

Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue

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La vérité a nécessairement un goût de vengeance
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A. Introductory Remarks: Migration in the Age of Globalization

Mobility has become an integral feature of our globalizing world. Goods and capital now circulate with greater ease than ever before, and people increasingly move across borders. The reasons for migrating from one country to another are multiple and rarely mutually exclusive. The most obvious causes of migration are related to socio-economic inequalities between North and South, aggravated by persistent conflicts and serious human rights violations.¹ These traditional causes of migration have been accentuated by new factors closely associated with the process of globalization, such as the revolution of the modes of transport, the growth of transnational communities or the evolution of information technology. Awareness of existing life and work opportunities in other parts of the world has spread, while the ability to travel long distances in search of a better life has become an accessible reality to many.

The United Nations Population Division estimated that between 1960 and 2005 the number of international migrants in the world has more than doubled,

¹ Given the focus section of this volume on “poverty as a challenge to international law,” the present contribution will primarily deal with economic migration between the South and the North in contrast to refugee movements in general and South-South migration in particular.

rising from 75 million in 1960 to almost 191 million in 2005.² Such a figure is huge, equating to the population of Brazil, the fifth most populated country in the world. However it appears to be insignificant when one considers that it corresponds to the margin of error to calculate the world population (*i.e.* about 3 %). From that angle, the increase in the number of migrants has remained modest compared to 1960 when the proportion of migrants represented 2.5 % of the world population. More than the actual statistics, it is the perception of the phenomenon of migration that has changed profoundly. Although migration is as old as humanity, it is now more visible than ever before. Every country is affected by migration, whether it is a country of immigration, transit or emigration, and an increasing number of States – such as in northern Africa – are all three at once.

As a result of this change in perception, migration has become one of the highest priorities on the international agenda. Since 2000, a vast number of initiatives have been launched at both the multilateral and regional level.³ This sudden interest on the part of the international community largely focused on the linkage between migration and development which since then has been labeled as the “migration-development nexus.” Linking the question of international migration to the issue of development has opened up new avenues for dialogue and collaboration between the North and the South. According to the former Secretary-General of the United Nations, “there is an emerging consensus that countries can cooperate to create triple wins, for migrants, for their countries of origin and for the societies that receive them.”⁴ The migration-development nexus thus becomes the magic formula for fostering North-South cooperation around the identification of mutual interests.

However, this new area of dialogue has not emerged in a political and legal vacuum. Restrictive immigration policies implemented by western States since the first oil shock in 1973 have patently failed to meet their stated objectives.⁵

² United Nations Population Division, Trends in Total Migrant Stock: The 2005 Revision, UN Doc. POP/DB/MIG/Rev.2005/Doc (2006).

³ These initiatives are detailed *infra*, most notably in Part. C.I.

⁴ Un General Assembly, International Migration and Development – Report of the Secretary-General, UN Doc. A/60/871 (2006), 5.

⁵ See among an abundant literature *Hein de Haas*, The Myth of Invasion: Irregular Migration from West Africa to the Maghreb and the European Union, IMI research report, October (2007); *Stephen Castles/Mark J. Miller*, The Age of Migration. International Population Movements in the Modern World, (3rd ed. 2003); *Bimal Ghosh* (ed.), Managing Migration. Time for a New International Regime? (2000); *Jagdish Bhagwati*, Borders

Rather they have fuelled the rise in irregular migration and have paradoxically encouraged the permanent settlement of undocumented migrants. Alongside the considerable human⁶ and financial⁷ costs of border controls, three decades of criminalizing economic migration have accentuated the misuse of legal channels for family and asylum migration and have led to the professionalization of migrant smuggling and trafficking. This “crisis of immigration control”⁸ coincides with the decrease of multilateral development aid. Confronted with the recurrent lack of funds for financing the achievements of the Millennium Development Goals, States and international organizations have become increasingly interested in private transfers by migrants as an alternative source of finance. Indeed, current estimates suggest that the annual value of remittances is about twice as much the value of official development assistance.⁹ Against this background, *Stephen Castles* rightly emphasizes that “the perceived ‘migration crisis’ is really a crisis in North-South relations, caused by uneven development and gross inequality. Migration control is essentially about regulating North-South relations.”¹⁰

The current fashion for maximizing the positive linkages between migration and development is attempting to reshape the North-South divide into a more comprehensive and balanced approach. It is also quite revealing of the paradox inherent in the need to cooperate internationally on immigration, a concern traditionally considered as the last bastion of the truly sovereign State.¹¹ Despite

Beyond Control, *Foreign Affairs* (1998), 98; *Wayne A. Cornelius/Philip L. Martin/James F. Hollifield* (eds.), *Controlling Immigration. A Global Perspective* (1993).

⁶ A Spanish human rights organization estimated that some 4,000 people drowned in the Straights of Gibraltar between 1990 and 2003: *Thomas Spijkerboer*, *The Human Costs of Border Control*, *European Journal of Migration and Law* (2007), 135.

⁷ The 25 richest countries are spending approximately 25–30 billion US Dollar a year on immigration enforcement and asylum processing mechanisms: *Philip L. Martin*, *Bordering on Control: Combating Irregular Migration in North America and Europe* (2003), 6.

⁸ *Cornelius/Martin/Hollifield* (note 5), 7.

⁹ *Jeff Crisp*, *Globalization, Poverty and Mobility: A Introduction to the Developmental Dimensions of International Migration* (2008), 6, available at: www.unhcr.org/research/RESEARCH/48e4be0e2.pdf; *Alessandro Monsutti*, *Migrations et développement: une histoire de brouilles et de retrouvailles*, *Annuaire suisse de politique de développement* (2008), 25.

¹⁰ *Stephen Castles*, *Why Migration Policies Fail*, *Ethnic and Racial Studies* 27 (2004), 211.

¹¹ The traditional reference to State sovereignty for apprehending migration may, however, be misleading for it suggests that States have a completely discretionary power

the prevailing euphoria, the apparent convergence of interests between developing and developed countries is plagued by recurrent ambiguities. For the migration-development nexus is at the junction of two conflicting paradigms which will be detailed and analyzed in the present article: A first predominantly negative view focuses on the need to eradicate the root causes of migration through development assistance (Part B), while a second emphasizes the positive effects of migration on poverty reduction in countries of origin together with the alleviation of demographic and labor market needs in countries of destination (Part C). These different conceptions of the migration-development nexus correspond to two successive stages of international practice, even if they are not necessarily irreconcilable (and in fact continue to coexist to some extent). The key challenge is to turn these contradictory driving forces into a coherent and principled legal framework. A closer look at these two paradigms, their origin and their evolution enables a better understanding of the potential, but also the limits, of the migration-development nexus for reframing North-South cooperation on one of the most pressing issues of our time.¹²

in that field. It should be recalled, though, that there are international norms governing migration which are part of customary and conventional law. Moreover, from the perspective of the history of international law, the emergence of the nation State and its implicit corollary – State sovereignty – did not coincide with the introduction of border controls. Freedom of movement remained the rule rather than the exception during several centuries, before migration controls appeared in Europe and North America at the end of the 19th century, and which have been generalized during and after the First World War. For further discussion see *Vincent Chetail*, *Migration, droits de l’homme et souveraineté: le droit international dans tous ses états*, in: *Vincent Chetail* (ed.), *Mondialisation, migration et droits de l’homme: le droit international en question / Globalisation, Migration and Human Rights: International Law under Review* (2007), 13. For an overview of the existing international norms see also *id.*, *International Legal Protection of Migrants and Refugees: Ghetto or Incremental Protection? Some Preliminary Comments*, in: *Law of Refugees: Global Perspectives* (2008), 31; *Alexander T. Aleinikoff/Vincent Chetail* (eds.), *Migration and International Legal Norms* (2003). For a compendium of both international and regional instruments see *Vincent Chetail*, *Code de droit international des migrations* (2008). English version forthcoming, 2009.

¹² For a similar example of the North-South dialogue in the context of the establishment of the Human Rights Council see *Vincent Chetail*, *Le Conseil des droits de l’homme des Nations Unies: l’An I de la réforme*, *Refugee Survey Quarterly* 26 (2007), 134; *id.*, *Le Conseil des droits de l’homme des Nations Unies: réformer pour ne rien changer?*, in: *Vincent Chetail* (ed.), *Conflicts, sécurité et coopération / Conflicts, Security and Cooperation*. *Liber Amicorum Victor-Yves Ghebali* (2007), 125.

B. The Root Causes Approach of Migration: More Development for Less Migration

The linkage between migration and development has been first considered through the so-called “root causes approach of migration,” also labelled the “stay-at-home policy.”¹³ According to this perspective, migration is perceived as a failure of development and it is believed that migration can be prevented or at least mitigated through aid and development. For a long time this conventional view was the mainstream approach adopted by States and international organizations (I). Although the root causes approach was thought to reconcile the concerns of western States with those of the South, this superficially attractive but simplistic assumption has demonstrated the limits of using development as an instrument of migration control (II).

