INTRODUCTION

MIGRATION, GOVERNANCE AND HUMAN RIGHTS: CONTEMPORARY DILEMMAS IN THE ERA OF GLOBALIZATION

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This article posits that evolution of law and its application in the field of migration are inseparable from the economic and political context in which they exist. This exposé first describes the contemporary dilemmas of the rule of law and human rights as a dialectic with evolving economic and political challenges driven by the dynamics of globalization. It highlights issues of refugee protection, decreasing solidarity with uprooted people, exploitability of migrants in conditions of deregulatory globalization, the impact of the crisis, and questions of economic and social development. The article underlines the applicability of international human rights and labour standards, and briefly reviews the principal international and regional standards that form the basis for a “rights-based approach” necessary to address the challenges posed by migration today. The article then discusses contemporary policy conundrums, including arguments and approaches constraining implementation of legal standards. It concludes by proposing a “ten-point programme of policy and action priorities” for enhancing effective governance of international migration.

1. Introduction: protecting refugees and migrants, regulating migration and harmonizing international relations

Human migration – the movement of people across borders – has emerged as one of the most visible and contentious concerns of governments, and of governance, today. While migration is both a permanent feature of human history and generally contributes to economic and social development, it raises a multitude of challenges for economic development and welfare, for social cohesion, and thus for governance.

The displacement of people and their arrival in other lands inevitably reflect – and pose – conflicts of needs and interests. As discussed below, factors motivating or compelling migration often derive from political, social, and economic

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conflicts. While migration offers the prospect of escaping conflict, untenable, or unproductive situations, the arrival of people to other territories requires accommodating them alongside existing populations, responding to basic needs, respecting fundamental rights, and integrating them in labour markets to incorporate them in productive activity.

This examination of challenges and responses to governance of migration takes as its premise that the rule of law is the fundamental grounding of governance. For the purpose of this article, governance means assuring just rule, arbitrating conflict of interests, sustaining socio-economic order, and implementing democracy.

A government exists to provide for economic, political, and social order, regulate relations and mediate conflicts among different interests, ensure responses to economic and social needs, foster enterprise, provide for infrastructure, preserve integrity of territory, and arbitrate exchange and relations with other States. To accomplish these, the State requires compliance and cooperation by those subject to its authority. While compliance can be obtained, at least in form and for limited periods of time, through exercise of force and compulsion, in the long term obtaining cooperation based on democratic participation, protection of individual freedoms and rights, and provision of responses to the basic needs of all is far more sustainable.

The regime of international law, and the existing constellation of international institutions, emerged through dialogue and negotiation to obtain a rational international order and to provide means and support for governance of individual States comprising the international community of nations. International law emerged and evolved addressing a broad range of governance issues. Earlier efforts focused on regulating conflict between States, the Geneva humanitarian conventions being emblematic.

The development experience of Western industrialized countries showed that reducing exploitation and ensuring equality of treatment were essential elements for building prosperity, social cohesion, and democratic governance of societies. International instruments explicitly establishing principles and defining norms for protection of human and labour rights began to emerge at the beginning of the twentieth century.

The central notion of human rights is:

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\ldots \text{the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic and cultural life} \ldots \text{Further, human rights implies that these principles are somehow present in the very fact of our common humanity.} \ldots
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Universal principles of human rights implemented in the rule of law provide the foundation for governance – governance of nations, of community relations, and of international migration. This notion reflects historical experience that social

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cohesion and social peace can only be sustained under conditions of democratic rule, which in turn requires the accountability, the credibility, and the enforceability provided under the rule of law.

The international legal regime and its attendant institutions presume that individual States, while maintaining sovereignty over internal affairs pertaining to their territory, are nonetheless accountable to upholding certain principles and standards in the exercise of national governance. This reconciliation of sovereignty with universality has been central to the evolution of human rights law, to many other international standards, to the development of the United Nations system, and to the elaboration of regional legal regimes and political institutions, such as in Europe, the Americas, and Africa.

The rule of law in most nation States has evolved accordingly with reference to international standards in setting parameters for accomplishing the tasks and roles of governance, and in parallel of obtaining and reinforcing the participation, cooperation, and compliance of populations.

International norms addressing refugees and migrants began to emerge nearly a century ago. The need to provide for protection of workers outside their own countries emerged early in this process; it was explicitly raised in the Treaty of Versailles that ended the First World War (and established the Constitution of the International Labour Organization (ILO)); the first specific international treaty on migrant workers was drawn up in the 1930s and the ILO Migration for Employment Convention (No. 97) (ILO Convention 97) was adopted in 1949, shortly after the Universal Declaration of Human Rights (UDHR) emerged in 1948. Coincidentally, but not necessary deliberately in parallel, instruments and mechanisms to provide for recognition and protection of refugees emerged also shortly after the end of the First World War. The development and application of this normative regime on migration is elaborated below.

The evolution of law and its application are inseparable from the economic and political context in which they exist. This expose thus begins by describing the contemporary dilemmas of the rule of law and human rights as a dialectic with evolving economic and political challenges driven by the dynamics of globalization. It briefly reviews the principal international and regional standards – which are elaborated in more detail in other contributions to this special issue – that form the basis for a “rights-based approach” necessary to address the challenges posed by migration today. The article then discusses some of the policy conundrums and concludes by outlining priorities for enhancing law and policy in the migration field.

2. Migration today: challenges for protection and governance

2.1. Refugees and asylum
It is increasingly difficult to clearly differentiate motivational factors and protection needs between “refugees” and “migrants” in today’s globalized world.
Nonetheless, given the emergence and evolution of a specific legal regime for recognition and protection of refugees, and the evolution of distinct institutional systems, this section highlights from a migration perspective particular dilemmas for refugee protection, and the refugee regime itself.

Mixed migration is a term used to describe the phenomenon whereby refugees and asylum-seekers move alongside different categories of persons across international borders, usually in an irregular manner, using the same channels or routes and means of transport, often with the assistance of migrant smugglers, and which may also involve human trafficking. Such movements are particularly visible in the “boat people” who cross the Mediterranean (towards Malta, the Sicilian island of Lampedusa, or Greece), the Eastern Atlantic (towards the Canary Islands) or across the Gulf of Aden from the Somali coast to Yemen. The perilous conditions under which such crossings take place and the human tragedies that occur attract considerable media attention.

In recognition that such movements include persons who may have international protection needs, the United Nations High Commissioner for Refugees (UNHCR) adopted its 10-Point Plan of Action on refugee protection and mixed migration, and has since organized regional workshops, funded by the European Commission and in cooperation with other agencies such as the International Organization for Migration (IOM) and the ILO, to ensure its implementation across the world. In addition to persons seeking protection and refugees moving from their first country of asylum to what they consider as more attractive locations in terms of protection against refoulement (that is, secondary refugee movements), mixed migration may contain other vulnerable groups, such as victims of trafficking (who may or may not qualify for international protection), unaccompanied minors, stranded migrants, victims of gender-based violence or trauma, and persons with particular health care needs. The provision of direct assistance to all such persons—who often arrive at their destination in an abject condition—and identification of their different protection needs are paramount. The IOM has highlighted the need for a

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3 Such media attention, however, also tends to detract from the reality that most irregular migration, especially to Europe, is of a different nature with people arriving lawfully and then staying beyond the period allotted in their visa.


comprehensive approach to the challenges posed by mixed migration: recognizing the full range of individuals involved and adopting measures across the whole migration “lifecycle”, including: informational and capacity-building activities in countries of origin and transit; provision of direct assistance on arrival to meet immediate needs; and assistance for return to and reintegration in home countries.  

