

KATHARINA
EISELE

Reinforcing Migrants' Rights? The EU's Migration and Development Policy under Review

Abstract: This article critically discusses the role and place of migrants' rights in the EU's evolving migration and development policy under the Global Approach to Migration and Mobility (GAMM) pursued by the EU.¹ The GAMM, which aims to govern migration flows from outside of the EU more effectively, incorporates the field of migration and development as one of four pillars. Only in November of 2011, however, the human rights of migrants were explicitly acknowledged as a cross-cutting theme within the GAMM, which before paid little attention – not to say neglected – the protection of such rights. This contribution analyses how the linkage between migration and development evolved on the international and European level, highlights the EU's interests in such a policy, and explains the pitfalls of disregarding the protection of migrants' rights in this context. The article argues that the 'development burden' should not be placed on immigrant populations without guaranteeing their secure legal status in the host countries.

Key words: EU Global Approach to Migration and Mobility, EU Migration Law and Policy, Migration and Development, Migrants' and Human Rights Protection



Introduction

The dramatic incidents of September 2005 – when hundreds of African migrants despairingly attempted to cross into the Spanish enclaves of Ceuta and Melilla in hopes of reaching the EU's shores – caused major outcry within media and civil society alike. Six migrants were killed while trying to climb barbed-wired fences in North Africa that seemed like a gateway to Europe, ironically in search of a better life.² This tragedy led national authorities to take swift policy action in a combined effort: a month later, during an informal summit at Hampton Court, the EU Heads of State and Government adopted a comprehensive approach to tackle migration issues and their implications. This approach – the EU Global Approach to Migration³ – has the objective to manage migration flows in an effective and balanced manner, and in genuine partnership with third countries.⁴ The policy area of migration and development that, in a nutshell, sets out to encourage the positive impact of migration on development was thematically integrated in the Global Approach to Migration, also to address the root causes of migration.⁵

¹ European Commission, COM(2011) 743, 18.11.2011.

² See BBC news article, 'Africans die in Spanish Enclave' of September 29, 2005, available at: <http://news.bbc.co.uk/2/hi/africa/4292490.stm>; K. J. O'Connell, 'Fortress Europe: Ceuta and Melilla - Comment', *Peace and Conflict Monitor* (2005), available at: http://www.monitor.upeace.org/archive.cfm?id_article=315.

³ In 2011, the Global Approach to Migration was renamed "Global Approach to Migration and Mobility" (GAMM), see European Commission, COM(2011) 743, 18.11.2011.

⁴ European Commission, COM(2008) 61, 8.10.2008, p. 2.

⁵ European Commission, COM(2008) 611, 8.10.2008 and COM(2007) 248, 16.5.2007.

In fact, in recent years the so-called migration-development-nexus has become a fashionable concept among policy makers, and the general trend can be observed that governments put this nexus on their political agendas, as measures to reduce poverty and alleviate development problems in the world's poorest countries.⁶ The EU picked up on the issue with the formulation of the aforementioned Global Approach to Migration in 2005. The European Commission had communicated its perspectives on the elements of a fruitful relationship between migration and development already in 2002.⁷ It is thus striking that until 2011, the Global Approach highlighted the development potential that migrants can bring, without taking into account the protection of the migrants. Such protection is in particular of vital importance for vulnerable immigrant communities. Discrimination and social exclusion, financial hardship, poor language skills, ghettoization processes, a low level of education and professional skills, the requirements of work and residence permits are only some of the factors that can result in the marginalization of migrant workers and their family members in the receiving state.⁸ For long, the issue of migrants' rights has been ignored within the scope of the migration-development-nexus in academia and policy-making, notwithstanding the fact that rights of migrant workers have a considerable impact on sending and receiving countries.⁹

This article examines the migration and development policies in the international and European context and considers the role that migrants' rights play therein. It is argued that for a successful linkage between migration and development, migrants' rights must be ensured. When reading this contribution, three points should be kept in mind: first, it has been pointed out that 'migration is neither a panacea for economic development nor the opposite'; second, it has been further pointed out that the migration-development nexus shifted the actual 'development burden' from the country of origin to their emigrants.¹⁰ Migrants cannot and should not bear the main responsibility to grant economic growth to their countries of origin. Lastly, striving against the economic and social inequalities in developing countries translates into a contribution to global justice by migrants.

6 See UK House of Commons - International Development Committee, "Migration and Development: How to make migration work for poverty reduction", Sixth Report of Session 2003-04, Volume I, 8 July 2004; Dutch Ministry of Foreign Affairs, Policy Memorandum "International Migration and Development 2008", October 2008.

7 European Commission, COM(2002) 703, 3.12.2002 and COM(2005) 390, 1.9.2005.

8 R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997), pp. 271-273.

9 M. Ruhs, 'Migrants' Rights, Immigration Policy, and Human Development', *Journal of Human Development and Capabilities* 11/2 (2010), 259-279, p. 259.