I. Origin and Rationale of the Root Causes Approach of Migration

From the outset, the linkage between development and migration was based on a control-oriented paradigm that was intended to alleviate migration pressure from countries of origin. At the intergovernmental level, the root causes approach was first endorsed in Europe in 1991. At that time, the major concern of European States was not linked to South-North migration but rather to East-West migration as a result of the fall of the Iron Curtain and the beginning of the conflict in the Balkans. Against such a background, the fourth Conference of European Ministers responsible for migration affairs was convened in September 1991 in Luxembourg within the framework of the Council of Europe. It called “for new policy approaches and instruments based on an analysis of the root causes of migration and a growth in co-operation and harmonization among all European governments on migration questions.”¹⁴

¹³ See among the first studies on the root causes approach of migration *Abelardo Lopez Valdez*, *The Causes and Effects of Undocumented Worker Migration in the Western Hemisphere: The Need for a Development Solution*, *American Society of International Law Proceedings* 73 (1979), 119; *Wolf Rüdiger Böhning/M.L. Schloeter-Parades* (eds.), *Aid in Place of Migration?* (1994); *Wolf Rüdiger Böhning*, *Helping Migrants to Stay at Home*, *Annals of the American Academy of Political and Social Sciences* 534 (1994), 165.

¹⁴ Conclusions and Resolution adopted by the Conference, Fourth Conference of European Ministers Responsible for Migration Affairs, 17/18 September 1991, Doc. MMG-4 (91) 9 final, 3.

This “new” approach was clearly based on the consideration that “emigration is not the solution to the problems of the countries of origin and that the industrialized countries of Western Europe cannot at present accept an increase in immigration for permanent residence.”¹⁵ The ministers responsible for migration affairs thus agreed on a battery of common principles based on two complementary axes: First, addressing the root causes of migration, through “bilateral and multilateral co-operation” and “programmes of productive investment in the emigration regions,” and, second, combating irregular immigration “by applying rigorously sanctions against organizers of clandestine immigration networks and employers, or any other appropriate measure.”¹⁶

Such a preventive approach to migration, combining the improvement of socio-economic conditions in countries of origin with the fight against irregular migration, constituted the original matrix of the migration-development nexus. This policy objective, initially formulated in the framework of the Council of Europe, was rapidly endorsed by the European Union as well. One month after the Luxembourg Conference, the European Commission issued a Communication on immigration calling for “a global approach to the problem” based on three components which “combine realism with solidarity:” Relieving migration pressure at the source, controlling migration flows at the Community’s external frontiers, and strengthening integration of legal immigrants.¹⁷ One year later, in 1992, the European Council adopted at the Edinburgh Summit a *Declaration on principles of governing external aspects of migration policy* (Edinburgh Declaration), which focused on the “ways of removing the causes of migratory movements.”¹⁸

The European Council recognized a number of factors that could foster the reduction of migration pressure into member States, which included the preservation of peace, full respect for human rights, and the improvement of social and economic conditions in the countries of emigration.¹⁹ To implement this remarkably ambitious program, the Edinburgh Declaration identified a set of

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Commission Communication to the Council and the European Parliament on Immigration, SEC (91) 1855 final, 23 October 1991, 2. See also Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM (94) 23 final, 23 February 1994.

¹⁸ Declaration on principles of governing external aspects of migration policy, Doc. SN 456/92 Annex 5 Part A, 12 December 1992, para. xv.

¹⁹ *Ibid.*, para. ix.

common principles which should guide and inform the external policy of the European Community. Among these principles, member States agreed that “they will further encourage liberal trade and economic cooperation with countries of emigration.”²⁰ More significantly, “they will ensure the appropriate volume of development aid is effectively used to encourage sustainable social and economic development, in particular to contribute to job creation and the alleviation of poverty in the countries of origin, so further contributing in the longer term to a reduction of migration pressure.”²¹ In connection with this long term strategy, member States also acknowledged the need to “reinforce their common endeavours to combat illegal immigration” through the conclusion of readmission agreements with countries of origin and transit.²²

The growing concern for addressing the root causes of migration gained increased recognition within the United Nations at the 1994 International Conference on Population and Development. The Cairo Declaration and the accompanying Program of Action provided the first comprehensive assessment of the link between migration and development at the multilateral level. They also presented a slightly different understanding of the migration-development nexus, which combines the root causes approach with a more positive assumption of the role of migration for development. Although the long-term priority is “to make the option of remaining in one’s country viable for all people,”²³ the United Nations Program of Action also stressed the “positive impacts [of migration] on both the communities of origin and the communities of destination, providing the former with remittances and the latter with needed human resources.”²⁴ This balanced approach to the migration-development nexus was intended to be based on three complementary objectives:

- (a) To address the root causes of migration, especially those related to poverty;
- (b) To encourage more cooperation and dialogue between countries of origin and countries of destination in order to maximize the benefits of migration to those concerned and increase the likelihood that migration has positive consequences for the development of both sending and receiving countries; and
- (c) To facilitate the reintegration process of returning migrants.²⁵

²⁰ *Ibid.*, para. xvi, principle 3.

²¹ *Ibid.*, principle 4.

²² *Ibid.*, principles 5 to 7.

²³ Report of the International Conference on Population and Development, UN Doc. A/CONF.171/13 (1994), para. 10.3.

²⁴ *Ibid.*, para. 10.1.

²⁵ *Ibid.*, para. 10.2.

However, the twenty-year Program of Action largely remained a dead letter in the absence of a real dialogue and partnership between countries of emigration and countries of immigration. The proposal to convene a United Nations conference on migration and development has been regularly postponed since 1994²⁶ and during the ensuing decade the European Union became the major promoter of the root causes approach with a view to curbing irregular migration.

Meanwhile, the validity of the root causes approach has been increasingly criticized. Research into the interaction between migration and development has identified a far more complex picture than that postulated by the root causes approach. The relationship between migration and development is generally described as being “unsettled”²⁷ and “unresolved,”²⁸ because the causal link between the two is “putative rather than proven.”²⁹ In short, migration and development are far from being negatively and linearly correlated processes.³⁰

The underlying assumption of the root causes approach is contested for two main reasons. First, notwithstanding the common assertion that “migration is the oldest action against poverty,”³¹ international migration remains a selective process simply because “the poorest of the poor, that is the 1.2 billion people living on less than 1 US Dollar a day, do not have the connections and resources needed to engage in inter-continental migration.”³² The survival migration of the poorest is thus primarily within their country of origin (generally from rural to urban areas). Viewed from this perspective, development cannot be a substitute for international migration but rather an objective in its own

²⁶ See GA Res 49/127 of 19 December 1994; GA Res 59/241 of 22 December 2004.

²⁷ *Demetrios G. Papademetriou/Philip L. Martin* (eds.), *The Unsettled Relationship: Labor Migration and Economic Development* (1991).

²⁸ *Reginald Appleyard*, *International Migration and Development – An Unresolved Relationship*, *International Migration* 30 (1992), 251, 266.

²⁹ *Kimberly Hamilton*, *Migration and Development: Blind Faith and Hard-to-Find Facts* (2003), 1, available at: www.migrationinformation.org/Feature/display.cfm?ID=174.

³⁰ *Alessandro Monsutti* (note 9), 26; *Hein de Haas*, *Turning the tide? Why ‘development instead of migration’ policies are bound to fail* (2006), available at: www.imi.ox.ac.uk/pdfs/wp2-development-instead-of-migration-policies.pdf; *Kathleen Newland*, *Migration as a Factor in Development and Poverty Reduction* (2003), available at: www.migrationinformation.org/Feature/display.cfm?id=136.

³¹ *John Kenneth Galbraith*, *The Nature of Mass Poverty* (1979), 7.

³² *Ninna Nyberg-Sørensen/Nicholas Van Hear/Poul Engberg-Pedersen*, *The Migration-Development Nexus: Evidence and Policy Options*, *International Migration* 40 (2002), 51.

right, conducted for the purpose of poverty reduction. More than *absolute* poverty it is *relative* poverty – namely the economic differential between origin and destination countries – which is the main determinant of North-South migration.³³ However, the risk inherent in a development policy targeted to reduce migration pressure is to divert international aid from non-sending countries, which include the poorest regions of the world.³⁴

Second, the root causes approach of migration is confronted with another paradox. Contrary to its conventional assumption, development initially leads to an increase rather than a decrease in migration, in so far as economic growth of developing countries raises new opportunities and encouragements to find a better life abroad.³⁵ In the short run, “international migration does not stem from

³³ *Ibid.* This has been abundantly confirmed by numerous studies. See notably *Jeff Crisp* (note 9); *Richard Black/Xiang Biao/Michael Collyer*, Migration and Development: Causes and Consequences, in: Rinus Penninx/Maria Berger/Karen Kraal (eds.), *The Dynamics of International Migration and Settlement in Europe. A State of the Art* (2006), 41, 45; *Denis Cogneau/Flore Gubert*, Migrations du Sud et réduction de la pauvreté: des effets ambigus pour les pays de départ, in: El Mouhoub Mouhoud (ed.), *Les nouvelles migrations. Un enjeu Nord-Sud de la mondialisation* (2005), 59, 78; House of Commons, International Development Committee, *Migration and Development: How to Make Migration Work for Poverty Reduction*, 1 (2004), para. 25; *David Ellerman*, Policy Research on Migration and Development (2003), 13, available at: www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/30/000094946_0309160409263/Rendered/PDF/multi0page.pdf; *Richard H. Adams, Jr./John Page*, International Migration, Remittances and Poverty in Developing Countries (2003), available at: econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000160016_20040121175547; *Ronald Skeldon*, Migration and Poverty, *Asia-Pacific Population Journal* (2002), 67; *Uma Kothari*, Migration and Chronic Poverty (2002), 1, available at: www.chronicpoverty.org/pdfs/16Kothari.pdf; *Arjan de Haan*, Livelihoods and Poverty: The Role of Migration – A Critical Review of the Migration Literature, *Journal of Development Studies* 36 (1999), 1.