There have also been calls for the adoption of a “soft law framework”, based on the approach taken in the Guiding Principles on Internal Displacement, to articulate standards applicable to particularly vulnerable groups of irregular migrants and to establish a system for collaboration between the principal stakeholders (that is, governments, international agencies and non-governmental organizations (NGOs)). The challenges involved in mixed migration are likely to multiply in the coming years with the anticipated growing impact of environmental degradation and climate change on displacement and migration. The concept of mixed migration and the responses to the phenomenon are discussed in the article by Johannes van der Klaauw.

While mixed migration probably presents the most visible challenge to the international refugee protection regime in today’s globalized world, there is increasing reluctance among many countries to fulfil the long-standing humanitarian obligations to which they have signed up for at the international or regional level. The practice of interception on the high seas without providing for the proper consideration of asylum claims and the return of such persons to countries without functioning refugee determination systems constitute a clear violation of the fundamental principle of non-refoulement, which is found not only in the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention), but exists independently in customary international law. Access to an asylum determination procedure is greatly hindered by visa restrictions in many parts of the developed world forcing refugees to use the services of unscrupulous intermediaries to travel clandestinely or on the basis of false documents. Even when they reach their destination, third country rules, such as those operating in the European Union (EU) under the Dublin II Regulation, mean

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that they can be returned to another part of the EU where the asylum determination process is less developed and where their chances of succeeding in a protection claim diminish considerably. The Dublin II Regulation has also resulted in countries on the EU’s periphery such as Malta adopting draconian mandatory detention measures in response to the arrival of asylum-seekers on its shores, which, while hardly condonable, have given greater urgency to the debate on the need to create a proper system of responsibility sharing for refugee arrivals in the EU. Finally, the debate continues about how best to meet protection needs in first countries of asylum, which are often developing countries with limited means that either struggle to meet the needs of refugee populations within their borders or are only willing to provide basic safeguards, such as non-refoulement, while neglecting their obligations to protect economic and social rights. Even though assistance of the international community for such populations continues to be provided under the mandate of UNHCR, the traditional three durable solutions of voluntary repatriation to the country of origin, integration in the asylum country, and resettlement in a third country are not set in stone, and (temporary) labour migration, particularly in situations of protracted forced displacement, enabling refugees to lead more dignified and self-sustained lives, is also being discussed as a possible fourth “durable solution”.

2.2. Decreasing solidarity and protection

Decreasing solidarity and protection is occurring not only in respect of refugees and asylum-seekers — the group of human beings traditionally perceived to be “in most need of protection” by the international community given the lack of any possible protection in their own countries where they fear threats to their lives or freedom because of individualized persecution or other circumstances such as civil war, generalized violence, and breakdown of public order — but also in respect of all migrant groups. Increasingly, however, refugees are hardly distinguishable from “ordinary migrants”, not only in a factual sense, as in the mixed migration situations described above, but also in a conceptual sense in cases where they have made a formal application for international protection but are not portrayed as such by uninformed or even hostile political groupings and media. Nevertheless, there is also growing recognition and advocacy — on the part of civil society actors in particular — for the most vulnerable migrant groups,

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namely those in irregular situations. Indeed, such migrants are the “quintessential product” of an inequitable economic globalization which promotes the freer movement of capital, goods and services, while restricting or even suppressing the movement of human beings. This suppression of movement represents a constraint on labour mobility that forces migrants into low-skilled jobs in the more affluent parts of the world, impedes their ability to obtain equality of treatment and decent work, and pushes them into unfair competition with national workers. As a result, demand for a considerable number of jobs is being met by an irregular labour force. In recognition of this reality and given that most migrants in irregular situations are in employment, their access to their universally recognized human and labour rights is becoming a key issue. It is hardly surprising, therefore, that the work of the NGO, the Platform for International Cooperation on Undocumented Migrants (PICUM), started with the publication of “Books of Solidarity”, which highlighted the assistance being provided in a number of European countries by civil society organizations to those “hidden” persons in the midst of national economies and societies, who contribute significantly but who are stigmatized and marginalized with very limited access to basic employment and other social protections, such as healthcare or schooling for their children. The struggle of protecting migrants in irregular situations is examined in the article by Michele LeVoy and Eve Geddie.

2.3. Labour migration

A vast component of migration today is bound up with labour. The ILO estimates that some 105 million of the total 214 million people living outside their countries of birth or citizenship in 2010 are economically active, engaged in the world of work; this means most working-age adults in the global migrant population – including refugees – taking into account that the migrant population includes children and aged dependents. In some Western European countries, for example, the foreign-born proportion of the work force is 10 per cent or more, nearly 15 per cent in Ireland and over 40 per cent in Luxembourg. It is 25 per cent in Switzerland.

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15 For more information, see the PICUM website, available at: http://www.picum.org/article/reports (last visited 20 Jun. 2010).
In this era of internationalization of labour mobility, migration is driven not only by demographic changes (that is, declining and aging populations and workforces), but especially by globalization and the dynamics of capitalist development itself. Mobility of capital and rapid evolutions in technology and organization of work requires that labour and skills are available where new investments are being made and where rapid changes in work activity are taking place.

In the economic realm, migrant labour has become a key feature in meeting economic, labour market and productivity challenges in a globalized economy. Migration today serves as an instrument to adjust the skills, age, and sectoral composition of national and regional labour markets. Migration provides responses to fast-changing needs for skills and personnel resulting from technological advances, changes in market conditions and industrial transformations. In countries of aging populations, migration is replenishing declining work forces and injecting younger workers, in turn contributing to increased dynamism, innovation and mobility in those work forces.

2.4. Deregulation

However, labour migration is taking place in a context of deregulation of work and of labour markets. Salient characteristics of changes in work today include increased precarization of employment, increased informalization of work and economic activity, and deteriorating conditions at work. These changes affect large numbers of workers in industrialized countries as well as in developing countries.

Deregulation – the reduction in application of labour standards as well as market and financial controls – occurs in the context of huge competitive pressures on wages and conditions of work. Liberalized global circulation and marketing put goods, services, and technology produced in low-wage, low-protection countries in direct and unfettered competition with goods and services produced under regimes of more regulated and higher wages and better working conditions. These competitive pressures provide a huge incentive for seeking and hiring labour compelled to accept lowered standards and more precarious and “flexible” employment, in industrialized as well as less-developed countries.

On the supply side, a large and continuous availability of labour is assured by what may be the biggest failing of globalization: its inability to create decent employment in countries with growing and youthful populations. Generally high unemployment rates, lack of formal jobs and absence of decent working conditions in many less-developed countries assure a high supply of labour and skills compelled to look elsewhere for sustenance and employment.

In day-to-day reality, migration is the terrain of contention over the distribution of benefits deriving from economic activity; in other words, how much of wealth generated is returned to capital and how much is paid out in wages and benefits to working people. It is the zone of contention over the levels of
protection and regulation of conditions of employment and work. In the most
dramatic cases, that contention over protection, or lack of protection, is now
fought out literally in the streets as well as workplaces, for example in strikes by
undocumented workers in France and in demonstrations of tens of thousands of
immigrants in cities across the United States. Migration has also become a
defining context for the extent to which working people – and foreign workers
in particular – can or cannot organize to articulate and defend their interests.
Thus, migration is a central and significant arena of dispute and redefinition in
relations between “labour” and “capital”. It can also be said that migration
exposes tensions between the economic logic of globalization and the values
embodied in human rights and labour standards.