10 V. Chetail, 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue', *German Yearbook of International Law* 52 (2008), 183-215, pp. 212-213; V. Chetail refers to the report of J.E. Taylor, 'International Migration and Economic Development', UN/POP/MIG/SYMP/2006/09, International Symposium on International Migration and Development, held in Turin on 28 to 30 June 2006, p. 20.

Migration and development – a complex interrelationship

People opt to leave their home countries for different reasons, such as poverty and hunger, war and armed conflicts, oppression and the violation of human rights, and environmental degradation. The decisive step to emigrate and settle in another state is based on several factors of inter alia political, social and economic nature rather than just one decisive ground. This leads to the conclusion that the migration decision cannot be considered as a one-dimensional rational choice, whereby individuals make a simple cost-benefit calculation. Factors, such as the ease of travel in a globalizing world, the availability of information on immigration requirements in other countries, professional opportunities, and family links ‘make migration more than just an option for many people.’¹¹ It is important to notice that migrants and their families may attach different value to the various components that result in the actual relocation, depending on the particular situation they find themselves in. R. Lucas emphasizes in this regard that ‘concerns about lifestyle in an alien context may deter some, while the thrill of change may attract others; the presence of kith and kin abroad can allay concerns and ease a transition for those possessing such network connections [...]’¹² The migration process not only renders further movement more likely but also triggers changes in social structures, making migration a part of the communities.¹³ D.S. Massey *et al.* also indicate that non-migrants who have social ties and links based on friendship or kinship with migrants can rely on the support and assistance of the former with regard to finding employment and other issues. The authors underscore in an example of Mexican migrants that ‘empirical studies in Mexico clearly show that having network connections greatly increases the likelihood of international movement.’¹⁴

How do these observations relate to development outcomes? Undoubtedly, the relationship between underdevelopment and migration is of a particularly ambiguous and complex nature, as R. Skeldon explains: ‘Migration can be both cause and be caused by poverty.’¹⁵ The author considers poverty as a root cause of migration but emphasized, at the same time, that it is usually not the world’s poorest who dispose of the necessary resources to travel and resettle. On the

11 P.A. Taran, ‘Human Rights of Migrants: Challenges of the New Decade’, *International Migration* 38/6 (2000), 7-51, pp. 12-13.

12 R.E.B. Lucas, *International Migration and Economic Development – Lessons from Low-Income Countries* (Cheltenham: Edward Elgar Publishing Ltd, 2005), p. 46.

13 D.S. Massey, L. Goldring & J. Durand, ‘Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities’, *American Journal of Sociology* 99/6 (1994), 1492-1533, p. 1499, referring to R. Mines & D.S. Massey, ‘Patterns of Migration to the United States From Two Mexican Communities’, *Latin American Research Review* 20 (1985), 104-124.

14 Ibid, p. 1500, referring to J.E. Taylor, ‘Differential Migration, Networks, Information, and Risks’, *Research in Human Capital and Development: Migration, Human Capital and Development* 4 (1986), 147-171.

15 R. Skeldon, ‘Migration and Poverty’, *Asia-Pacific Population Journal* 17/4 (2002), 67-82, p. 67.

downside, migration can also lead to poverty, due to virtue of policy that brings about forced relocation, as well as brain drain, i.e. the emigration of skilled people. Brain drain, however, can potentially evolve into circular or return migration, and thus entail a 'brain gain situation' with beneficial development outcomes for the sending state. According to the author it is difficult to draw general conclusions based on the foregoing observations. However, evidence suggests that the correlation between migration and poverty alleviation is of a positive nature, and that population movements can help to reduce poverty.¹⁶ The view that the relationship between migration processes and economic development is highly intricate has been confirmed by other scholars too, who describe the said relationship as 'unclear' and 'unsettled'.¹⁷ Migration processes can benefit the country of origin, the country of destination, and the individual migrant. The countries of origin may profit from remittances flows, lower unemployment rates and the knowledge and skills of return migrants. The countries of destination can make use of a larger and younger workforce, a more diverse and energetic population, and the tax income from foreign workers. The migrants themselves may benefit from employment, an increased income, education and new cultural experiences.¹⁸

To foster the positive effects of the migration process on development, the following measures are usually proposed: facilitate and cheapen the transfer of remittances, and encourage the use of these funds for development-related objectives; better engage the diaspora communities; mitigate brain drain, and ideally transform it into brain gain; promote return migration and establish favorable conditions for the reintegration in the country of origin, including a transfer of knowledge, technology and investment; create circular migration schemes that provide migrants with a certain degree of mobility between home and host state; permit and facilitate the portability of social security pensions and annuities to the country of origin.¹⁹

Brain drain relates to the loss of human capital due to highly-skilled migration from developing to developed countries.²⁰ According to OECD figures, the foreign-born, tertiary-educated populations in OECD countries has risen to almost

16 R. Skeldon, 'Migration and Poverty', *Asia-Pacific Population Journal* 17/4 (2002), 67-82, pp. 67-77.

17 C.W. Stahl, 'Labor Emigration and Economic Development', *International Migration Review* 16/4 (1982), 869-899; Demetrios G. Papademetriou & Philip L. Martin, *The Unsettled Relationship: Labor Migration and Economic Development* (Westport: Greenwood Publishing Group, 1991) D. Sriskandarajah, 'Migration and Development', Report for the Global Commission on International Migration (2005).