³⁴ See also in this sense *Louka T. Katseli/Robert E.B. Lucas/Theodora Xenogiani*, Policies for Migration and Development: A European Perspective, OECD Development Centre, Policy Brief No. 30 (2006), 29; *Christian Boswell/Jeff Crisp*, Poverty, International Migration and Asylum (2004), 19; *Sharon Stanton Russell*, Migration and Development: Reframing the International Policy Agenda (2003), 3, available at: www.migrationinformation.org/Feature/display.cfm?ID=126.

³⁵ See *supra*, note 33. See also among the first studies of this well-known phenomenon: US Commission for the Study of International Migration and Cooperative Economic Development, *Unauthorized Migration: An Economic Development Response* (1991); *Philip L. Martin*, Trade and Migration: NAFTA and Agriculture (1993); *Philip L. Martin/J. Edward Taylor*, The Anatomy of a Migration Hump, in: J. Edward Taylor (ed.), *Development Strategy, Employment, and Migration: Insights from Model* (1996), 43.

a lack of economic development, but from development itself.”³⁶ This phenomenon – called the “migration hump” – tends to disappear only at a later stage when the level of development in the country of origin reaches a more stable stage. The solution of such a dilemma calls for a long-term and sustainable development strategy, one that has never really been implemented at a global level.

With this in mind, it has been frequently asserted that the goal of western countries is far more to curb immigration than to contribute to the development of sending countries.³⁷ This is not surprising given the origin and rationale of the root causes approach, which is indeed basically intended to prevent immigration. The real question is therefore whether the root causes approach succeeded in creating mutual benefits for both the North and the South. The answer is clearly no.

II. Use and Misuse of the Root Causes Approach of Migration

Although the root causes approach could have been the opportunity to reconcile the immigration concerns of western States with the development needs of the South, this option has never been taken seriously. Instead the migration control objective has dominated concerns about sustainable development. The rhetorical posture of addressing the root causes thus became a policy mantra for validating the migration control paradigm without assuming the correlative consequences in terms of development aid. For many commentators, the “contamination of the development agenda”³⁸ with the aim of migration control is nothing but a “camouflage”³⁹ for justifying a “policy of containment.”⁴⁰ It has

³⁶ Douglas S. Massey/Joaquin Arango/Graeme Hugo (eds.) *Worlds in Motion: Understanding International Migration at the End of the Millennium* (1998), 227.

³⁷ See for instance Sandra Lavenex/Rahel Kunz, *The Migration-Development Nexus in EU External Relations*, *Journal of European Integration* 30 (2008), 439, 457; Ferruccio Pastore, *Europe, Migration and Development: Critical remarks on an emerging policy field* (2007), available at: www.cespi.it/PDF/Pastore-MigrationandDevelopment.pdf; Hein de Hass (note 30), 18; Kathleen Newland (note 30); Sharon Stanton Russell (note 34).

³⁸ Ben Hayes/Tony Bunyan, *Migration, Development and the EU Security Agenda*, in: *Europe in the World: Essays on EU Foreign, Security and Development Policies* (2003), 71.

³⁹ Patrick Weil, *Towards a Coherent Policy of Co-Development*, *International Migration* 40 (2002), 42.

⁴⁰ Channe Lindstrom, *Addressing the Root Causes of Forced Migration: A European Union Policy of Containment?* (2003), available at: www.rsc.ox.ac.uk/PDFs/working

even been argued that “the root causes approach is in fact only concerned with restricting migration at any cost rather than with alleviating the situation in countries of origin.”⁴¹

Whatever the accuracy of this last assertion, a brief overview of the evolution of the European Union policy during the last decade reveals the limits of using development as a tool for migration control. The preventive stance of the root causes approach has been not only an easy smokescreen for the reinforcement of return and readmission of undocumented migrants, it has also been accompanied by the constant temptation to subordinate development aid to the externalization of migration control in and by the countries of origin and transit themselves.

A first attempt towards this direction was proposed in 1998 by the Austrian Presidency of the Union in its Strategy paper on migration and asylum.⁴² Among many other controversial measures – including the revision or abandoning of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the possibility of military interventions to prevent migratory flows – the strategy paper proposed that:

Economic aid [to third countries] will have to be made dependent on visa questions, greater border-crossing facility on guarantees of readmission, air connections on border-control standards, and willingness to provide economic cooperation on effective measures to reduce push factors.⁴³

Although much of the paper was dismissed primarily because of its proposal of reviewing the 1951 Convention, some of its proposals have clearly influenced the European Union work program. In October 1998, the Dutch government proposed that a new body – which became the High Level Working Group on Asylum and Migration – be formed with the objective “to help reduce the influx of asylum seekers and immigrants into the member States of the European Union [and] to analyze and combat the reasons for flight taking account of

paper11.pdf. See also *id.*, European Union Policy on Asylum and Immigration. Addressing the Root Causes of Forced Migration: A Justice and Home Affairs Policy of Freedom, Security and Justice?, *Social Policy & Administration* 39 (2005), 587, 605; *Christina Boswell*, The External Dimension of EU Immigration and Asylum Policy, *International Affairs* 79 (2003) 619, 638.

⁴¹ *Saskia Gent*, The Root Causes of Migration: Criticizing the Approach and Finding a Way Forward (2002), 15.

⁴² Austrian Presidency of the European Union, Strategy paper on immigration and asylum, Doc. 9809/98 LIMITE CK 4 27 ASIM 170, 1 July 1998.

⁴³ *Ibid.*, para. 59.

the political and human rights situation.”⁴⁴ However, the Actions Plans prepared by the High Level Working Group mainly focused on migration control and readmission of irregular migrants, while little progress has been made in tackling the root causes of migration in countries of origin.⁴⁵

In parallel with this first experimentation in linking migration with external relations and development, the European Council has incorporated the root causes approach as a core component of the European Union policy on migration. The grandiloquent Conclusions of the Tampere Summit held in October 1999 (Tampere Conclusions) proclaimed that:

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, in particular rights of minorities, women and children. [...] 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

However, the Tampere Conclusions do not enumerate specific measures for promoting development but rather call for assistance to third countries for the purpose of combating illegal migration and coping with their obligation of readmission.⁴⁷ By contrast, the Communication on a community immigration policy published by the Commission in 2000 insists on the need for “a proactive immigration policy,” which “should be based on the recognition that migratory pressures will continue and that there are benefits that orderly immigration can bring to the EU, to the migrants themselves and to their countries of origin.”⁴⁸ It proposed for that purpose two sets of measures: first, the opening up of channels for economic immigration to meet the needs of the European Union for both skilled and unskilled workers and, second, the establishment of partner-

⁴⁴ Terms of reference of the High Level Working Group on Asylum and Migration, Doc. 5264/2/99, Rev. 2, JAI 1, AG, January 1999, 2.

⁴⁵ See in this sense *Lavenex/Kunz* (note 37), 444; *Lindstrom* 2005 (note 40), 597; *Boswell* (note 40), 630, 632; *Gent* (note 41), 13, 19; *Joanne van Selm*, Immigration and Asylum or Foreign Policy: The EU’s Approach to Migrants and Their Countries of Origin, in: Sandra Lavenex/Emek M. Uçarer (eds.), *Migration and the Externalities of European Integration* (2002), 143, 160.

⁴⁶ European Parliament, Tampere European Council, 15/16 October 1999, Presidency Conclusions, para. 11.

⁴⁷ *Ibid.*, para. 26.

⁴⁸ COM (2000) 757 final, 22 November 2000, 13.

ship with countries of origin “to ensure the regulation of migration flows” and “to promote development in the countries concerned.”⁴⁹

The Communication received little support, however, because of the strongly divergent views in the member States on the admission of third country nationals. As a consequence, the Commission was eventually forced to withdraw its proposal, presented in July 2001, to adopt a directive on the conditions of entry and residence of migrants for the purpose of paid employment and self-employment activities.⁵⁰ The process of communitarisation of the asylum and migration policy initiated by the Treaty of Amsterdam is thus incomplete and unbalanced. Despite the adoption of an increasing number of directives and regulations governing asylum,⁵¹ admission of students⁵² and researchers,⁵³ family reunification,⁵⁴ and the status of long-term third country nationals already established in the European Union,⁵⁵ access to the European territory remains clearly dominated by a post-9/11 security focus through the stepping-up of controls at external borders,⁵⁶ the generalization of visas,⁵⁷ the imposition of sanctions to carriers,⁵⁸ the adoption of repressive measures against illegal entry,⁵⁹ and the forcible return of undocumented migrants.⁶⁰

⁴⁹ *Ibid.*, 22.