Migrant labour largely fills “3-D jobs”: dirty, dangerous, and degrading.
Efforts to fill “3-D jobs” and to acquire economic competitiveness at interna-
tionally competitive low cost produce a continuous demand for cheap and
low-skilled migrant labour in numerous sectors of national economies. These
sectors commonly include agriculture and food processing, construction, clean-
ing and maintenance, hotel and restaurant services, labour intensive assembly
and manufacturing, the commercial sex industry, and others.

Small and medium-sized companies and labour-intensive economic sectors
do not have the option of relocating operations abroad. Migrant labour has long
been utilized as a low-cost means to sustain economic enterprises and, some-
times, entire sectors of economic activity that are only marginally competitive.
Demands for migrant workers provide a significant impetus to labour flows and
facilitate incorporation of undocumented migrants.

Migrant workers are concentrated in sectors and activities where labour
standards are weak and/or where enforcement of existing standards is lax or
non-existent. Migrant workers face lacunae of real protection of health and
safety. In Western Europe – the only region where this data is available –, foreign
workers face occupational injury and death rates twice as high as for nationals.19
More generally, around the world, employment for foreign workers is commonly
associated with underpayment or non-payment of wages, physical abuse, sexual
harassment and violence against women workers, denial and repression of free-
dom of association and trade union rights.

The ILO estimates that, globally, some 15 per cent of international migrant
workers are in irregular situations: without legal authorization for residence and/
or employment, or undocumented. A recently established online database pro-
ject on irregular migration in the EU provides detailed country by country
estimates indicating that migrants in irregular situations numbered between

19 ILO, “ILO standards-related activities in the area of occupational safety and health: An in-depth study for
discussion with a view to the elaboration of a plan of action for such activities”, Report VI, Interna-
1.9 and 3.8 million in 2008,\textsuperscript{20} giving a range of 6.2 per cent to 12.3 per cent of total migrant stocks of foreigners residing in the EU-27.\textsuperscript{21} “Results [of this research] for 2002, 2005 and 2008 show a clear decline in the stocks of irregular resident populations in the European Union over time…”\textsuperscript{22}

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

The flow of low-skilled migrants is channelled by clandestine means precisely because of the non-existence of regular migration channels that would allow for legal entry in destination countries. Once they are in host countries, these migrants remain confined to jobs in unstructured or informal sectors, in irregular work and under exploitative conditions of employment.\textsuperscript{23} In contrast, ILO research underlines that regular labour migration channels contribute to both reducing trafficking and the smuggling of migrants.\textsuperscript{24}

2.5. Discrimination

Discrimination plays an important role in maintaining – and justifying – stratification and segmentation in the labour market. It contributes and mutually reinforces attitudes that relegate or constrain certain identifiable groups to specific roles and strata in the work force.

There is considerable research documenting the impact of discrimination. Repeated, reinforced discrimination leads to depression, apathy, resignation, and marginalization. When people – and groups – are consistently denied


\textsuperscript{22} Clandestino Project, “Undocumented Migration”, op. cit.


employment opportunities, and when they are also confined to ghettos, provided inferior education or training opportunities, perceive law enforcement as providing little protection, and face discrimination in other aspects of community life, the combination adds up to a powerful recipe for exclusion, the antithesis of inclusion that is the fundamental notion of integration.

Unequal starting points or disadvantages, together with discriminatory behaviour, are the key reasons why migrant and ethnic minority workers face greater obstacles than the majority population. In contrast to individual acts of discrimination, societal discrimination consists of arbitrary barriers against the advancement of migrants and minorities; the whole “system” disfavors individuals because they are members of a certain group.

Today, in a period of increasingly internationalized demand for and dependence on foreign labour, and thus increased labour mobility, there appears to be a pronounced shift regarding national versus foreign identities. This shift appears to be reinforcing discrimination and exploitation on an increasingly polarized basis between national versus foreign or so-called “alien” identities. Periods of anti-immigrant sentiment have swept countries in the past, usually in times of recession and widespread unemployment.

The rise in xenophobic phenomena is both associated with and clearly driven by the resurgence and generalization of terminology of “illegal alien”, “illegal immigrant”, “illegal worker” in discussing migration and minorities. Use of such language denies this group of migrants their essential humanity and is hardly in keeping with the fundamental right of everyone to be recognized everywhere as a person before the law, and also “justifies” their further criminalization. In an attempt to go some way to rectifying this injustice, this article (and the special issue as a whole), in conformity also with the approach taken by most international and regional organizations, uses neutral terminology, such as “migrants in irregular situations” or “undocumented migrants”, to describe this group. It goes without saying that implementation of official policies and practices of total exclusion of populations in irregular or undocumented situations from legal and social protection exacerbate this situation. This is despite—or perhaps because of—the increased importance of foreign labour generally to national economies around the world.


27 Indeed, in 1975, the United Nations General Assembly requested United Nations (UN) organs and specialized agencies “to utilize in all official documents the term ‘non-documented or irregular migrant workers’ to define those workers that illegally and/or surreptitiously enter another country to obtain work”. See “Measures to ensure the human rights and dignity of all migrant workers”, UNGA res. 3449 (XXX), 9 Dec. 1975, para. 2. In addition to UN agencies, the IOM and the Council of Europe also adopt this more neutral terminology, although the EU persists in using “illegal (im)migration”.

28 Migration, Governance and Human Rights

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2.6. Impact of the global economic crisis

The global financial and economic crisis has evolved into a deepening global employment crisis. This employment crisis also has a huge impact on labour mobility and labour migration, both in itself and in perceptions of migration and migrants. This impact and these perceptions only intensify the pressures on and challenges for “getting it right” on migration legislation and policy.

The global employment crisis – following the financial and economic crisis – is still deepening in many situations, even where economic indicators are reportedly improving. The latest update of the 2009 Global Employment Trends Report,28 issued by the ILO, estimated an increase in global unemployment in 2009 compared to 2007 by more than fifty million persons. Most predictions are that layoffs and downsizing of employment will continue for some time, and that job recovery will be slow. A review of economic crises over the last seventy years shows that it usually takes four to five years or more for employment levels to reach the pre-crisis levels.29 And in between, unemployment levels can go very high.

In times of crisis, migrants are victims of the shame that has no name, or rather, the shame that is not named. Migrants become the first to be blamed; they are the scapegoats for unemployment, insecurity, crime, and even rising disease and ill health. And angry, frustrated citizens follow the lead of politicians and sometimes governments that concur in blaming migrants by taking direct action. In times of economic insecurity, migrants easily become scapegoats; and xenophobic sentiments and discrimination against migrant workers rise. This alone presents one of the most formidable challenges for social peace and cohesion, and therefore for governance, in difficult economic times.