18 ILO, *Towards a Fair Deal For Migrant Workers in the Global Economy* (2004), available at: <http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/rep-vi.pdf>, pp. 17-40.

19 See *inter alia* Chapter 2 of Council of Europe, *Economic Migration, Social Cohesion and Development: Towards and Integrated Approach* (Strasbourg: Council of Europe Publishing, 2009).

20 B. L. Lowell, 'Some Development Effects of the International Migration of Highly Skilled Persons', *International Migration Papers*, International Labour Office Geneva, No. 46 (2002).

8 million between 1990 and 2000, reaching approximately 20 million skilled professionals at the beginning of the 21st century.²¹ The international competition for the brightest minds is hard-fought; the European Commission suggested in 2005 to mitigate the adverse effects of brain drain by disciplining recruitment and by using development cooperation to create employment opportunities for skilled personnel in the sending country.²² In the debate ‘on how to make migration work for development’, the concept of circular migration, which seeks to promote brain circulation, has been high on the agenda of scholars and policy makers. Circular migration appears to help prevent brain drain, as it contributes to the economic growth of the sending countries and facilitates the matching of cross-border labor supply and demand. Circular migration has been defined as being ‘based on a continuing, long-term and fluid relationship among countries that occupy what is now increasingly recognized as a single economic space.’²³ The Commission has taken ‘circular migration’ to mean creation of provisions for legal mobility back and forth between two countries.²⁴ While admitting that there is no formal definition of circular migration, and that ‘the term often means different things to different people’, K. Newland finds that most working definitions of circular migration have a spatial, temporal, iterative and developmental dimension.²⁵ The World Bank indicates the potential beneficial effects of temporary movement of persons, particularly for developing countries, under the General Agreement on Trade in Services (GATS), which seeks to promote the progressive liberalization of trade in services in the world economy. However, political sensitivity and increasing security concerns associated with such movement have prevented countries of destination from making strong commitments in trade in services.²⁶

Migrants’ rights in the international debate on migration and development

The idea of linking migration to development has emerged in an international discourse, in which the UN holds the role of the main promoter. The UN has encouraged studies on the interrelation between migration and development, and advanced the political dialogue in this respect. The UN General Assembly has adopted a number of resolutions, which highlight the significant contribution provided by migrants to development, backed by K. Annan in his address to the

21 L.T. Katseli, R.E.B. Lucas & T. Xenogiani, ‘Effects of Migration on Sending Countries: What Do We Know?’ *OECD Development Centre Working Paper* No. 250 (2006), p. 17.

22 European Commission, COM(2005) 390, 1.9.2005, pp. 8-9.

23 D.R. Agunias & K. Newland, ‘Circular Migration and Development: Trends, Policy Routes, and Ways Forward’, *Migration Policy Institute Policy Brief* (2007), p. 2.

24 European Commission, COM(2007) 248, 16.5.2007, p. 8.

25 K. Newland, ‘Circular Migration and Human Development’, *UNDP Human Development Research Paper* No. 42 (2009), p. 9.

26 World Bank, *Global Economic Prospects 2004 - Realizing the Development Promise of the Doha Agenda* (Washington, D.C.: World Bank, 2003), p. 144; see also, C. Dommon, ‘Migrants’ Human Rights: Could GATS Help?’, *Migration Information Source*, Migration Policy Institute (2005).

High-Level Dialogue on International Migration and Development in 2006.²⁷ The former UN Secretary-General professed in the run up to this High-Level Dialogue that:

‘[F]or the full benefits of international migration to be realized, the rights of migrants must be respected. States have the obligation to protect the fundamental rights of all persons in their territory and they must take effective action to protect migrants against all forms of human rights violations and abuse. They must also combat all forms of discrimination, xenophobia, ethnocentrism and racism.’²⁸

In a similar vein, J. Somavia, Director-General of the International Labour Office (ILO), claimed at the 2006 ECOSOC High-Level Segment that took place in Geneva that:

‘[G]ains from migration and protection of migrant rights are indeed inseparable. Migrant workers can make their best contribution to host and source countries when they enjoy decent working conditions, and when their fundamental human and labor rights are respected.’²⁹