⁵⁰ COM (2001) 0386 final, 11 July 2001.

⁵¹ EC Directive 2001/55 of 20 July 2001, OJ 2001 L 212, 12; EC Directive 2003/9 of 27 January 2003, OJ 2003 L 31, 18; EC Regulation 343/2003 of 18 February 2003, OJ 2003 L 50, 1; EC Directive 2004/83 of 29 April 2004, OJ L 304, 12; EC Directive 2005/85 of 1 December 2005, OJ 2005 L 326, 13.

⁵² EC Directive 2004/114 of 13 December 2004, OJ 2004 L 375, 12.

⁵³ EC Directive 2005/71 of 12 October 2005, OJ 2005 L 289, 15.

⁵⁴ EC Directive 2003/86 of 22 September 2003, OJ 2003 L 251, 12.

⁵⁵ EC Directive 2003/109 of 25 November 2003, OJ 2004 L 16, 44.

⁵⁶ Council Regulation 2007/2004/EC of 26 October 2004, OJ 2004 L 349, 1; Regulation 562/2006/EC of the European Parliament and of the Council of 15 March 2006, OJ 2006 L 105, 1.

⁵⁷ Council Regulation 539/2001/EC of 15 March 2001, OJ 2001 L 81, 1, as modified by the Regulations 2414/2001, 453/2003, 851/2005 and 1932/2006.

⁵⁸ EC Directive 2001/51 of 28 June 2001, OJ 2001 L 187, 45.

⁵⁹ Framework Decision 2002/946/JHA of 28 November 2002, OJ 2002 L 328, 1; EC Directive 2002/90 of 28 November 2002, OJ 2002 L 328, 4.

⁶⁰ EC Directive 2001/40 of 28 May 2001, OJ 2001 L 149, 34; EC Directive 2003/110 of 25 November 2003, OJ 2003 L 321, 26; Council Decision 2004/573 of 29 April 2004, OJ 2004 L 261, 28; EC Directive 2008/115 of 16 December 2008, OJ 2008 L 348, 98.

In such a normative context, external relations and cooperation with third countries appear to be the continuation by other means of the European Union's migration control policy. For many commentators, "partnership with countries of origin is a euphemism for a policy that has so far produced little more than extended the control driven policy, while very few progress has been made in the field of economic development and root causes prevention."⁶¹ A telling example is the Partnership Agreement between the European Union and the members of the African, Caribbean and Pacific Group of States concluded in June 2000 (Cotonou Agreement).⁶² The Cotonou Agreement does not fundamentally depart from the traditional security approach linking development cooperation with migration control.⁶³ Article 13 of the Agreement actually sanctions the traditional approach, by obliging State Parties to readmit "without further formalities" nationals who are illegally present on their respective territories. This clear-cut obligation of readmission starkly contrasts with the other relevant provisions that address the remaining aspects of the migration-development nexus in particularly vague terms. While restating the need for fair treatment and non-discrimination for nationals legally present in the territories of State Parties, Article 13 simply recalls that "the issue of migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership" and stresses that "strategies aiming at reducing poverty, improving living and

⁶¹ *Daphné Bouteillet-Paquet*, *Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States*, *European Journal of Migration and Law* 5 (2002), 359, 360. See also *Sandra Savenex*, *Shifting up and out: The foreign policy of European immigration control*, *West European Politics* 20 (2006), 329, 350; *Boswell* (note 40), 638; *Ana Becerro*, *The External Aspect of Migration Policy* (2004), available at: www.iue.it/RSCAS/WP-Texts/04_05.pdf; *Claude-Valentin Marie*, *Preventing Illegal Immigration: Juggling Economic Imperatives, Political Risks and Individual Rights* (2004), 36; *Delphine Nakache*, *La migration: une priorité stratégique pour l'Union européenne dans le partenariat Nord/Sud* (2003), available at: www.unites.uqam.ca/gric/pdf/DelphineNakacheCIMADE.pdf.

⁶² *Partnership Agreement 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 (Cotonou Agreement)*, 23 June 2000, OJ 2000 L 317, 3.

⁶³ For a similar assessment see notably *Martin Gallié*, *La coopération ACP-CE et l'immigration: de la partie IV du Traité de Rome à l'Accord de Cotonou*, in: *Daniel Dormoy/Habib Slim* (eds.), *Réfugiés, immigration clandestines et centres de rétention des immigrés clandestins en droit international* (2008), 119; *Adam Higazi*, *Integrating Migration & Development Policies: Challenges for ACP-EU Cooperation* (2005); *Henri Labayle/Daphné Bouteillet-Paquet/Anne Weyembergh*, "La lutte contre l'immigration illégale," in: *Philippe de Bruycker* (ed.), *L'émergence d'une politique européenne d'immigration* (2003), 342, 371.

working conditions, creating employment and developing training contribute in the long term to normalizing migratory flows.”⁶⁴

A new step toward a coercive approach to the migration-development nexus was taken at the Seville European Council in 2002 (Seville Conclusions). Echoing the Austrian strategy paper referred to previously, the Spanish and UK Prime Ministers proposed making development aid dependent on third countries’ effort to combat irregular immigration. This initiative was ultimately rejected but the Seville Conclusions maintain a level of conditionality between migration control and development cooperation. While addressing the root causes of migration is alleged to remain “the European Union’s constant long-term objective,” the only concrete decision taken at Seville was to subordinate the conclusion of any future association or cooperation agreement to the obligation of controlling illegal migration.⁶⁵ Moreover, readmission clauses should not only include nationals of third States unlawfully present in a member State, but also encompass other countries’ nationals who can be shown to have passed through the country in question.⁶⁶ In addition to this broad obligation of readmission, the Seville Conclusions adopted a set of indirect sanctions for non-collaborative States with possible measures of retorsion. It decided that “insufficient cooperation” by a third country in combating illegal immigration could “hamper the establishment of closer relations” between that country and the Union.⁶⁷ And, if a third country were to show “an unjustified lack of cooperation in the joint management of migration flows,” the Council could adopt “measures or positions” under the Common Foreign and Security Policy and other European Union policies, “while honouring the Union’s contractual commitments but not jeopardizing development cooperation objectives.”⁶⁸

⁶⁴ See also Art. 80 Cotonou Agreement, “[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.”

⁶⁵ European Council, Presidency Conclusions (Seville Conclusions), 21/22 June 2002, Doc. 13463/02, para. 33.

⁶⁶ *Ibid.*, para. 34. Under the Cotonou Agreement, the obligation of readmission was limited to nationals of State Parties illegally present on their respective territory, whereas the readmission of third countries’ nationals shall be subjected to future negotiations between ACP States and the European Union.

⁶⁷ *Ibid.*, para. 35.

⁶⁸ *Ibid.*, para. 36.

This strong and quite threatening message addressed to developing States did not go unnoticed. The Nadi Declaration adopted in July 2002 by the ACP Heads of State expressed “concern at the turn of discussions on migration in Europe.”⁶⁹ ACP States clearly “reject the implicit link established in the Seville Declaration between immigration and development aid” and affirm that “any attempt to establish restrictive migratory policies will constitute a blow to the spirit of EPAs [economic partnership agreements] and thus be a major source of concern.”⁷⁰ In December 2002, the Commission promptly presented a Communication on integrating migration issues into the European Union’s relations with third countries, together with a report on the effectiveness of financial resources available for repatriation, management of external borders, and asylum and migration projects in third countries.⁷¹ Without renouncing the goal of linking cooperation agreements with migration control, the Commission acknowledges that “migration is not to be seen only as a problem, but also as an essentially positive phenomenon,”⁷² which “can both contribute to the economic development of industrialized countries and have positive effects on the developing countries of origin.”⁷³ From that perspective, “dialogue [with third States] should not limit itself to the question of how address illegal migration and readmission.”⁷⁴

For the European Commission, the objective of stepping up cooperation with third countries in the area of migration calls for a three-pronged strategy: First, a balanced overall approach that addresses the root causes of migratory movements by combating poverty and improving the economic and social situation, second, a genuine partnership on migration stemming from a definition of common interests with third countries, including channels for legal immigration, and third, specific and concrete initiatives to assist third countries in increasing their capacity in the area of migration management, with financial and technical incentives to obtain their cooperation in the negotiation and conclusion of readmission agreements.⁷⁵

⁶⁹ Nadi Declaration on ACP Solidarity in a Globalized World, 18/19 July 2002, Doc. ACP/28/029/02 [Final] (2002), para. 62.

⁷⁰ *Ibid.*, paras. 63–64.

⁷¹ COM (2002) 703 final, 3 December 2002.

⁷² *Ibid.*, 7.

⁷³ *Ibid.*, 14.

⁷⁴ *Ibid.*, 23.

⁷⁵ *Ibid.*, 25, 46.

