true human, social, political and economical progress⁹², rather than migration control and border closure.

Together with the EP, I believe that the Union must adopt a “win-win approach” to external cooperation on migration and development, i.e. an approach that is beneficial to the Union, to the third country in question and to the refugees and migrants in/from that third country⁹³. From this point of view, EU cooperation with third countries should focus on adopting a long-term strategy to tackle the geo-political issues that affect the root causes of irregular migration flows, such as conflict, persecution, ethnic cleansing, generalized violence or other factors such as extreme poverty, climate change, natural disasters, lack of opportunities that forces people to flee to Europe into the hands of criminal smuggling networks.

September 2016, 2015/2316(INI), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A820160245&language=EN>), has estimated that improvements in the coherence of the GAMM, and more rigorous integration of human rights monitoring and oversight mechanisms in all external agreements, are necessary. It also stresses that aid should not be conditional on cooperation with regard to migration. This Committee and the Development Committee are now working on a joint report on the role of EU external action in addressing refugee and migrant movements (Draft report of 29 September 2016, 2015/2342(INI), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-589.425+02+DOC+PDF+V0//EN&language=EN>).

⁹² About the multifaceted right to development see VILLANI, “Il diritto allo sviluppo: diritto umano e dei popoli”, in VILLANI (a cura di), *A tutti i membri della famiglia umana. Per il 60° anniversario della Dichiarazione universale*, Milan, 2008, p. 123 ff.

⁹³ European Parliament Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, *cit. supra* note 56, paras. 93-96, 100-103.

Moreover, the EU could help third countries to build up their asylum systems and integration strategies⁹⁴, their assistance to refugees, and their capacity to tackle human trafficking and criminal smuggling into and through those countries. The EU and the Member States must put up the financial aid to third countries capacity-building, such as by facilitating investment and education, strengthening and enforcing asylum systems, supporting a better management of borders, and reinforcing legal and judicial systems there. This way, at the same time, the EU and the Member States would help third countries to improve their degree of human, social, political and economic development, that is truly sustainable only if it is people-centred.

⁹⁴ See ABBASS and IPPOLITO (eds.), *Regional Approaches to the Protection of Asylum Seekers. An International Legal Perspective*, Abingdon/New York, 2016.

I. Should Europe be looking into Turkey's Byzantine past to discover its own future? (Francesca Galgano)

This paper wishes to draw attention on Turkey's Byzantine past, especially after the fall of Western Roman Empire. The Empire of "Romaei", as the Byzantines used to call themselves, was Christian till XIV century, inheriting most of the Western Roman Empire's culture. Its society was multiethnic, where being a foreigner was considered as a resource, both in commerce and in the army. Its geographic position was a natural hinge between future Europe and Islam. Throughout centuries, Constantinople became a cultural melting pot, where it was possible to study Christian, Greek, Latin and pagan classics. Many Roman law codes were translated into Arabic (for Christian communities, fallen under Islam) for consultation and application. The cultural and commercial exchange between Eastern and Western Mediterranean areas was the norm. A new European citizenship should consider the lesson coming from this common past.

II. The EU Development Policy and its Impact on Migration (Francesco Luigi Gatta)

This paper addresses the EU's migration and development policy by focusing in particular on the different strategies and actions put in place by the European institutions and the Member states in the recent period.

In general terms, the positive effects of the interaction between these two policy areas have been acknowledged as a matter of interest at the international level, progressively gaining relevance in the political agenda of governments and international organisations. Migration, indeed, is recognised as a powerful development vehicle. Therefore, facilitating orderly, safe and responsible mobility of people represents an important goal that could lead to positive results in both the country of origin and destination.

Among the various forms of cooperation launched in order to foster the potential posi-

tive synergy between migration and development, the initiatives taken in the European context appear to be particularly significant: the EU is the world's largest aid donor and it can count on relevant diplomatic, financial and humanitarian resources, which have been used in a number of programmes and actions aimed at fostering dialogue and collaboration with relevant partner countries.

The analysis of the EU's migration and development policy is divided in two main parts: the first one presents the EU development policy in general, on the one hand clarifying its origin and evolution and, on the other, highlighting the relevant guiding principles and the legal-institutional framework in which the EU has built and elaborated its action during the years.

The second part specifically focuses on the various strategies and initiatives concretely put in place by the EU in order to improve the interaction between migration and development and to enhance the coherence between these two elements. In this regard, in particular, specific attention is given to the practical measures adopted in order to tackle work-related issues and peculiar phenomena (such as "remittances", "diasporas", "circular migration" and "brain drain"), which play a considerable role in the development process of countries of origin.