Data compiled by the ILO over the last year confirmed multiple impacts of the crisis on migrant workers.30 First, migrants and persons of foreign origin have been hard hit; they are disproportionately among those already laid off or rendered unemployed. Second, those migrants remaining employed are often affected by reductions in pay, working time, and worsening working conditions. Third, migrant workers have less access to social safety net support, which is especially true for migrants in irregular situations. Fourth, many migrant workers are not returning home, unless forcibly expelled. This is the case even when they

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are being offered financial incentives to depart voluntarily, as has been the case in the Czech Republic, Japan, and Spain. Simply put, conditions at home are often even worse. While there may be opportunities for some kind of work in host countries, including in the informal sector, there are simply none at all at home. Fifth, migrant workers are thus compelled to take whatever work they can find. They accept even more substandard pay and abusive conditions than before. This presents a major policy challenge for governance and for stabilization of labour markets and working conditions. Sixth, scapegoating of migrants and xenophobic violence against foreigners are on the rise throughout the world. These are expressed in increased murders and lynchings of migrants in some countries, in generalized expressions of anti-foreigner sentiment, in hostile political discourse, and in calls for exclusion of migrants from access to labour markets and emergency social protection benefits. Seventh, many countries have reduced quotas or intake of foreign workers; some countries have embarked on deliberate policies of exclusion and expulsion of migrant workers. Eighth, migrant remittances have declined to most countries of origin. Ninth, the further deteriorated situations in home countries make whatever remittances migrants can send an even more crucial lifeline for their families and local communities. And, finally, employment opportunities for those remaining at home declined in some countries of origin, meaning even fewer options for persons coming back from abroad. This also makes the return of migrant workers potentially a greater threat to labour market stability and, ultimately, social stability at home.

However, it is incontestable that, given long-term labour market, demographic and technological trends, migrant labour and skills will be as essential for recovery from the crisis, as they already have been for economic progress in a growing number of countries in recent years.

2.7. Migration, development, and human rights

A fundamental condition for ensuring that migration enhances host and origin country development is protection of universal human and labour rights and appropriate civil and political rights. As strangers to a society, migrants may be unfamiliar with the national language(s), laws, and practices, and so be less able than others to know and assert their rights. They often face discrimination, unequal treatment, and unequal opportunities at work. In some countries — more than half according to a recent ILO survey — national discrimination law does not apply to migrant workers.32


Tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, to name but a selection of violations, all contribute to undermining any substantial contribution that migrant workers can make to development of their host country, let alone remitting income and eventually returning home with new skills and capital. Furthermore, non-payment of wages and deportation of unauthorized workers without allowing them to collect earnings is effectively a *de facto* expropriation of resources from the migrants and the home countries to which at least part of those earnings would be transferred.

Migrant workers can better contribute to the economies of both destination and origin countries when they have decent working conditions and when their fundamental human and labour rights are protected in their countries of employment, although on no account should such potential contributions justify alone the protection of these rights which are inviolable. This also benefits destination countries by preventing the development of an unprotected underclass of migrants that undercuts prevailing pay and working conditions. The relationship between development, mobility, and human rights is analysed in the article by Piyasiri Wickramasekara.

In the economic realm, growth in most regional economic integration systems is premised on establishing larger common market spaces with labour circulation in larger labour markets. Examples that cover many countries include the Central African Economic and Monetary Community (CEMAC), the East Africa Community, the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) in Africa, the Andean Community and Mercado Común del Sur (MERCOSUR) in South America, Caribbean Community and Common Market (CARICOM) in the Caribbean, the Association of Southeast Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC) in Asia, the Commonwealth of Independent States (CIS) comprising former Soviet Union Republics and, of course, the EU, which is widely regarded as the most advanced system.33 In all of these, increased labour mobility is seen as a component of integration equally essential to eliminating barriers to free movement of capital, goods, services, and technology. The legal regimes being constructed to regulate this regional circulation have explicitly recognized that freer movement of people can only emerge as a boost to economic activity and development in larger markets to the extent it is based on equality of treatment and protection of rights. For example, the free movement of workers

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regime in the EU is reinforced by strong equal treatment and social rights provisions.\textsuperscript{34}

2.8. Social cohesion

“Social cohesion is weakened by growing insecurity, declining protection in the employment market and, above all, the emergence of a huge stratum of marginal population.”\textsuperscript{35} Migrants remain frequently exposed to exclusion from employment, housing, health, and education. They face a large number of obstacles to mere participation, or eventually integration, in host societies. Significant and pervasive discrimination against migrants and persons of migrant origins in access to employment, housing, and public services has been amply documented in many migrant destination countries. Migrants also face obstacles to obtaining access to education and training, and limited opportunities for taking part in civic life. For many migrants, the combination of these factors adds up to exclusion that precludes possibilities for integration.

Tensions between migration and social cohesion have been dramatically underscored by civil disorders and violent manifestations of discontent in urban areas of concentrations of migrant-origin populations in destination countries, in Africa, Asia, the Caribbean, the CIS, Europe, and North America. Violent attacks explicitly targeting foreigners and persons of immigrant origin leading to deaths, injury, and/or destruction of property are widely reported.

Social cohesion establishes a link of cause and effect between integration and protection mechanisms on the one hand and the individual’s sense of belonging to society on the other. The principles of equality of treatment and non-discrimination and the notion that diversity should be considered as an asset have repercussions on migrants’ individual and collective sense of inclusion, and thus are starting points for obtaining integration. Ultimately, social cohesion derives from respect of human and labour rights of all members of society as well as from equitable access for the whole population to the benefits of economic progress.

Immigration’s influence on social cohesion is undoubtedly one of the major challenges for migration governance. Social cohesion in societies characterized by migration and diversity is only possible in a context of human rights, social justice, and respect for democracy.


2.9. Resistance to external insurgence in national governance

Although determining admission into a country and employment and residence of foreigners are in essence matters of national authority and sovereignty, they require international norms, for optimizing the incorporated development and human rights aspects. However, while many States, both developed and developing, have accepted legally binding international standards, gaps in their proper and effective implementation remain vast, begging the question the degree to which such States are committed to complying with these standards. However, even in the case of international agreements that have not been formally ratified, or in the case of “soft law” norms (that is, declarations, recommendations), these standards and bodies responsible for their application can offer guidance and assistance to individual States to help them formulate good policies on questions of migration and development.

3. International standards for a “rights-based approach”

3.1. Universal standards: genesis and applicability

As highlighted in the introduction, the central notion of human rights is “the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic and cultural life”;36 they are “universal” — they apply everywhere; “indivisible” — political and civil rights cannot be separated from social economic and cultural rights; and, “inalienable” — they cannot be denied to any human being.37 This is the basis of the concept of “human rights for all” articulated in the 1948 UDHR, which codified in a single instrument norms common to major religious and historical traditions worldwide.

These values were increasingly reflected and codified in development of laws as nation States emerged and were consolidated as the primary political-territorial entities over the last two centuries. Declarations of independence and elaborations of constitutions in both Europe and the “New World” made explicit since the late eighteenth century construction of a “values-based” foundation for emerging modern States.

Reflection of values-based norms in international treaties emerged in the mid-nineteenth century with development by the International Committee of the Red Cross of its codes of humanitarian principles applicable to armed conflict intended to influence the behaviour and legal mechanisms of States.

International instruments explicitly establishing principles and defining norms for protection of human and labour rights emerged at the beginning of

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36 Stackhouse, Creeds, Society and Human Rights, op. cit. 1.
the twentieth century. Among the most notable were the principles incorporated in the Treaty of Versailles ending the First World War and establishing the ILO.