Although this three-pronged strategy has not been endorsed *mutatis mutandis* by the European Council, it has influenced the evolution of the European policy, which has since gradually moved from an essentially unilateral and securitarian approach to a more collaborative and balanced one. Such a shift has been frequently presented as amounting to a “Copernican turn”⁷⁶ in the migration-development debate. The Commission has itself considered that “it is necessary to move from a ‘more development for less migration’ approach to one of ‘better managing migration for more development.’”⁷⁷ It issued in 2005 a second communication identifying “further steps for improving the impact of migration on development”⁷⁸ (rather than the contrary). The Commission outlined for that purpose four concrete actions: Facilitate the remittances of migrant workers, encourage the contribution of diasporas to the socio-economic development of their country of origin, promote circular migration through adequate forms of temporary migration, and mitigate the negative effects of brain drain.

C. Managing Migration: Better Migration for More Development

Although the root causes approach to migration has not been abandoned as a longer term objective, it has been progressively encapsulated within a new and more positive conception of the migration-development nexus. Within this last approach, migration is considered as a primary fact and an opportunity for development rather than a problem in itself which has to be eradicated. In other words, “[migration] is no longer simply seen as a failure of development but increasingly as an integral part of the whole process of development with a potentially important role to play in the alleviation of poverty.”⁷⁹ From that perspective, the convergence of interests between developing and developed States arguably relies on the management of migration with a view to maximiz-

⁷⁶ *Ferruccio Pastore*, “More development for less migration” or “Better migration for more development?” *Shifting priorities in the European debate* (2003), 3, available at: www.cespi.it/bollMigration/MigSpecial3.PDF.

⁷⁷ COM (2006) 26 final, 25 January 2006, 10.

⁷⁸ COM (2005) 390 final, 1 September 2005, 3.

⁷⁹ Department for International Development/World Bank, *Report and Conclusion, International Conference on Migrant Remittances* (2003), 11. Available at: siteresources.worldbank.org/INTTOPCONF3/Resources/1588024-1152543209834/REPORT_AND_CONCLUSIONS_INTERNATIONAL_CONFERENCE_ON_MIGRANT_REMITTANCES.doc.

ing the gains for both sending and receiving countries. Such a move towards a more collaborative approach of the migration-development nexus (I) does not lead, however, to a complete paradigm shift and, in turn, raises a question as to its legal implications (II).

I. Moving towards a Collaborative Approach of the Migration-Development Nexus in the European Union and Beyond

Contrary to the previous communications of the European Commission, those adopted in 2002 and 2005 have gained a growing recognition by the European Council and member States. The shift initiated by the Commission materialized in the 2005 European Consensus on Development, which offers for the first time a common vision for guiding the action of the European Union in development cooperation, both at member States and Community levels. Member States and European Union institutions agree that they “will strive to make migration a positive factor for development, through the promotion of concrete measures aimed at reinforcing their contribution to poverty reduction, including facilitating remittances and limiting the ‘brain drain’ of qualified people.”⁸⁰

Despite the changing rhetoric, the new focus on migration as a “positive force for development”⁸¹ still coexists alongside the more traditional root causes approach. While acknowledging that “reducing poverty and promoting sustainable development are objectives in their own right,” the joint statement emphasizes that “development is also the most effective long-term response to forced and illegal migration and trafficking of human beings.”⁸² In conjunction with these general endorsements for promoting a better interaction between migration and development, the European Union established a multi-annual financial program for 2004–2008 with a total amount of 250 million Euro (the so-called AENEAS programme) with a view to ensuring closer cooperation of third States in the area of migration control. Its explicit aim is to support third States in their efforts “to manage more effectively all aspects of migratory flows, and in particular to stimulate third countries’ readiness to conclude readmission

⁸⁰ European Council, 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, 22 November 2005, Doc. 14820/05, para. 38.

⁸¹ *Ibid.*, para. 110.

⁸² *Ibid.*, para. 40.

agreements, and to assist them in coping with the consequences of such agreements.”⁸³

Assistance to third States for managing migration has been encompassed under the broader auspices of the Global Approach to Migration adopted by the European Council in December 2005⁸⁴ and complemented in December 2006.⁸⁵ Initially focused on Africa and the Mediterranean region,⁸⁶ the Global Approach to Migration is intended to pave the way for a comprehensive and balanced policy addressing all aspects of migration through a genuine partnership with third countries. Underlying “the importance of closer cooperation with third countries in managing migration flows,” the European Council summarizes the contours of this allegedly new strategy in the following terms:

Specific partnerships on migration with third countries could contribute to a coherent migration policy which combines measures aimed at facilitating well-managed legal migration opportunities and their benefits – while respecting Member States’ competences and the specific needs of their labour markets – with those fighting illegal migration, protecting refugees and tackling the root causes of migration while at the same time impacting positively on development in countries of origin.⁸⁷

Its conclusions of 20 November 2007 on the coherence between migration and development policies further insist on the importance of “harness[ing] the positive links and synergies between relevant policy areas for the benefit of migrants themselves, the EU and partner countries.”⁸⁸ For that purpose, supporting developing countries in strengthening their migration management capacities must be accompanied by compensatory measures, including possibilities of greater mobility through legal immigration channels, facilitation of remittances,

⁸³ EC Regulation 491/2004/EC of 10 March 2004, OJ 2004 L 80, 1, preambular para. 7.

⁸⁴ European Council, Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean, 13 December 2005, Doc 15744/05, Annex.

⁸⁵ European Council, A Comprehensive European Migration Policy, Brussels, Presidency Conclusions, 14/15 December 2006, Doc. 16879/1/06, 6.

⁸⁶ The Global Approach to Migration was extended in June 2007 to the eastern and south-eastern regions neighbouring the European Union: European Council, Council Conclusions on Extending and Enhancing the Global Approach to Migration, 18/19 June 2007, Doc. 10746/07.

⁸⁷ European Council, Presidency Conclusions, 21/22 June 2007, Doc. 11177/1/07, para. 17.

⁸⁸ European Council, Conclusions on Coherence between European Union Migration and Development Policies, 20 November 2007, Doc. 15116/07, para. 7.

promotion of the role of diasporas and alleviation of brain drain⁸⁹ in line with the recommendations formulated by the Commission in 2002 and 2005.

The coexistence of the traditional control paradigm with a new focus on the positive role of migration for development thus paves the way to a more consensual approach based on the mutual interests of both the European Union and third countries. One could argue, however, that the European Union simply drops the stick in favor of the carrot, after having finally realized the limits of its own coercive and Eurocentric approach. Only the method changes, for the ultimate objective remains the same: Associate third countries in controlling access to the European territory. Although this conclusion is partly true, it does not fairly represent the current stage of the migration-development debate for three main reasons. First, contrary to the previous focus on preventing immigration, the opening up of legal channels for economic migration is increasingly considered as an integral part of the managing migration approach. Second, there is a better understanding among States and international organizations of the potentials and limits of the complex interactions between migration and development. Third, the migration-development nexus has truly become a matter of common interest at the global level.

Although the Millennium Development Goals do not mention migration, the United Nations has, since 2003, played a leading role in promoting a mutually beneficial approach of the migration-development nexus between developed and developing states. In 2003 the General Assembly launched the High Level Dialogue on Migration and Development which was convened in New York in September 2006 “to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize its development benefits and minimize its negative impacts.”⁹⁰ In parallel with this initiative, a vast number of stakeholders emphasize “the role that migrants play in promoting development and poverty reduction in countries of origin, as well as the contribution they make towards the prosperity of destination countries.”⁹¹ The positive assumption of the interactions between migra-

⁸⁹ *Ibid.*, paras. 13–19.

⁹⁰ GA Res. 58/208 of 23 December 2003, para. 10 (a). The results of the High-Level Dialogue are recapitulated in: Summary of the High-Level Dialogue on International Migration and Development, Note by the President of the General Assembly, UN Doc. A/61/515 (2006). For a comment see also *Philip Martin/Susan Martin/Sarah Cross*, High-Level Dialogue on Migration and Development, *International Migration* 45 (2007), 7.

⁹¹ Global Commission on International Migration, *Migration in an Interconnected World: New directions for action* (2005), 23. See also: Commission on Population and

tion and development has been restated by many agencies of the United Nations under the specific terms of their respective mandates. For instance, the World Bank has, since 2003, steadily proclaimed the virtues of remittances as “an increasingly prominent source of external funding for many developing countries.”⁹² The Multilateral Framework on Labour Migration, adopted by the International Labour Organization (ILO) in 2005, underlines in a similar vein that “the contribution of labour 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.”⁹³ It has also identified a comprehensive set of guidelines for facilitating the management of labour migration with due respect for the migrants’ rights.⁹⁴

This growing awareness of the positive impact of migration on development has been acknowledged well beyond the confines of the United Nations. Mention can be made of the longstanding work of the International Organization for Migration (IOM) in this field and in particular its International Dialogue on Migration launched in 2001,⁹⁵ as well as the International Agenda for Migration Management adopted in 2004 as a result of a State-owned consultative process initiated by Switzerland.⁹⁶ Among many other and somewhat repetitive initiatives undertaken by regional organizations,⁹⁷ the African Union adopted in 2006

Development (CPD), Resolution 2006/2, International Migration and Development, UN Doc. E/CN.9/2006/9, 10 May 2006.