III. Regular Migrants' Integration between European Law and National Legal Orders: a Key Condition for Individual and Social Development (Stefano Montaldo)

The paper analyses the relationship between regular migrants' integration and economic and social development, in light of EU migration law and policies. A specific attention is paid to integration conditions, which are aimed at providing migrants with the tools needed to be active in the economic and political life of the hosting Member State. Both EU secondary law and national legislations provide for various forms of integration conditionality. The failure to fulfill integration requirements imposed at national level may result in a restriction on the rights provided by EU law. However, such conditions must respect the general principles of the EU legal order, principle of equality and principle of proportionality in primis. In fact, integration conditionality measures must favour social inclusion rather than selecting migrants deserving a chance.

IV. Migration and Development: the Case of People Displaced by Development and States' Obligation to Respect Their Human Rights (Laura Messina)

A peculiar and rather disguised case of forced migration occurs when people are forcibly displaced as a result of development.

The plight of at least 15 million people displaced every year to make way for development projects of all kinds is a topic that remains rather neglected. Such projects include: the construction of dams and infrastructure; the urban renewal or "beautification" of cities; the preparation of mega-events; conservation projects; and activities of exploration and exploitation of natural resources.

The conditions suffered by these people can be as dire as those of people displaced by conflicts, persecution, and natural disasters. People ousted from their home and land in the name of a supposedly greater economic good, face serious risks of impoverishment. They are deprived of their houses, their livelihood, and their community ties.

From an international human rights law perspective, their situation is problematic. It raises concerns about respect for their human rights, specifically with regard to their right to property; right to respect for private and family life and respect for home; right to housing; and right to freedom of movement and choice of residence. Additionally, the authoritative recognition of a new general right "not to be arbitrarily displaced" has also been put forward, which extends to displacement caused by development projects.

While these rights may all be legitimately restricted, and indeed development pursued in general public interest for the well being of the country is a legitimate justification for limiting individuals' rights, the necessity and proportionality test is frequently material to assess whether human rights have been fully respected. The jurisprudence of human rights monitoring bodies and courts has given due weight to the exploration of all feasible alternatives to eviction and expropriation measures, to the resulting consequence of rendering individuals homeless or depriving them of their source of living, to the vulnerability of the people affected, to the respect of procedural safeguards, including people's right to consultation and participation in development process, as well as access to justice and remedy.

The analysis of the topic through the lens of international human rights law demonstrates how the human rights of displaced people are frequently disregarded in the pursuit of development. It equally proves that international human rights law provides protection against development-induced displacement.

V. The Undesirable Worker Fiction: Demand-Based Labour Migration Schemes and Migrant Workers' Socio-Economic Rights (Fulvia Staiano)

The majority of EU Member States currently adopt labour migration schemes based on labour market demands for third-country national workers. These systems pursue the two-

fold objective of restricting the admission of foreign workers to what is strictly necessary to comply with such demands, and to favour the employment of national or EU workers over that of non-citizens. National labour migration schemes adopted by EU Member States pursue these goals in a variety of ways, ranging from the imposition of a preliminary market needs test as a prerequisite to grant residence permits to third-country national workers to the adoption of quota systems, or to the barring of residence and work permits in certain sectors of the labour markets. A common feature of these legislative and policy choices is the existence of some form of assessment of the demand for foreign worker in the national labour market. This paper starts from the consideration that this assessment can often be flawed and inaccurate, with negative consequences on third-country national workers' socio-economic rights. Through a critical analysis of the labour migration schemes adopted in Italy and Ireland, this chapter discusses how the underestimation and misrepresentation of employers' demands carries a serious risk of pushing migrant workers in unregulated and informal sectors of the European labour market - thus jeopardising key socio-economic rights such as the right to receive wages. By comparing the interpretative approaches adopted by Italian and Irish courts, this chapter also enquires on which normative and judicial solutions are more capable of ensuring an effective protection of migrant workers' rights in this field.

VI. Limits to the Implementation of International Law Instruments on Labour Migration: a Focus on ILO's Praxis (Beatrice Gornati)

The recognition of migration as a condition for development by the United Nations is an important indicator of a new awareness of the problem at international level. However, it is important to consider that, as far as international law is concerned, instruments to facilitate labour migration, in order to foster development, date back to the fifties. The contribution focuses on three particular aspects. The first part focuses on the ILO's praxis as far as labour migration is concerned. A special attention is paid to the effective implementation of ILO's binding and non-binding instruments. The intent is to understand why both Conventions and Recommendations struggle to be put into practice by States, despite the copious production of such legal instruments by the ILO. In the wake of these considerations, second and third parts move to particularly problematic areas, namely the employment of refugees and the phenomenon of forced labour. The two areas, among other things, appear to influence each other. In particular, the precarious situation of these refugees may render them vulnerable to discriminatory practices which can lead to exploitation and the denial of fundamental principles and rights at work, even to forced labour.