A series of complementary leaps forward occurred during and in the aftermath of the Second World War with the adoption of the Declaration of Philadelphia by the ILO in 1944, the foundation of the United Nations System in 1945, and the subsequent elaboration of the UDHR, adopted by the United Nations General Assembly in 1948. The Declaration of Philadelphia was elaborated around the fundamental notion that “[a]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.38 While not a binding legal instrument in itself, the UDHR has subsequently been adopted or formally endorsed by nearly all the world’s nation States. Most of its provisions have acquired the legal status of customary international law – and are generally universally applicable as legal norms.

Two major International Covenants elaborated the principles of the UDHR into binding normative standards on political and civil rights, and economic, social and cultural rights in the 1960s.39 These Covenants, together with the UDHR, are often referred to as the “International Bill of Rights”, and generally considered applicable to all human beings irrespective of their nationality or immigration status. However, the extension of application of these universal human rights to vulnerable groups has been a long and difficult process.

While the two Covenants were widely ratified, in practice it became evident that the norms in these instruments were not applied to a number of important groups of persons. Despite the premise of the universality of the International Bill of Rights, practice demonstrated that applicability to groups commonly marginalized in national political and juridical contexts needed to be articulated explicitly, in order to ensure that groups at risk of denial and violations of their rights were actually protected in national law and practice.

As a result, specific conventions explicitly extending the “universal” rights to victims of racial discrimination and torture, women, children, and migrants were elaborated over the three decades from 1960 to 1990: the 1965 International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the 1979 Convention on the Elimination of Discrimination Against Women (CEDAW), the 1989 Convention on the Rights of the Child (CRC), and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and

38 The Declaration concerning the aims and purpose of the ILO (Declaration of Philadelphia) was adopted at the 26th International Labour Conference in 1944 and was added as an Annex to the ILO Constitution. Text available at: http://www.ilo.org/ilolex/english/iloonst.htm (last visited 20 Jun. 2010).
Members of Their Families (ICRMW).\textsuperscript{40} These seven instruments – the two Covenants plus the five Conventions cited above – were characterized as the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups worldwide.\textsuperscript{41} These treaties have since been supplemented by two further core human rights instruments, on the rights of persons with disabilities and on the protection of all persons from enforced disappearance.\textsuperscript{42}

The ILO Declaration on Fundamental Principles and Rights at Work of 1998 was another step in the direction of insisting that there are certain – values-based – principles and specific norms that apply to all States, whether or not they have ratified the specific ILO conventions. The Declaration establishes respect – and reporting on compliance – regarding these principles and specific normative instruments as a function of membership in the organization – which counts 182 Member States, nearly the entire United Nations Membership.

A rights-based approach to migration is placement of universal human rights norms defined by the relevant international instruments as central premises of national migration legislation, policy, and practice founded on the rule of law. Application of these norms is, of course, conditioned by historical, economic, social, and cultural factors.

Historical experience has shown that regulation providing protection for refugees and migrant workers – indeed any workers – cannot be left to market mechanisms alone. When highly competitive and now globalized market pressures are brought to bear in the absence of protections and appropriate regulation, migration, rather than being viewed as a positive force for the development of the country concerned, is inevitably characterized by abuse and exploitation of migrant workers, marginalization and social exclusion of migrant and immigrant origin populations, fear of loss of jobs blamed on immigration, increasing anti-migrant sentiments and, ultimately, communal violence.

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

- Equality of treatment and non-discrimination between regular migrant/immigrant workers and nationals in the realm of employment and work;
- Universal human rights apply to all migrants, regardless of immigration status;


The broad array of international labour standards providing protection in treatment and conditions at work – safety, health, maximum hours, minimum remuneration, non-discrimination, freedom of association, maternity, etc. – apply to all workers without distinction. These notions, and the first two in particular, are explored further in the article by David Weissbrodt and Stephen Meili on human rights and protection of non-citizens.

Certain principles and rights at work are deemed to be fundamental for the protection of human rights for all workers, including migrant workers, by the ILO and its Member States. These are found in the eight core ILO conventions encompassing four categories of labour standards: elimination of all forms of forced or compulsory labour; the effective abolition of child labour; freedom of association and the right to collective bargaining (trade union rights); and non-discrimination in respect of employment and occupation. The 1998 ILO Declaration on Fundamental Principles and Rights at Work, mentioned above, established that all ILO members have an obligation to “respect and to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”.

Furthermore, all international labour standards are considered applicable to the protection of decent work conditions for all migrant workers. These include conventions on occupational safety and health, conditions of work, protection of wages and labour inspection, employment policy, social security, maternity protection, the regulation of private and public employment agencies, as well as those covering sectors employing a large number of migrant workers.

The notion of universal applicability of labour standards to all workers has been explicitly upheld by an international court at the regional level. In 2003, the Inter-American Court on Human Rights decided unanimously that:

[T]he migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his [or her] human rights, among them those of labor character. A migrant, by taking up a work relation, acquires rights by being a worker, that must be recognized and guaranteed, independent of his [or her] regular or irregular situation in the State of employment. These rights are a consequence of the labor relationship.

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Three specific international instruments explicitly define the application of human and labour rights to migrant workers: the ILO Migration for Employment Convention (No. 97) of 1949, the ILO Migrant Workers (Supplementary Provisions) Convention of 1975 (No. 143) (ILO Convention 143), and the 1990 ICRMW.

The ILO Convention 97 establishes equal treatment between nationals and regular migrants in areas such as recruitment procedures, living and working conditions, access to justice, tax and social security regulations. The ILO Convention 143 sets provisions intended to prevent and eliminate exploitation of migrants while ensuring protections for irregular migrants, reinforcing the “decent work” agenda defined by international labour standards, nearly all of which, as noted above, apply explicitly or implicitly to all migrant workers. This Convention also provides norms for integration of regular migrants in host societies.

The content of ILO Conventions 97 and 143 formed the basis for drafting the 1990 International Convention on migrant workers. The ICRMW further establishes that migrant workers are more than labourers or economic entities; they are social entities with families and accordingly are entitled to protection of the basic economic, social, cultural and civil rights defined in the UDHR and the other core United Nations human rights instruments. ILO Convention 143 and the ICRMW explicitly address unauthorized or clandestine movements of migrant workers and call for resolving irregular or undocumented situations, in particular through international cooperation.

These three instruments comprise an “international charter on migration”, providing together a broad and comprehensive framework covering most issues of treatment of migrants. These are not just instruments on rights alone, they contain provisions to encourage and guide intergovernmental consultation, information sharing and cooperation on nearly all aspects of international migration.

Eighty-two countries – nearly two thirds of the some 130 countries for which international migration is an important feature – have ratified at least one of these three complementary Conventions. Eleven Member States of the EU have ratified one or both of the ILO Conventions on migrant workers, among them most of the larger migrant destination countries: Belgium, France, Germany, Italy, the Netherlands, Norway, Slovenia, Spain, Sweden, Portugal and the United Kingdom. On the southern shores of the Mediterranean, Algeria, Egypt, Libya, and Morocco have ratified the ICRMW, and Algeria and Israel have also ratified ILO Convention 97. The full list of countries which have ratified or signed one or more of the three instruments is provided in the Annex to the Documents section at the end of this issue.