⁹² World Bank, *Global Development Finance 2003*, 157.

⁹³ ILO, *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Doc. TMMFLM/2005/1 (Rev.). For a comment of the ILO multilateral framework see *Guy S. Goodwin-Gill*, *Migrant Rights and ‘Managed Migration,’* in: Chetail (note 11), 161.

⁹⁴ See also with regard to the UN bodies on human rights: Contribution by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to the High-Level Dialogue on Migration and Development of the General Assembly, UN Doc. A/61/120 (2006); *Mary Robinson*, *Realizing the Rights of Migrants* (2006), available at: www.unitar.org/en/migrationhr.html.

⁹⁵ See notably: IOM, *International Dialogue on Migration*, 90th Council Session: Policy approaches to migration and development, 29/30 November 2005. Doc. MC/INF/281.

⁹⁶ *International Agenda for Migration Management (IAMM)* (2004), available at: <http://apmrn.anu.edu.au/publications/IOM%20Berne.doc>; See in particular: IAMM, 36, para. 13.

⁹⁷ See, for instance, with regard to the Council of Europe: Parliamentary Assembly, Res. 1462 (2005) Co-development policy as a positive measure to regulate migratory flows, 3 October 2005; European Committee on Migration, Recommendation CM/Rec (2007)10 of the Committee of Ministers to member States on co-development and migrants working for development in their countries of origin, 12 July 2007.

an African Common Position on Migration and Development, which deals with various aspects of the issue. It notably acknowledged that “it is necessary to establish a common strategy for the management of migration which associates countries of origin, transit and destination, in order to find balanced solutions that take into account the interests of the countries concerned.”⁹⁸

For that purpose, two interregional conferences were organized between African and European States in Rabat in July 2006 and then in Tripoli in November of the same year. The Rabat Declaration on Euro-African Partnership for Migration and Development starts by acknowledging that “international migration has a positive effect on the host country and on the country of origin when such flows are well managed.”⁹⁹ Signatory States agreed that the Euro-African Partnership should address the concerns and interests of all the involved countries, such as “making better use of the potential of legal migration and its beneficial effects on the development of countries of origin and host countries,” “enhancing the capacity of countries of origin and transit and destination to manage migratory flows in their entirety,” “implementing an active policy of integration for legal migrants and combating exclusion, xenophobia and racism,” and “fighting against illegal migration, including readmission of illegal migrants, and trafficking in human beings.” A few months later, the Joint Africa-European Union Declaration on Migration and Development adopted at Tripoli restated the need for a balanced and comprehensive partnership based on the above-mentioned common matters of interest but enlarged to other related areas, including the protection of refugees and the broader issues of peace and security.¹⁰⁰

As a result of this unprecedented enthusiasm, the United Nations Secretary General proposed in September 2006 at the High Level Dialogue Meeting the establishment of a Global Forum on Migration and Development. Contrary to his initial proposal, the Global Forum has been established outside the United

⁹⁸ Executive Council of the African Union, African Common Position on Migration and Development, Doc. EX.CL/277 (IX), July 2006, para. 5. See also Brussels Declaration on Asylum, Migration and Mobility, 13 April 2006, Doc. ACP/28/025/06 Final (2006).

⁹⁹ The text is available at: www.maec.gov.ma/migration/Doc/RABAT%20DECLARATION_EN.pdf.

¹⁰⁰ The text of the joint Declaration is available at: www.unhcr.org/refworld/docid/47fdfb010.html See also the Africa-EU Partnership on Migration, Mobility and Employment adopted in December 2007, available at: www.africa-eu-partnership.org/thematic.php?thematic=migration.

Nations as a State-driven process.¹⁰¹ Its *raison d'être* is to continue and strengthen the dialogue at a multilateral level through an informal and voluntary consultation open to all member States of the United Nations.¹⁰² The goals of the Global Forum on Migration and Development are to enhance inter-State cooperation and to foster practical and action-oriented outcomes in the multifaceted areas of migration and development.¹⁰³ Although such objectives require a minimum of coordination at both the normative and policy levels, the Global Forum is not intended to be a decision-making process. It does not produce negotiated outcomes, surprisingly not even in the form of a non-binding declaration or resolution. Despite the lack of consensus in favor of a norm-setting negotiation, intergovernmental consultations were deemed to be held on a lasting and very regular basis. The Global Forum is accordingly convened every year, which is quite unusual for this kind of worldwide consultation.¹⁰⁴

II. The Way Forward: Crossing the Bridge from Rhetoric to Reality

The vast number of multilateral and regional initiatives carried out since 2003 has facilitated the emergence of a consensus among States and within intergovernmental organizations. Given the great diversity of the stakeholders and interests involved in this issue, one might be surprised to know that it is nevertheless possible to identify a common understanding on what should be the core components of a balanced and holistic approach linking migration to development. The continued relevance of better targeted development policies on poverty reduction and unemployment has been acknowledged in various intergovernmental fora as a way to address the root causes of migration. But this traditional approach has been enriched by four interrelated core

¹⁰¹ International Migration and Development – Report of the Secretary-General (note 4), 10; GA Res. 62/270 of 20 June 2008.

¹⁰² Summary of the High-Level Dialogue on International Migration and Development (note 90), 5.

¹⁰³ *Ibid.* See also Global Forum on Migration and Development (GFMD), Report of the first meeting of the Global Forum on Migration and Development, 9–11 July 2007, 28.

¹⁰⁴ The first meeting took place at Brussels in July 2007 and focused on three themes for discussion: human capital development and labor mobility; remittances and other diaspora resources; policy and institutional coherence and partnership. The second meeting was hosted by the Philippines in October 2008 around one central theme: protecting and empowering migrants for development, and the third such meeting will be organized in Greece in 2009.

components for strengthening the positive impact of migration on development.¹⁰⁵

First, although remittances are not considered as a substitute for development assistance (notably because of their private-owned nature), they are regarded as “the most tangible benefit of international migration for countries of origin.”¹⁰⁶ States accordingly concur that remittances should be facilitated, through faster, cheaper and safer transfers, alongside the promotion of the role of diaspora in co-development projects and other productive investments in their countries of origin. Second, the need to minimize the negative consequences of highly skilled emigration from developing countries is also widely acknowledged. The most common proposals to tackle this last issue are to foster the mobility and temporary return of skilled workers in their countries of origin and to adopt codes of conduct for disciplining recruitment in critical sectors such as health-care and education. Third, the most promising but also challenging component of the migration-development nexus relies on the promotion of “legal migration as an opportunity for development of both origin and destination countries,”¹⁰⁷ through the adoption of temporary labor migration schemes.¹⁰⁸ Temporary migration is deemed to present the greater potential for the purpose of fulfilling the short-term market needs of low-skilled workers in receiving countries, while providing legal alternatives to irregular migration and improving the development impact of migration (partly because temporary migrants are known to remit more than permanent migrants). Promoting legal channels of temporary labor migration is commonly held to work in tandem with the fight against irregular migration through closer inter-State cooperation in border control and readmission of those who overstay their permitted period of residence and other undocumented migrants. Fourth, as a way to mitigate the usual utilitarian arguments about the economic gains of migration, “respect for fundamental rights and freedom of all migrants [is] considered essential for

¹⁰⁵ Because of the lack of space, it was not possible to refer specifically to all the intergovernmental documents already mentioned for each component.

¹⁰⁶ Summary of the High-Level Dialogue on International Migration and Development (note 90), 3.

¹⁰⁷ GFMD (note 103), 16.

¹⁰⁸ Temporary migration is labelled “circular migration” for the twofold purposes of insisting on the mobility – and arguably flexibility – of foreign work force and of avoiding the contentious souvenir of the guest-worker programs carried out during the 1960’s in western Europe.

reaping the full benefits of international migration,”¹⁰⁹ notably in combating racism, discrimination, exploitation and trafficking of migrants.

However, despite this growing consensus, one cannot help but notice that the migration-development nexus is still struggling to move from rhetoric to reality. Although intergovernmental dialogue may be considered a virtue in itself, it is doubtful that progress can be achieved in a sustainable and coherent way by continuing to ignore the normative implications of the migration-development nexus. The most efficient and suitable method would be to convene a United Nations conference on migration and development, as has been regularly proposed since 1994. Such an international conference seems particularly appropriate in so far as the multiple facets of the migration-development nexus are interrelated and accordingly require a comprehensive treatment through a close cooperation between origin and destination countries. For the moment however, there is no consensus among member States on the desirability of convening such a conference,¹¹⁰ especially because of the reluctance of the European Union and other western States (such as the United States and Canada).¹¹¹

In the absence of an international conference specifically devoted to migration and development, another possible avenue would be to implement and reinforce the existing legal framework. The current multilateral framework governing international migrations relies on two distinct but complementary normative pillars. The first is constituted by the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (Migrant Workers Convention¹¹²), which primarily governs the legal status of migrant

¹⁰⁹ Summary of the High-Level Dialogue on International Migration and Development (note 90), 3.