The statements of these two top officials are straightforward as regards the key role of migrants' rights for the development process. The importance of the respect for migrants' rights was further stressed in the ILO's Multilateral Framework on Labour Migration of 2005, which emphasized that 'the contribution of labor migration to employment, economic growth, development and the alleviation of poverty should be recognized and maximized for the benefit of both origin and destination countries.'³⁰ Relevant is moreover the annually held Global Forum on Migration and Development (GFMD), – an informal platform for dialogue on migration and development issues, founded with the objective to share experiences and discuss policies among stakeholders.³¹ The GFMD conference consists of two sessions: the civil society meeting on the first day and the government summit on the second and third day. At the 2011 GFMD held in Geneva, more than 120 representatives of 100 states and 20 observers gathered.³² The civil society

27 See for instance UN General Assembly Resolution A/RES/61/208 on international migration and development of 20 December 2006, 83rd Plenary Meeting; Secretary-General Address to the High-Level Dialogue of the General Assembly on International Migration and Development, New York, 14 September 2006, available at: <http://www.un.org/migration/index.html>.

28 K. Annan, UN Secretary-General Report on International Migration and Development, UN/GA A/60/871 of 18 May 2006, para. 77.

29 J. Somavia, Statement of the Director-General of the International Labour Office, 2006 ECOSOC High-Level Segment, Geneva, 5 July 2006, available at: http://www.ilo.org/pubcgi/links_ext.pl?http://www.un.org/docs/ecosoc/meetings/2006/hls2006/documents/DG%20ILO-RT3.pdf.

30 ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration (2006), p. 29, available at: http://www.ilo.org/public/libdoc/ilo/2006/106B09_343_engl.pdf.

31 R. Matsas, 'The Global Forum on Migration and Development: A New Path for Global Governance?', *The Brussels Journal of International Relations* LXI/2 (2008), Egmont Institute.

32 See 2011 GFMD website, available at: <http://www.gfmd.org/>

days took place under the central topic ‘Taking Action on Labor Migration, Development and the Protection of Migrant Workers and their Families’. Two sub-sessions are relevant, as they deal with the legal protection of migrants: one session concerns rights-based policy-making for the benefit of migrant workers and their families, and the other one addresses protection of migrants working or moving in irregular circumstances.³³ These activities and the aforementioned statements are evidence of an emerging interest on the international plane to tackle the often precarious legal position of migrants in direct relation to a positive development outcome.³⁴

Migration and development in the eu: a migrant-centered GAMM?

The Global Approach to Migration, which was officially adopted in 2005 by the EU Heads of State and Government, was preceded by joint EU efforts to tackle the migration phenomenon, with a clear emphasis on fighting irregular migration.³⁵ The Global Approach envisages cooperation between Member States and with countries of origin, and the focus was first put on the Mediterranean and African regions.³⁶ The Commission further developed the Global Approach defining it as the external dimension of the EU’s migration policy, integrated into the EU’s external affairs, and agreed on in partnership with third countries.³⁷ The Commission asserted that the Global Approach represented a ‘shift from a primarily security-centered approach focused on reducing migratory pressures, to a more transparent and balanced approach guided by a better understanding of all aspects relevant to migration’, and outlined the three thematic dimensions: legal economic migration and mobility, irregular migration, and migration and development.³⁸ In November of 2011 the Commission revised the Global Approach and renamed it ‘Global Approach to Migration and Mobility’ (GAMM).³⁹ The GAMM is said to be more strategic and efficient, promoting in particular the mobility of third-country nationals across the EU’s external borders. The GAMM should be firmly embedded in the EU’s external foreign policy, and be implemented by the Commission, the European External Action Service (EEAS) and the Member States.⁴⁰ The GAMM has added a fourth dimension concerning international protection, and contends to be migrant-centered concentrating on

33 2011 Program GFMD Civil Society Days, available at: <http://www.gfmdcivilsociety.org/>.

34 For an overview of more non-binding intergovernmental processes, see R. Cholewinski, ‘Human Rights of Migrants: The Dawn of a New Era?’, *Georgetown Immigration Law Journal* 24 (2010), 585-615, pp. 604-609.

35 Presidency Conclusions of the Brussels European Council of 15-16 December 2005; for a more detailed analysis on the emergence of the EU’s externally-oriented migration approach, see C. Boswell, ‘The “External Dimension” of EU Immigration and Asylum Policy’, *International Affairs* 79/3 (2003), 619-638.

36 European Commission, COM(2005) 621, 30.11.2005, pp. 2-9.

37 Council of the European Union: “Adoption of the Council Conclusions on enhancing the Global Approach to Migration”, document number: 9604/08 of 20 May 2008.

38 European Commission, COM(2008) 611, 8.10.2008, pp. 2-8.

39 European Commission, COM(2011) 743, 18.11.2011.

40 European Commission, COM(2011) 743, 18.11.2011, pp. 3-5.

the needs, aspirations and problem of individuals. The Commission highlighted that the human rights of migrants are a cross-cutting theme that concerns all four dimensions. As regards the geographic coverage, the GAMM aims to be truly global covering all interested and relevant partners.