The ICRMW now has forty-three ratifications plus fifteen additional signatories. Ratifying States should have already incorporated its norms into national legislation, while signatory States have in principle expressed their

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willingness to be bound by its content. National studies conducted in a number of EU Member States have found that national legislation of most of these States is already entirely or largely in conformity with the content of the ICRMW;\textsuperscript{47} these studies generally concluded that resistance to or difficulties in ratification are primarily for political, not legal, reasons.

The need for the effective application of universal standards to all migrants is increasingly underlined in the work and activities undertaken under the auspices of the special procedures mechanisms of the United Nations Human Rights Council, especially the thematic mandates such as that of the Special Rapporteur on the human rights of migrants. These mechanisms are important for the development of a human rights based approach to migration, and are examined in detail in Taryn Lesser’s article.

3.2. Regional standards: a widening web of protection

Developments in the legal protection of migrants at the regional level are contributing considerably to raising political awareness of their precarious plight and opening doors for their improved treatment. The above-cited Advisory Opinion of the Inter-American Court of Human Rights underlining the universality of standards in respect of irregular migrants, particularly in the employment context, has been buttressed by a judgment of the same Court supporting the protection of other categories of migrants in irregular situations who are especially vulnerable. The Court has underlined the importance of the right of undocumented migrant children to be issued with a birth certificate and to a nationality in circumstances where they would have otherwise been rendered effectively stateless with the adverse consequences that such a situation implies for the full enjoyment of important social rights such as the right to education.\textsuperscript{48} This jurisprudence has also had repercussions in other regions, not least in Europe where the European Committee of Social Rights has expanded the seemingly narrow personal scope of the European Social Charter (and revised Charter),\textsuperscript{49} the regional social rights instrument of the Council of Europe, to vulnerable groups of migrants in irregular situations by underscoring that


\textsuperscript{49} European Social Charter, ETS No. 35, 18 Oct. 1961; Revised Charter, ETS No. 163, 3 May 1996. According to the Appendix to the Charter, it only applies to nationals from other Contracting parties who are “lawfully resident or working regularly” within the territory of the Contracting party concerned, although the European Committee of Social Rights considered (in the cases cited below, footnote no. 50) the Charter as a living instrument, which needs to be interpreted in the light of human rights developments elsewhere.

The Council of Europe, which comprises forty-seven Member States spanning the whole European continent, represents a region in the world that contains a broad range of legally binding instruments protecting human rights. The best known of these is the European Convention on Human Rights (ECHR),\footnote{European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950.} which applies to “everyone” within the jurisdiction of a States parties,\footnote{\textit{Ibid.}, Art. 1.} and thus does not in general make distinctions on the basis of nationality or immigration status.\footnote{However, some rights are restricted to nationals, such as the right to free movement within a country (Protocol No. 4 to the ECHR, ETS No. 46, 16 Sep. 1963, Art. 2) and procedural safeguards in the context of expulsion are limited to those non-nationals who are lawfully resident in the territory of a State party (Protocol No. 7 to the ECHR, ETS No. 117, 22 Nov. 1984, Art. 1).} In this regard, the judicial body authorized by the ECHR to make legally binding judgments, the European Court of Human Rights, has issued a series of important judgments relating to the human rights of migrants, including \textit{inter alia}: protection against \textit{refoulement} in cases where the person concerned is subject to a real risk of serious harm in the country to which he or she is being returned;\footnote{ECHR, \textit{op. cit.} Art. 3; European Court of Human Rights (ECtHR), \textit{Chahal v. United Kingdom} (Judgment), (1996), Application No. 22414/93.} conditions of detention of asylum-seekers\footnote{ECHR, \textit{op. cit.} Art. 3; ECtHR, \textit{S. D. v. Greece} (Judgment), (2009), Application No. 53541/07.} as well as the legal limits of their detention;\footnote{ECHR, \textit{op. cit.} Art. 5(1)(f); ECtHR, \textit{Saadi v. United Kingdom} (Judgment), (2008), Application No. 13229/03.} the protection of family life in the context of expulsion from and admission to the territory;\footnote{ECHR, \textit{op. cit.} Art. 8; Protocol No. 4 to the ECHR, \textit{op. cit.} Art. 4; ECtHR, \textit{Conka v. Belgium} (Judgment), (2002), Application No. 51564/99.} safeguards against collective expulsion;\footnote{ECHR, \textit{op. cit.} Art. 8; ECtHR, \textit{Boulift v. Switzerland} (Judgment), (2001), Application No. 54273/00, and ECtHR, \textit{Sen v. Netherlands} (Judgment), (2001), Application No. 31465/96.} and protection from discrimination on the grounds of nationality in the field of social security.\footnote{ECHR, \textit{op. cit.} Art. 14 and Protocol No. 1 to the ECHR, ETS No. 9, 20 Mar. 1952, Art. 1; ECtHR, \textit{Gaygusuz v. Austria} (Judgment), (1996), Application No. 17371/90, and ECtHR, \textit{Poirrez v. France} (Judgment), (2003), Application No. 40892/98.}

As discussed above, the European Social Charter, as well as its revised version, is less generous in personal scope, although the European Committee of Social Rights has sought to give the Charter an extensive interpretation to protect particularly vulnerable groups of migrants. The Council of Europe also has its own instrument aiming to protect migrant workers, the European Convention
on the Legal Status of Migrant Workers. The relevance of this instrument was questioned for a long period given that it had only been ratified by a limited number of countries belonging to the former fifteen Member States of the EU, Norway (which belongs to European Economic Area), and Turkey, and that it only applies to lawfully resident migrant workers who are nationals of other States parties. However, the Convention’s recent ratification by Albania (in 2007), Moldova (in 2006), and the Ukraine (in 2007), whose nationals are lawfully working in EU Member States that have previously ratified it, such as Italy and Portugal, should breathe new life into this instrument.

The Council of Europe is also becoming an important source of “soft law” standards on the human rights of migrants, led in part by national parliamentarians who participate in its Parliamentary Assembly. This body has recently adopted recommendations and resolutions on the human rights of irregular migrants, mixed migration in Southern Europe, and the detention of asylum-seekers and irregular migrants. The recommendations are considered by the Council of Europe’s political arm, the Committee of Ministers, which itself has adopted a number of important standards, including outlining safeguards in the context of forced return. The treatment of migrants in Council of Europe Member States has also attracted the attention of the Council of Europe’s Commissioner for Human Rights, who has made statements expressing concern regarding the treatment of migrants during country visits and published issue papers on the human rights of irregular migrants and the criminalization of migration.

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60 European Convention on the Legal Status of Migrant Workers, ETS No. 93, 24 Nov. 1977.
In the EU, the human rights record in respect of migration has been mixed. While this economic and political system of regional integration is widely recognized as affording a best practice model of social protection for those citizens who move from one EU Member State to another to take up work, safeguards for third-country (that is, non-EU) nationals lag some way behind despite laudable intentions to the contrary. In this regard, it should be recalled that the EU only gained competence over third-country nationals in May 1999 when the Treaty of Amsterdam came into force and transferred asylum and immigration matters – which were formerly the subjects of intergovernmental cooperation – to the then first (Community) pillar giving the Council of Ministers the mandate to adopt legally binding measures in a specified number of areas. However, admission of third-country nationals to the territory of Member States for periods of more than three months remains an individual Member State competence and not all EU Member States are fully participating in this endeavour.66 To date, the substantive measures adopted have focused on steps towards the creation of a common European asylum system and addressed irregular migration, which EU institutions and officials persist in calling “illegal immigration”.67 A coherent and robust European policy on regular migration is floundering in the face of stiff opposition from some Member States. The original intention to adopt clear and workable rules on the conditions governing the lawful entry and residence of third-country nationals for the purpose of employment68 has been replaced by a fragmented approach focusing on specific categories of workers. While a Directive on the admission and residence of highly qualified migrants (“Blue Card” Directive) has been adopted,69 the proposed Directive addressing the less qualified or low-skilled70 is still undergoing difficult negotiations and the proposed text (as well as the current version) reveals a considerably lower level of protection for the latter group, thus mirroring the approach taken at the national level in many Member States.