VII. The “Asylum Payers”: Questioning the Asylum Seekers’ Obligation to Contribute to the Costs of their Reception under International and European Law (Salvatore Fabio Nicolosi)

Migration is an important topic within the actual context of globalization, it can be recognized as a powerful - though challenging - development vehicle in both the country of origin and destination. Nonetheless, the ongoing migratory crisis in the Mediterranean has been dramatically impacting on many States of destination within the European Union. Although the need to receive asylum seekers is traditionally informed with reasons of humanitarianism, the recent adoption of the Danish so called “Jewellery Law”, providing for the search and seizure of certain assets of asylum seekers that may serve as a contribution to the expenses for their maintenance, sheds light on its possible implications from a human rights perspective. Despite triggering initial debates, the issue remained partly unexplored, though constituting a burning topic of the migration and development discourse. Host States claim, in fact, that the cost of reception of asylum seekers may have an impact on the state of national economy, particularly in time of crisis.

The research aims to answer the question whether the reception of asylum seekers may constitute an issue for the State of destination from a perspective of (economic) development. It will therefore investigate the nature, scope and legality of the asylum seekers’ obligation to contribute in the costs of their reception under international and EU law.

To this extent, the research will firstly review the most relevant domestic practice at the European level, highlighting the possible risks beyond construing asylum seekers as profiteering from the international refugee protection regime. Next, the research will examine the international and EU legal framework as to the possibility for States to impose on refugees and asylum seekers any obligation to contribute to the cost of their reception.

Ultimately, it will be argued that the tendency to impose an obligation for asylum seekers to contribute to the cost of their reception may undermine the exercise of the right to asylum and can also create discriminations by treating asylum seekers radically different from other migrants and from national citizens. It will be concluded that a careful test is necessary, especially under EU law, to ensure that asylum seekers have an adequate and dignified standard of living.

VIII. Unaccompanied Minors Seeking for Protection in the European Union: Will a Fair and Adequate Asylum System Ever See the Light? (Elena Gualco)

In recent years, migration has become a huge phenomenon that all European States have the duty to deal with. When asylum seekers are unaccompanied minors, the difficulties in tempering the freedom of action of States with their human rights increase. Unaccompanied children are in fact weaker than other migrants because of their vulnerable age.

Stressing the idea that unaccompanied minors’ fundamental rights can be effectively

protected only via the enhancement of solidarity within Members States, the paper investigates the current rules of the Common European Asylum System to highlight their inadequacy in accommodating migrant minors as well as in respecting their human rights. Secondly, the paper focuses on the reforms that have been recently suggested to demonstrate that - despite being a slight improvement - the Commission proposals do not solve all the issues related to both the respect of asylum seeking minors' fundamental rights, and minors' successful integration in the host countries.

IX. Something Old, Something New, Something Balanced, Something Blue: the EU Blue Card Directive, Brain drain, and the Economic Development of the EU and the Sending Countries (Alessandro Rosanò)

The purpose of this paper is to provide an analysis of the EU Blue Card Directive and its revision proposal presented by the Juncker Commission, assessing whether they can offer proper solutions to the problems of labour shortages and brain drain, taking into account the needs of both the EU and sending countries. With regard to the fight against brain drain, the paper focuses on Article 13 of the Cotonou Agreement as a provision that might counteract the idea that the needs of the EU labour market shall always prevail. In the final paragraph, the author seeks to identify a legal basis in the EU Treaties that would make it possible to reform the EU Blue Card Directive in a sense consistent with the objective of reduction and eradication of poverty.

X. More Development of Third States and Less Migration towards the EU Member States: Is This a New Dual Aim of the EU Partnership and Cooperation Agreements? (Martina Guidi)

The recent EU external policy and cooperation praxis seems to turn the development-migration nexus into a link between two different targets: more development of Third States and less migration towards Europe. Is such an approach, leading to the development aid serving migration-control and readmission objectives, consistent with EU development cooperation goals and with the Policy Coherence for Development? Does the EU "global approach" cause confusion about the respective targets? In the author's opinion, a "separation" of the EU legal instruments adopted in the framework of each one of the two policies would better guarantee consistency with the EU treaties, even if coherence is also necessary as the instruments of development cooperation could tackle, at the same time, the root causes of migration. Anyhow, EU development agreements should remain exclusively targeted on poverty alleviation or eradication and an overall sustainable (people-centred) de-

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