Migration and development was no new policy field under the GAMM; the European Commission had published insights on the correlation of both policy domains in 2002 and 2005, in which it essentially referred to the well-known remedies: remittances, diaspora networks, and circular migration.⁴¹ In the EU context, circular migration related to two forms of movements 'allowing some degree of legal mobility back and forth between two countries': third-country nationals settled in the EU who engage in an activity in their country of origin, while retaining their main residence in a Member State; and persons residing in a third country, coming temporarily to the EU for work, study and training purposes and leaving again for their country of origin as soon as their residence permit has expired. Major importance was attached to effective return, so as to ensure circularity.⁴² The organization of conferences in 2006, such as the Euro-African Ministerial Conference held in Rabat and the Africa-EU Tripoli Summit, confirmed the EU's political intentions to address synergies between migration and development; the launch of the 2007 EU Africa-Strategy setting out a 'partnership on migration, mobility and employment' provided a specific framework for collaboration with African countries.⁴³ Mobility partnerships have become the main policy instrument of the GAMM. Mobility partnerships are political, non-binding statements between some EU Member States and a third country, which contain commitments in relation to all three thematic dimensions. To date, mobility partnerships have been concluded with Cape Verde and Moldova in June 2008, and Georgia in November 2009. The Commission assessed mobility partnerships as highly innovative and sophisticated, and is said to contribute substantially to its operationalization.⁴⁴

Until the proclamation of the GAMM, the protection of migrant workers in respect to development in EU policy endeavors was rather disappointing. The European Consensus on Development only rudimentarily mentions the need to respect the human rights of migrants. The Commission emphasized that "[I]t will

41 European Commission, COM(2002) 703, 3.12.2002 and COM(2005) 390, 1.9.2005.

42 European Commission, COM(2007) 248, 16.5.2007, pp. 8-11.

43 Rabat Action Plan, Euro-African Ministerial Conference held on 10-11 July 2006, available at: <http://www.maec.gov.ma/migration/fr>; 2006 Tripoli Joint Africa-EU Declaration on Migration and Development, Africa-EU Summit held on 22-23 November 2006, available at: http://www.euromed-migration.eu/e1152/e1537/e2138/e2279/e1258/e1286/ENTripolideclarationreadmatwg3s32022042009nuremberg_eng.pdf; European Commission, COM(2008) 611, 8.12.2008, p. 7.

44 European Commission, COM(2007) 248, 16.5.2007, pp. 2-8 and SEC(2009) 1240, 18.9.2009, p. 4; for a critical stance on mobility partnerships, see S. Carrera & R. Hernández i Sagrera, 'The Externalisation of the EU's Labour Immigration - Towards Mobility or Insecurity Partnerships?', *CEPS Working Document* No. 321 (2009).

support developing countries in their policies of management of migratory flows, as well as in their efforts to combat human trafficking, in order to make sure that the human rights of the migrants are respected."⁴⁵ The European Consensus on Development was announced in 2005 and sets out the EU's common vision to reduce and eventually eradicate poverty in the context of sustainable development, and to establish a more stable, peaceful and equitable world in line with the UN Millennium Development Goals.

EU legislation enhancing the protection of third-country migrants

While the GAMM has acknowledged the human rights of migrants as a cross-cutting theme, and thus also for the EU's strategy for migration and development, it must be pointed out that the EU legislator had already adopted immigration and asylum legislation, which enhance the protection of third-country nationals, on the basis of the competences that the EU had received with the 1997 Amsterdam Treaty. These directives and regulations were passed in line with the Tampere objective of developing an integration policy, based on fair treatment granting third-country nationals rights and obligations comparable to those of EU citizens.⁴⁶ The measures concerned in particular: a right to family reunification setting out the conditions under which family members of third-country nationals may join the latter in the host EU Member State⁴⁷; the introduction of a long-term resident status that provides third-country nationals who have lawfully and continuously resided for a period of five years in the territory of a Member State with a more secure legal position as well as an enhanced protection against expulsion⁴⁸; the adoption of a single permit that combines work and residence authorizations for third-country nationals who (wish to) reside and work in the EU in addition to a set of rights⁴⁹; special admission regimes for highly-skilled non-EU nationals and third country-researchers.⁵⁰ With the exception of the family reunification directive, these instruments also facilitate the movement to another Member State after having resided lawfully for a certain period in the 'first' Member State. In order to fall within the scope of these directives, criteria such as the length of legal residence, professional qualification, or a certain family relationship

45 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 the European Union Development Policy: 'The European Consensus on Development' (2006/C46/01), published in the Official Journal on 24.2.2006, p. 2, see para. 110.