There are signs, however, that considerably more importance is now being attached to addressing the “human rights deficit” in the EU. The entry into force of the Lisbon Treaty on 1 December 200971 has given legally binding force to

66 Denmark, Ireland, and the United Kingdom secured opt-outs at the time of the entry into force of the Treaty of Amsterdam.

67 For the inappropriateness of this terminology, see the discussion above, footnote no. 27.


the EU Charter of Fundamental Rights,72 which applies to EU institutions and Member States when they are implementing EU law, and which generally does not distinguish between persons on the grounds of nationality or immigration status. The Charter contains some potentially wide-ranging provisions, such as the obligation to respect and protect human dignity or the “right to asylum”.73 As a result of the Lisbon Treaty’s entry into force, the EU has also committed itself to ratifying the ECHR.74 With regard to asylum and migration, the role of the European Parliament in the decision-making process is now complete,75 and the competence to refer cases in this field to the European Court of Justice, which oversees the uniform application of EU law, has been extended to all courts in Member States and not just to final courts of appeal. The positive role of the Court of Justice in protecting the rights of third-country nationals has recently been highlighted in a case concerning the detention of an irregular migrant76 in connection with the application of the much discussed Return Directive.77 The adoption of this measure has given rise to considerable controversy and its implications for the human rights of migrants are considered in the article by Anneliese Baldaccini.

Outside the Americas and Europe, there have been fewer legal developments at the regional level relating to the protection of the human rights of migrants, although it is worth pointing out a number of important “soft” standard-setting activities. The human rights architecture of the African Union has been complemented by a holistic policy document on migration,78 which attaches particular importance to the protection of the human rights of migrants:

Ensuring the effective protection of the human rights of migrants is a fundamental component of comprehensive and balanced migration management systems. Historically, migrants have often been deprived of their rights and subjected to discriminatory and racist actions and policies including exploitation, mass expulsion, persecution and other abuses. Safeguarding

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73 Ibid., Arts. 1 and 18, respectively.
74 Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, op. cit. Art. 6(2).
75 The ordinary EU decision making process (co-decision of the Council and European Parliament) has been incrementally applied to asylum and migration matters. Before the entry into force of the Lisbon Treaty, the European Parliament had only a consultation role in the adoption of measures on legal migration, but this has now changed.
the human rights of migrants implies the effective application of norms enshrined in human rights instruments of general applicability as well as the ratification and enforcement of instruments specifically relevant to the treatment of migrants.\textsuperscript{79}

While there is no legally binding instrument in Asia protecting human rights generally, there is hope that a legally binding convention protecting the rights of migrant workers may be realized in Southeast Asia in the near future. In January 2007, the Heads of State/Government of the ASEAN adopted a Declaration on the Protection and Promotion of the Rights of Migrant Workers, with a commitment to finalize a legally binding instrument in this field.\textsuperscript{80} A committee to oversee the implementation of the Declaration, including realization of the commitment on development of a legally binding instrument, has since been established.\textsuperscript{81}

4. Policy conundrums

The structural economic contradictions described earlier play out in the contradictory behaviour of governments on migration. Tough political rhetoric and border control measures contrast with a degree of tolerance of irregular migrants working on their territories, providing for a supply of cheap and flexible, but vulnerable and unprotected workers. Flows of low-skilled migrants are channelled by clandestine means in the absence of legal migration categories that allow legal or regular entry; once in host countries, migrants in irregular status remain confined to jobs in unstructured or informal sectors, under exploitative conditions of employment.

Without pretending to offer a definition of globalization, it may be nevertheless useful to refer to it as an unprecedented generalization of global exchange and movement of capital, goods, resources, services, and technology, taking place under capitalist modes of accumulation, production, distribution, and finance. This globalized circulation is underpinned by largely private control over resources, economic processes, means of production and distribution, and capital accumulation itself. This largely private control is accompanied by a significant degree of the privatization of enterprises and of social welfare and governance functions that in many countries were previously held by the State.

Economic and administrative policy dilemmas are reinforced in political discourse and ideological frameworks. The utility of migrants in irregular and

\textsuperscript{79} Ibid., 24.


\textsuperscript{81} ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). The ACMW’s work plan identifies three tracks along the lines of the Declaration: namely, (i) protection of migrant workers against exploitation, discrimination and violence; (ii) labour migration governance; and (iii) the fight against trafficking in persons – as well as an additional track concerned with the development of a legally binding instrument. The work plan is available at: http://www.aseansec.org/23062.pdf (last visited 20 Jun. 2010).
exploited situations runs counter to the normative and ideological values of most industrialized countries. In response, irregular migration is associated with crime, arms and drug trafficking, and terrorism, while social stigmatization is reinforced by the language of illegality.

As discussed earlier, discrimination plays an important role in maintaining – and justifying – stratification and segmentation in the labour market, which particularly affects migrants. Compounding the challenges of discrimination and integration are the identities of many nation States constructed around mono-racial, mono-cultural, mono-lingual, and mono-religious definitions of belonging.

Contradictions pitting an amalgam of restriction and control measures against a rights-based approach to regulating migration are further reflected in international political developments. A growing assault on the universality of international principles of human rights has evolved over the last decade and is now focused on migration and the treatment of non-nationals.

Post-11 September doctrines articulate the notion that the extent and nature of threats to national and State security posed by “international terrorism” justify – even require – restrictions on human, civil and judicial rights of migrants, including migrant workers.

Meanwhile, a “utilitarian consequentialist” approach argues for an explicit trade-off of lowered application of rights and unequal treatment for non-national workers in exchange for increased opportunities for employment in potential host countries. Not only workers, but rights themselves are commodified as negotiable bundles that may be traded, sold or renounced in exchange for economic benefits in the form of access to foreign labour markets. However, the 2009 Human Development Report of the United Nations Development Programme found little empirical support for the “numbers versus rights” hypothesis.

4.1. Law versus policy

Migration – and regulation to address it – is manifestly essential to assure the present and future well-being, if not economic survival, of “post-industrial” countries, notably the established countries of immigration and generally across the EU. Meanwhile, immigration – as well as emigration – is becoming increasingly critical for meeting new needs for skills and sometimes, labour power – workers skilled or not – in a growing number of countries across the global South.

The elaboration of explicit policy and legislation seems to be, however, almost universally fraught with political and social tensions given the nature of migration and its susceptibility to conflicts of interests. Recent developments

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where migration has been explicitly addressed in industrialized countries are not widely encouraging, such as in the EU and in the United State contexts. For example, references to international standards, with the exception of the 1951 Refugee Convention and the 1967 Protocol, and Council of Europe human rights instruments – in particular the ECHR –, are conspicuous by their absence in elaboration of EU policy and legislation. And while most Southern Mediterranean countries have ratified one or more of the three international conventions protecting migrant workers, effective implementation is lacking and they are often not taken account of in newly adopted national legislation.