¹¹⁰ Between 1995 and 2002, a total of 78 Governments have expressed their views regarding the convening of a United Nations conference on international migration and development. Although the majority of the responding Governments appeared to be in favour of holding a conference, there was a lack of consensus on its objectives and the responses received from the Governments represent 41 per cent of the full membership of the United Nations. See International Migration Report 2002, UN Doc. ST/ESA/SER.A/220 (2002), 37.

¹¹¹ See for instance the debates preceding the adoption of the GA Res. 62/270 of June 2008, reprinted in: 109th plenary meeting, Official Records, UN Doc. A/62/PV.109 (2008).

¹¹² Migrant Workers Convention, GA Res. 45/158 of 18 December 1990. For an analysis of the drafting process of the convention and its provisions, see *Ryszard Cholewinski*, *Migrant Workers in International Human Rights Law: Their Protection in*

workers in States of destination. The second pillar relies on the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) and in particular its Mode 4,¹¹³ which is devoted to the temporary entry of workers in the context of services provision. Although these two core instruments address only part of the whole spectrum of the migration-development nexus, they provide a general and flexible framework whose potential remains largely unexplored and underestimated.

Concerning the first instrument, the Migrant Workers Convention entered into force in 2003 but still falls well short of universality in terms of ratification. It is currently ratified by only 40 States and no western countries have yet ratified it.¹¹⁴ Obstacles to the ratification of the Migrant Workers Convention do not seem insurmountable. They largely result from a misconception of what the provisions of the Convention actually entail.¹¹⁵ The sovereignty of States to decide whether to admit foreigners into their territories is indeed not affected by the Convention, which focuses on the treatment of migrant workers and their families.¹¹⁶ Moreover the convention cautiously distinguishes between two categories of migrants on the basis of their legal status in the States of destination. A first set of fundamental rights applicable to *all* migrant workers, including those who are undocumented, basically restates and sometimes specifies the civil and political rights as well as the economic and social rights

Countries of Employment (1997).

¹¹³ General Agreement on Trade in Services (Annex 1B to the WTO Agreement), 15 April 1994, UNTS 1869, 183. For a comprehensive assessment see *Joel P. Trachtman*, *The International Law of Economic Migration: Toward the Fourth Freedom* (2009).

¹¹⁴ The vast majority of State parties are sending countries and very few (such as Argentina, Morocco and Libya) are countries of destination or of transit.

¹¹⁵ *Euan MacDonald/Ryszard Cholewinski*, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* (2007); *Carla Edelenbos*, *The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, *Refugee Survey Quarterly* 24 (2005), 97; *Antoine Pécoud/Paul de Guchteneire*, *Migration, human rights and the United Nations: an investigation into the low ratification record of the UN Migrant Workers Convention* (2004).

¹¹⁶ According to the Migrant Workers Convention (note 112), Art. 79, "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families." Art. 35 also restates in the same vein that the convention shall not be interpreted as implying the regularization of migrant workers or members of their families who are in irregular situation.

which are already found in other more general human rights instruments.¹¹⁷ By contrast, regular migrant workers benefit from a broader range of rights, such as equality of treatment with nationals in access to housing (Article 43) or family reunion which is worded, however, as a rather weak obligation of State parties “to take measures that they deem appropriate [...] to facilitate the [family] reunification” (Article 44(2)).

The migrant workers convention is particularly relevant to three specific aspects of the migration-development nexus. First, remittances are explicitly acknowledged as the right for all migrant workers to transfer their earnings and savings into their countries of origin (Article 32), while States have the obligation to facilitate such transfers for migrant workers who are in regular situation (Article 47). Second, the Migrant Workers Convention is a comprehensive instrument which notably governs temporary labor migration with some adjustments for seasonal workers (Article 59), project-tied workers (Article 61) and other specified-employment workers (Article 62). Third, echoing the growing concern for better managed migration, the Convention addresses the need for consultation and cooperation between States to ensure that migration takes place in sound, equitable and lawful conditions (Article 64). This obligation of cooperation concerns, among others, the orderly return of migrant workers (Article 67(1)), their reintegration in countries of origin (Article 67(2)), as well as the prevention and elimination of irregular migration (Article 68), including the imposition of sanctions on those who exploit undocumented migrants such as traffickers and employers. By contrast, however, the Migrant Workers Convention does not contain any provision upon admission conditions.

The only multilateral instrument addressing this sensitive issue is the GATS and its Mode 4, which was included at the request of developing States during the Uruguay Round. Its potential for both developed and developing countries became apparent since a World Bank simulation has estimated that a modest increase of 3 % of both skilled and unskilled temporary workers in industrial countries in 2001–2025 would generate a global gain superior to those obtained

¹¹⁷ Some provisions are however at odds with general human rights instruments. For instance, contrary to migrants who are in regular situation, the right to form trade unions is not recognized to undocumented migrants and their right to health is circumscribed to emergency medical care only. See *Vincent Chetail/Gilles Giacca, Who Cares? The Right to Health of Migrants*, in: Mary Robinson/Andrew Clapham (eds.), *Realizing the Right to Health* (2009), 230.

from the total trade liberalization.¹¹⁸ Although Mode 4 only covers labor migration that is related to the supply of services, Article I:2(d) of the GATS defines it in broad terms as “the supply of a service [...] by a service supplier of one Member, through presence of natural persons of a member in the territory of another Member.” It thus covers service suppliers at all skills and for any occupations. The Annex on movement of natural persons supplying services, which is part of the Agreement, specifies that it applies to individuals who are “employed by a service supplier of a Member” as well as to individuals who are “service suppliers of a Member” (*i.e.* self-employed suppliers).

The relatively broad scope of Mode 4 is nevertheless mitigated by two substantial qualifications. First, the GATS only applies to the temporary movement of persons for the purpose of supplying a service. According to the Annex, it does not apply to “measures affecting natural persons seeking access to the employment market” and those “regarding citizenship, residence or employment on a permanent basis.” The temporary presence is thus negatively defined in vague terms as being non-permanent, the determination of its exact meaning being left to member States. Second, the Annex adds that the GATS “shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, [...] provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.”¹¹⁹ Whatever the exact scope of this delicate balancing exercise, the effectiveness of the Mode 4 depends on each Member’s specific commitments, subject to any terms and conditions specified therein. While Mode 4 is applicable to both unskilled and skilled labor, specific commitments are generally limited to the highly skilled, whose impact on development is rather counterproductive. In short, although the GATS jurisdiction over temporary movement of individuals “may become a fertile source of migration law norms” and “provides an opportunity for the WTO to adopt a more people-centered approach to trade and development,”¹²⁰ much more remains to be achieved in that direction,

¹¹⁸ World Bank, *Global Economic Prospects. Economic Implication of Remittances and Migration* (2006), 41.

¹¹⁹ A footnote to this proviso makes clear that member States may require visas for nationals from some countries and not from others.

¹²⁰ *Steve Charnovitz*, *Trade Law Norms on International Migration*, in: Alexander T. Aleinikoff/Vincent Chetail (note 11), 248, *ibid.*, 252. See *contra: Tomer Broude*, *The WTO/GATS Mode 4, International Labour Migration Regimes and Global Justice* (2007), available at: ssrn.com/abstract=987315.

particularly by enlarging specific commitments to broader categories of persons for the common benefit of developed and developing countries.¹²¹

As a result of the continued reluctance of States – and in particular western States – to commit themselves in multilateral instruments, a myriad of bilateral labor agreements have sprung up in the past decades.¹²² The OECD countries alone have entered into more than 176 bilateral agreements in 2004, a fivefold increase since 1990.¹²³ However, existing bilateral agreements are extremely scattered covering a variety of issues (social security entitlements, admission of seasonal and contract workers, exchange of trainees and working holidays workers, *etc.* ...). Moreover, although bilateral treaties related to the admission of migrant workers serve destination country interests in meeting labor needs and managing irregular migration, they rarely include specific provisions on development.

Given that the current normative context is plagued by the absence of an effective multilateral framework and the proliferation of heterogeneous bilateral agreements, the minimalist option for fostering the linkage between migration and development would be to adopt a treaty model of bilateral labor agreement which takes into account the various aspects of the issue. In fact, such a treaty model already exists since 1949 even if it was not designed in the specific context of the migration-development nexus. Recommendation No. 86 concerning migration for employment, adopted under the auspices of the ILO, contains in an annex a Model Agreement on Temporary and Permanent Migration for Employment. This comprehensive model covers the whole migration process from the selection of candidates to their return, and includes consideration of their living and working conditions in the destination State. It relies on a closed consultation between the two State parties for instance in respect to the determination of the requirements, numbers and occupational

¹²¹ WTO Secretariat, *International Migration and Development – A Perspective from the WTO*, UN Doc. UN/POP/MIG-7CM/2008/05 (2008); *Gabriela Wurcel*, *Movement of Workers in the WTO Negotiations: A Development Perspective* (2004), available at: www.gcim.org/attachements/GMP%20No%2015.pdf.