46 Tampere Presidency Conclusions of 15 and 16 October 1999, para. 18.

47 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

48 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

49 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.

50 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; 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.

have to be met. Third-country nationals are granted rights in the field of social security coordination. The rules for such coordination applicable to EU citizens were extended to third-country nationals who are not already covered by those provisions solely on the grounds of their nationality, for example because of an EU association agreement.⁵¹ However, for those social security coordination provisions to apply, third-country nationals must have legal residence in a Member State and they must be in a situation which is not confined in all respects within a single Member State; thus, the situation has to be characterized by a cross-frontier element. Regulation (EU) No 1231/2010 has extended the scopes of application of Regulation (EC) No 883/2004 and implementing Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by those provisions solely on the grounds of their nationality.⁵² The coordinating provisions stipulate the principle of equal treatment in social security matters; rules on the determination of the applicable legislation to prevent conflicts of law; the aggregation of insurance periods in other Member States to determine the amount of benefit; and the exportability of benefits.⁵³

Third-country nationals also enjoy protection under human rights instruments, of which there are three principal sources within the EU legal framework: the European Convention on Human Rights (ECHR), the EU Charter, and the general principles of EU law.⁵⁴ Signed in 1950, the ECHR was drafted under the auspices of the Council of Europe with the objective to protect human rights and fundamental freedoms.⁵⁵ The ECHR is the most pivotal Council of Europe treaty, which has 47 state parties, including all 27 EU Member States.⁵⁶ The ECHR's scope of application includes *all persons within the jurisdiction* of the contracting parties; the ECHR covers thus citizens and non-citizens alike.⁵⁷ The Court of Justice in Luxembourg has in the past repeatedly referred to this human rights treaty, stating that the ECHR has special significance as regards fundamental rights protection in the EU legal order.⁵⁸ Article F of the Treaty on the European

51 Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

52 See R. Cornelissen, 'The European Co-ordination of Social Security and Third Country Nationals', in: D. Pieters and P. Schoukens (eds.), *The Social Security Co-ordination Between the EU and Non-EU Countries* (Intersentia, Antwerp 2009), pp. 10-12.

53 See in this regard A.P. van der Mei, *Free Movement of Persons Within the European Community - Cross-Border Access to Public Benefits* (Oxford: Hart Publishing, 2003), pp. 63-64.

54 S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 3 edn. 2011), p. 96.

55 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 5.

56 As of February 12, 2012; see website of the Council of Europe: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=21/10/2011&CL=ENG>.

57 See Article 1 ECHR; on the notion of "jurisdiction" under Article 1 ECHR, see M. Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands International Law Review* (2005), 3.

58 Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 14; Case C-60/00 *Carpenter* [2002] ECR I-6279, paras. 41-46; Case

Union (TEU) first specifically referred to the respect of fundamental rights as guaranteed by the ECHR and the Treaty of Lisbon has created a legal basis for the EU to accede to the ECHR.⁵⁹ In this context, a draft accession agreement has been negotiated that lays down certain adaptations within the Convention system considering that the EU is not a state but a supranational organization. As regards the control mechanism under the ECHR it has been pointed out that it should be preserved as far as possible, and applied to the EU in the same way as to other contracting parties, by making only those adaptations that are strictly necessary.⁶⁰ Furthermore, the legally binding EU Charter of Fundamental Rights adds to the fundamental rights protection in the EU.⁶¹ It must be borne in mind that first the Charter reaffirms *existing* rights resulting from traditions and obligations, and second, the legal sources of the Charter are the national constitutions of the Member States, the ECHR, the case law of the Court of Justice and the European Court of Human Rights. Finally, in *Nold* the Court confirmed its view that fundamental rights form an integral part of the general principles of EU law; it stated that in safeguarding these rights it is bound to draw inspiration from the Member States' constitutional traditions and from international human rights treaties to which the Member States are signatories.⁶² In respect to international human rights treaties, the Court has granted the ECHR a special status as a source of the general principles of Community law.⁶³ This is reflected in the Lisbon Treaty under Article 6 (3) TEU determining that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law. While it is to be welcomed that the EU legal framework already in place enhances the protection of migrants, further legislative measures that specifically reinforce the status of migrants with the objective to effectively link migration to development policies are desirable, such as schemes aiming to facilitate circular migration flows.

The EU's interests in building a migration and development policy

The question arises as to why the EU was interested in creating a migration and development policy in the first place. It is clear that the international discourse on the beneficial linkages between migration and development advocated by

C-413/99 *Baumbast* [2002] ECR I-07091, para. 72; Case C-109/01 *Akrich* [2004] ECR I-9607.

59 See Article 6 (2) TEU as amended by the Lisbon Treaty; Protocol No. 8 to the Lisbon Treaty; Article 17 of Protocol No. 14 to the ECHR.

60 Steering Committee for Human Rights, Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights of 14 October 2011, document number: CDDH(2011) 009; see also Council of the European Union, Accession of the European Union to the ECHR – Working Document from the Presidency of 4 November 2001, document number: DS 1675/11.

61 Charter of Fundamental Rights of the European Union, Official Journal C 83, 30.3.2010, p. 389.

62 Case 4/73 *Nold* [1974] ECR 491, para. 13; the Court has affirmed this approach in Case 44/79 *Hauer* [1979] ECR 3727, para. 15.

63 Case 36/75 *Rutili* [1975] ECR 1219, para. 32; Case 222/82 *Johnston* [1986] ECR 1615, para. 18; many other case followed that contained a reference to the ECHR.

the UN informed and influenced the negotiations and policy-making in national and European settings.⁶⁴ But what incentives does such a policy entail for the EU and its Member States next to altruistically 'offer[ing] a significant potential for furthering development goals, without constituting a substitute to enhanced Official Development Assistance and improved policies that remain as necessary as ever to meet the Millennium Development Goals within the agreed timeframe?'⁶⁵ As regards circular migration, which is one of the main policy tools to implement migration and development objective, R. Erzan has pointed out that:

'[T]he term circular migration was used by the EU both to describe a phenomenon and to formulate a policy goal to reduce the tendencies of immigrants to settle permanently in the EU countries. It is a temptation to control migration through bilateral agreements, prevent irregular migration, and admit some selected types of labor and exclude others.'⁶⁶

This statement supports the viewpoint that the EU's major interests in pursuing such a migration and development policy are twofold: first, the EU considers migration and mobility in the context of the Europe 2020 Strategy for its own benefit as a factor that can contribute to its competitiveness by securing an adaptable workforce with the necessary skills. The Commission made clear that migration and mobility can foster more foreign direct investment and trade links emphasizing the role of diaspora communities.⁶⁷ Against this backdrop circular migration schemes allow for the short-term movement of labor forces, and thereby permit the Member States to flexibly fill gaps in specific sectors, while ensuring the return of the worker in question after the period of appointment has expired. Clearly, the concept of circular migration serves here also as a tool to prevent permanent migration.

Second, by establishing policies that connect migration with development outcomes the EU also aims to reduce and fight undocumented migration. In a 2002 Communication on migration and development the Commission referred to the Conclusions of the Seville European Council, in which the European leaders unmistakably established a connection in this regard.⁶⁸ They confirmed that a comprehensive and balanced approach to tackle the root causes of irregular immigration must remain the EU's long-term objective, and that closer trade cooperation, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned, and

64 See for example European Commission, COM(2005) 390, 1.9.2005.

65 European Commission, COM(2005) 390, 1.9.2005, p. 2.

66 R. Erzan, 'Circular Migration: Economic Aspects', *CARIM Analytic and Synthetic Notes 2008/31 Circular Migration Series*, EUI Robert Schuman Centre for Advanced Studies (2008), p. 1.

67 European Commission, COM(2011) 743, 18.11.2011, p. 4.

68 European Commission, COM(2002) 703, 3.12.2002.

thereby reducing the underlying causes of migration flows. This ties on circular migration opportunities, which are also based on the assumption that offering short- or medium-term employment contracts will forestall potential migrants from considering irregular ways of entering and residing in the territory of an EU Member State. Moreover, the prospect to return for work purposes to the EU in the future will discourage, the argumentation goes, migrants from overstaying visas.⁶⁹ In addition, it was highlighted that circular migration mechanisms could act as an incentive for sending states to assume more responsibility for countering unauthorized migration.⁷⁰

There are similarities between the circular migration schemes as discussed in an international context today and the former guest worker programs initiated in the 1960s by Western European states. Under these latter programs, workforce was recruited in order to overcome labor shortages experienced at that time, and which stopped quite abruptly in 1973 with the oil crisis.⁷¹ The recruitment programs meant to ensure that the *Gastarbeiter* (guest workers) would reside in the host country concerned exclusively for the purpose of working and only for a limited time period, while lacking basic rights. These guest worker policies related to migrant workers as temporary labor units, disregarding the human and social dimension that the phenomenon of migration entails. Still, in many cases family reunification trends could not be prevented and for example a majority of guest workers settled permanently in Germany.⁷² Put simply, 'Germany, like other Western European states, was trying to import labor, not people.'⁷³

How do the EU's efforts to build circular migration regimes compare to the former guest worker model? S. Castles underscores that it would be simplistic and misleading to consider the European approaches in this context as a 'resurrection' of a guest worker system and yet, both models feature to a great extent similar characteristics.⁷⁴ The author indicates that the guest worker programs addressed low-skilled workers, whereas EU migration policy targets primarily highly-skilled workers.⁷⁵ The author further contends that the EU's failure to provide for policies covering low-skilled migrants 'leads to the great hypocrisy of modern migration policy' that does not solve the problem of irregular migration; instead, rich states continue to exploit undocumented migrant workers without guaranteeing them basic human rights. The denial of a secure residence status and the exploitation

69 On this latter aspect see European Commission, COM(2007) 248, 16.5.2007, p. 11.

70 UK House of Commons - International Development Committee, "Migration and Development: How to make migration work for poverty reduction", Sixth Report of Session 2003-04, Volume I, 8 July 2004, p. 41.