¹²² On the compatibility of bilateral agreements with WTO law, see *Marion Panizzon*, *Bilateral Migration Agreements and the GATS: Sharing Responsibility versus MFN Reciprocity* (2008), available at: www.ssrn.com/link/SIEL-Inaugural-Conference.html; *Roman Grynberg/Veniana Qalo*, *Migration and the World Trade Organization*, *Journal of World Trade Law* 41 (2007), 751.

¹²³ OECD, *Migration for Employment. Bilateral Agreements at a Crossroads* (2004), 12.

categories of migrants to be recruited (Article 5), the coordination of education and vocational training (Article 9) or the facilitation of remittances (Article 13).

This model agreement could be amended within the ILO with a specific emphasis on temporary labor migration and its impact on development. Governments are already able to benefit from a “Compendium of good practices policy elements in bilateral temporary labour arrangements.”¹²⁴ It has been established in October 2008 by the Moroccan and Spanish Governments in collaboration with IOM, ILO and OSCE as a follow-up to the first meeting of the Global Forum on Migration and Development. Although this Compendium is still a work in progress and needs further consolidation, the declared objective is “to arriving at future arrangements that contribute to development and provide access to foreign labour markets, notably for lower skilled workers, while controlling irregular migration and protecting the human and social rights of migrants.”¹²⁵

D. Conclusion: While Waiting for Godot – Legalizing Migration for More Development

The migration-development nexus has evolved significantly in recent years both in terms of substance and tone. After several decades of criminalizing immigrants and portraying them as potential terrorists, the focus on migration as a positive force for development opens new opportunities to rethink the movement of peoples in more rational and less emotional terms.

Notwithstanding the current wave of optimism, one should keep in mind that “migration is neither a panacea for economic development nor the opposite.”¹²⁶ The migration-development nexus is rather a parcel of the broader migratory issue. Its virtue is essentially pedagogic by highlighting the transnational nature of migration and the correlative need for international cooperation. States are

¹²⁴ The Compendium and its Analytical Paper are available at: www.iom.int/jahia/webdav/shared/shared/mainsite/published_docs/studies_and_reports/analytical_paper_for_compendium.pdf. See also OSCE/IOM/ILO, *Handbook on Establishing Effective Labour Migration Policies*. Mediterranean edition (2007), 189.

¹²⁵ See the Analytical Paper (note 124), 2.

¹²⁶ *J. Edward Taylor*, *International Migration and Economic Development* (2006), 20, available at: www.un.org/esa/population/migration/turin/Symposium_Turin_files/P09_SYMP_Taylor.pdf.

more aware that migration is a matter of common interest which cannot be managed on a purely unilateral basis. But they still have to learn to collaborate on an issue which has been traditionally held as a core component of their own sovereignty.

However, overemphasizing the linkages between migration and development also entails a recognition of its own shortcomings. The growing confusion between the migration and development agendas tends to transfer the responsibility of migration control from immigration countries to countries of emigration, while the onus of development is surreptitiously moved from the countries of origin to the migrants themselves. Migrants may thus become the collateral victims of this dual shift of responsibility. In this regard, it is worth mentioning that the right to development, as notably proclaimed by the General Assembly in its Declaration on the right to development,¹²⁷ is curiously absent from the migration-development debate. Alongside the obvious risks of manipulation, the most telling shortcoming relies on the persistent gap between the rhetorical posture of States and their concrete actions for strengthening the impact of migration on development.

Although the multilateral approach offers greater potential than piecemeal bilateral agreements, this last option seems the preferred course of action, notably within the European Union. This has been confirmed by the European Pact on Immigration and Asylum adopted in September 2008 at the initiative of the French presidency. The Pact endorses the new orthodoxy of the migration-development nexus by restating that:

Any harmonious and effective management of migration must be comprehensive, and consequently address the organization of legal migration and the control of illegal immigration as ways of encouraging the synergy between migration and development.¹²⁸

The European Council agrees for that purpose to:

[C]onclude EU-level or bilateral agreements with the countries of origin and of transit containing, as appropriate, clauses on the opportunities for legal migration adapted to the labour market situation in the Member States, the control of illegal

¹²⁷ GA Res. 41/128 of 4 December 1986. See also *Bhupinder S. Chimni*, *Development and Migration*, in: Aleinikoff/Chetail (note 11), 255.

¹²⁸ European Council, *European Pact on Immigration and Asylum*, 24 September 2008, Doc. 13440/08, 2.

immigration, readmission, and the development of the countries of origin and of transit.¹²⁹

However, promises of legal migration opportunities as a counterpart to third States' commitments to fight irregular migration have still to be fulfilled. To date, the existing framework designed by the European Council¹³⁰ and the European Commission¹³¹ for developing bilateral mobility partnerships with third countries rather "confirms the enduring predominance of migration control elements and the near absence of development goals."¹³² A further limitation of opening legal migration opportunities results from the primary if not exclusive competence of member States in that field. Against such a background the four directives proposed by the European Commission as part of its Policy Plan on Legal Migration focus on very limited and selected categories of migrants (namely skilled workers, seasonal workers, intra-corporate transferees and remunerated trainees), whose impact on development remains dubious.¹³³

¹²⁹ *Ibid.*, 13.

¹³⁰ European Council, Conclusions on mobility partnerships and circular migration in the framework of the global approach to migration, 2893th General Affairs Council Meeting, 10 December 2007.

¹³¹ COM (2007) 248 final, 16 May 2007.

¹³² *Lavenex/Kunz* (note 37), 451. For a similar conclusion see also *Piyasiri Wickramasekara*, Globalization, International Labour Migration and the Rights of Migrant Workers, *Third World Quarterly* 29 (2008), 1257; *Elizabeth Collett*, The 'Global Approach to Migration: Rhetoric or Reality?' (2007), available at: www.epc.eu/TEWN/pdf/339002765_Global%20Approach%20to%20Migration.pdf; *Sergio Carrera*, Building a Common Policy on Labour Immigration. Towards a Comprehensive and Global Approach in the EU? (2007), available at: shop.ceps.eu/BookDetailphp?item_id=1457; *Meng-Hsuan Chou*, EU and the Migration-Development Nexus: What Prospects for EU-Wide Policies? (2006), available at: www.compas.ox.ac.uk/publications/Working%20papers/WP0637-Chou.pdf. For instance, out of nine commitments to be met by third countries spelled out in the Commission communication on mobility partnership, eight relate to effective border management, readmission and irregular migration and the ninth covers efforts by third countries to reduce migration pressures by the promotion of productive employment and decent work. By contrast the "commitments" of the European Union and member States belong to the range of possibilities and are written in discretionary terms. The two first pilot partnerships concluded in 2008 with Moldova and Cape Verde do not fundamentally change this control-oriented pattern. See Joint Declaration on a Mobility Partnership between the European Union and the Republic of Moldova; European Council, Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde, 21 May 2008, Doc. 9460/08 ADD 1 & ADD 2.

¹³³ COM (2005) 669 final, 21 December 2005. To date only the proposal of directive for highly qualified workers has been adopted by the European Commission: COM (2007) 637 final, 23 October 2007.

Furthermore, such a normative context begs the question of whether the European Union is both capable and willing to foster the synergies between migration and development.

While it is increasingly asserted that “the free movement of people would be the most dramatic way to signal a commitment to reversing underdevelopment,”¹³⁴ State practice makes abundantly clear that the driving force of the migration-development nexus relies on the internationalization of migration control under the banner of co-management and shared responsibility. Experience has proved, however, that associating countries of origin and transit in the management of migration requires more than simply exporting border control to the South. The credibility test for the managing migration approach hinges on its ability to legalize labor migration, and in particular “low-skilled migration [which] has the largest potential to reduce the depth and severity of poverty in communities of origin.”¹³⁵ If legalizing migration is not taken seriously, States are bound to repeat the mistakes of the past:

In the relationships between the developed North and the developing South, the biggest failure has not been the decline in aid programmes, which are trivial in the sum of things, or the failure to open markets quickly enough, or transfer technology, but in consistently denying the right to work to the willing and eager workers of the developing countries. In doing this, the developed countries have reduced the prosperity both of their own people and the Third World.¹³⁶

As a result of the recent and unprecedented mobilization of the international community, the migration-development nexus is clearly at the crossroads. States are now more conscious than ever of its promises and perils. If they fail to legalize labor migration properly, the managing migration rhetoric will be remembered as yet another missed opportunity in the long and turbulent history of North-South relations.

¹³⁴ *Ronaldo Munck*, *Globalization, Governance and Migration: An Introduction*, *Third World Quarterly* 29 (2008), 1239. See also among the abundant literature *Antoine Pécoud/Paul de Guchteneire* (eds.), *Migration without Borders. Essays on the Free Movement of People* (2007); *Satvinder Singh Juss*, *International Migration and Global Justice* (2006), 297; *Kevin R. Johnson*, *Open Borders?*, *UCLA Law Review* 193 (2003), 193; *Catherine Wihtol de Wenden*, *Faut-il ouvrir les frontières?* (1999).

¹³⁵ *International Migration and Development – Report of the Secretary-General* (note 4), 13.

¹³⁶ *Nigel Harris*, *Thinking the Unthinkable: The Immigration Myth Exposed* (2002), 130.