71 K. Bade, *Migration in European History* (Oxford: Blackwell Publishing, 2003), p. 228.

72 S. Castles, 'The Guest-Worker in Western Europe: An Obituary', 20/4 (1986), p. 773.

73 S. Castles, 'Guestworkers in Europe: A Re-Surrection?', *International Migration Review* 40/4 (2006), pp. 742, 769.

74 S. Castles, 'Guestworkers in Europe: A Re-Surrection?', *International Migration Review* 40/4 (2006), pp. 759-760.

75 See however the Commission's proposal on the admission of third-country seasonal workers, European Commission, COM(2010) 379, 13.7.2010.

of vulnerable foreign workers have negative consequences for the countries of origin and destination, and there is no reason, S. Castles argues, why the EU's circular migration promise should prevent migrant workers who are admitted on a temporary basis from settling permanently.⁷⁶ The remarks are rather dark, but it is true that circular migration schemes do not take into account family and social relations, nor do they provide options in case a migrant wishes to extend his/her stay in the host country. These conditions ignore human ties and needs, and render the EU's suggested circular migration policy debatable.

The way ahead: the need for a rights-based approach

While migration is indeed neither a panacea for economic development nor the opposite, there is broad agreement in political and academic forums that human mobility can maximize the positive effects on the source countries, on the destination countries, and for the migrants themselves. For this objective to be achieved the right policies must be put in place. However, it is clear that the relationship between migration and development is highly complex and that further study is needed to formulate fruitful corresponding policies.

Concepts of migration and development, as they are discussed today, attribute migrants a central role, such as transferring remittances and knowledge, commuting between home and host state, and engaging in gainful diaspora activities. While this 'burden' placed on migrant communities by both the sending and receiving countries, migrants find themselves more than often in an insecure legal position in the host country. The criticism that the main development responsibility is shifted from the country of origin to their nationals living abroad is therefore well-taken: migrants are asked to altruistically step up as 'development agents'.⁷⁷ Not only is this perception unrealistic, it is also ignorant of national authorities to impose immigrant communities a key role in 'making migration work for development' without ensuring their protection. A sound legal status empowers migrants, and in fact *enables* them in the first place, to stimulate economic and social progress in their home countries, to combat inequalities in developing states, and thereby to contribute to global justice.

International organizations have promoted global initiatives and international summits to raise awareness and educate national authorities on migration and development coherences. The UN and the ILO have been actively engaged in drawing up international standards for the protection of migrant workers and their families, such as the UN International Convention on the Protection of the Rights of Migrant Workers and their Families (ICMW) that was adopted in 1990

⁷⁶ S. Castles, 'Guestworkers in Europe: A Re-Surrection?', *International Migration Review* 40/4 (2006), pp. 759-760.

⁷⁷ As pointed out by V. Chetail, 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue', *German Yearbook of International Law* 52 (2008), 183-215, p. 213.

with the objective to provide a comprehensive legal framework for the protection of migrant workers and their family members.⁷⁸ Yet, these conventions do not enjoy great popularity among the international community of states as the limited number of signatories and ratifications illustrate.

The EU has followed the trend on the international level and put forward an EU migration and development policy under the GAMM. The Commission has been the driving force in proposing and discussing initiatives that serve the purpose to manage migration in manner so as to entail beneficial development outcomes. While the EU has admittedly strengthened migrants' rights in the field of legal migration by means of a variety of directives and regulations, and also by reinforcing general human rights protection, the EU's migration and development policy incorporated into its agenda only in November of 2011 the need to protect the human rights of migrants in a comprehensive way. The EU has straightforward goals for its migration policy, such as attracting highly-skilled workers to boost the economies of the EU Member States. Still, the EU should also assume responsibility for poorer parts of this world. Policies that envisage putting the migration-development-nexus successfully into practice must be migrant-centered and rights-based in order to empower migrant populations for a simple reason: people are the real wealth of a nation.⁷⁹

78 UN General Assembly Resolution A/RES/45/158 on International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families of 18 December 2006, 69th Plenary Meeting; the UN Convention entered into force on July 1, 2003.

79 Statement attributable to the economists M. ul Haq and A. Sen, the two innovators of the human development approach that puts the human being back at the centre of the development process, see UNDP, *UNDP Human Development Report 1990* (New York: Oxford University Press, 1990), p. 9.

*Katharina Eisele,
Department of International and European Law,
Maastricht University
email: katharina.eisele@maastrichtuniversity.nl*