As discussed above, the EU has been unable to elaborate a common policy on legal or regular migration beyond the high-skilled category, and even here the “Blue Card” Directive permits participating EU Member States to retain their own specific national schemes. This leaves a huge and untenable gap in the EU’s and Member States’ ability to regulate and ensure protection for a large part of migration – namely, that of low and middle-skilled migration, where the needs for rights protection, regulation, and cooperation are considerably more demanding than for high-skilled migration and inter-company transfers.84

The lack of adoption of protection and regulation standards suggests a trend towards a regime of “non-application” of law protecting human and labour rights – un espace de non-droit – for a substantial and growing part of European work forces in order to secure their status as a reserve of cheap, flexible, and unprotected labour. In broader terms, non-protection for a substantial group of people poses a serious challenge to the rule of law, to democratic governance, and to social cohesion. This exclusion risks formalizing an explicitly divided society characterized by a socially marginalized, legally unprotected and often racially differentiated labouring class, serving a population whose relative freedoms and benefits deriving from the arrangement are justified by reinforcement of exclusive ethnic and national identities.

As discussed above, recent manifestations of discontent and sometimes violent protests and police repression in communities of immigrant origin, and/or widespread civil violence against migrants have been registered across Europe, in CIS countries, and in countries across Africa and Asia. Imposition of a regime of repressive control on the movement of migrants, on their recognition as persons before the law and on their access to and conditions of work may subdue marginalized (im)migrant populations for a time. However, it is at the cost of the ethos and practice of democratic principles that presume universal and inalienable application of human rights, non-discrimination, and equality of opportunity and treatment.

4.2. So what is at stake?

On one hand, we see an explicit application of the deregulatory agenda to an important and growing, but especially vulnerable part of working populations. On the other hand, there is evident dehumanization and exclusion of a growing part of the working population. These pose large questions about the future nature of social relations, of public well-being, and of governance in societies worldwide.

Both the deregulation and the dehumanization are “justified” in the “alienating” imagery of migrants – as foreigners, as outsiders, unequals, opportunist competitors, and as undesirable individuals associated with criminality.

A significant number of migrant workers are confined by legal, economic and political circumstances to non-existence, to outright illegality. The logic that there are some humans who are not recognized, who are “illegal”, strips the foundations of the rule of law of its meaning and application. If rights are not universal – in employment, in the workplace, on the territory of a given country – how can anyone be protected?

In the bigger picture, the combination of deregulation and dehumanization risks adding up to a broad legal and social restructuring that is dichotomizing the populations of nation States into the included and the excluded, into those who participate and enjoy economic and social well-being, and those denied human rights, recognition in society, and access to human security. Such dichotomization will inevitably undermine democratic governance and social cohesion wherever it takes hold.

5. Priorities for enhancing law and policy

Protecting migrants – and national workers – and ensuring functional labour markets while upholding social cohesion require deliberate policy attention and a comprehensive set of measures and institutions to achieve this objective. Public service institutions and public service workers have particularly crucial responsibilities in shaping and implementing policies and practices that provide for rights protection, dignity, and empowerment of migrant workers and their families.

Policy and action addressing migration and integration need to cover administration of immigration, legal protection measures, labour market regulation, labour inspection, social protection, health, education, housing, police protection, and much more. An array of measures is needed to prevent abusive practices and promote decent and productive work for women and men migrants in conditions of freedom, equity, security, and human dignity. This is all the more so in these disruptive times of economic crisis.

The ILO has developed specific guidance for development, strengthening, implementation, and evaluation of national, regional and international labour migration policies and practices, while recognizing also the needs and interests of sovereign States. The International Labour Conference in 2004 adopted a Resolution and Conclusions on migrant workers that reflected global tripartite
consensus analysis of the importance, challenges and needed responses for a “rights-based approach” to governance and regulation of labour migration worldwide.\textsuperscript{85} This negotiated accord also set out a Plan of Action for the ILO and its 182 Member countries, with a specific mandate to develop detailed practical guidance, technical cooperation and capacity building, as well as to improve implementation of relevant international labour standards. A specific task was the elaboration of global, “state of the art” guidance, based on international norms and good practice experience. This guidance is contained in the ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration.\textsuperscript{86} In practice, the ILO has recently assisted Sri Lanka to establish a national labour migration policy framework, and at this writing is supporting tripartite processes to elaborate official national labour migration policy frameworks in countries such as Nigeria, Tanzania, and Zimbabwe, in some cases in collaboration with the IOM.

Based on this knowledge and experience, and taking into account the global economic and employment crisis, the next section proposes a number of action lines as a framework for “the way forward”. These are lines for a comprehensive approach; not all may be directly applicable in particular country situations, some may already be in place. But irrespective of whether some of these lines are being followed, governments and other stakeholders will benefit from seeing their efforts as crucial components of a global approach.

Three broad areas for intervention are: (1) shoring up legal protection and decent work conditions for migrant workers, including refugees;\textsuperscript{87} (2) enhancing employment creation and social safety net protections and; (3) resolutely repressing xenophobic violence.

6. Lines of response

A ten-point programme of policy and action priorities provides, in our view, an agenda for enhancing effective governance of migration in this era of globalization, mobility and economic crisis:

1. Setting a rights-based foundation for comprehensive migration policies and practices: Migration policies and practices can only be viable and effective


when they are based on a firm foundation of legal norms, and thus operate under the rule of law. The key steps are ratification and application of relevant international conventions and international labour standards, particularly the ICERD and ILO Discrimination (Employment and Occupation) Convention (No. 111) of 1958, along with the ILO migrant workers Conventions 97 and 143, the 1990 ICRMW, and relevant regional instruments, as well as the 1951 Refugee Convention and the 1967 Protocol.

2. An informed and transparent migration policy and administration: Establishing an explicit and comprehensive national definition of migration policy, including identification of implementing institutions and measures, and preferably on the basis of a consensus among the principal political factions in the country, is critical. Policy and practice will need to address such areas as regular labour market assessments, awareness raising, supervision of recruitment, administration of admissions, training of public service and law enforcement officials, recognition of educational equivalencies, provision of social and health services, labour inspection, rights restoration, and recovery for victims of trafficking.

3. Institutional mechanisms for dialogue, consultation and cooperation: Migration policy can only be credible, viable and sustainable to the extent it takes into account the interests, concerns and experience of the most directly affected stakeholders. Key stakeholders are the social partners: the employers and businesses that provide employment and the trade unions – worker organizations – representing the interests of workers, both migrants and nationals. Labour ministries need to have a key role. Of course, consultation and policy-making must also take into account the multiple concerned ministries and agencies within government as well as concerned civil society bodies and certainly the migrants themselves.

4. Enforcement of minimum national employment conditions and norms in all sectors of activity: Preventing exploitation of migrants, criminalizing abuse of persons that facilitates trafficking, and discouraging irregular employment require enforcement of clear national minimum standards for protection of workers, national and migrant, in employment. This requires “monitoring and labour inspection” in such areas as agriculture, construction, domestic work, the commercial sex industry, and other sectors where “irregular” employment is prevalent, to prevent exploitation, to detect forced labour, and to ensure minimal “decent work” conditions for all.

5. Provision of public services: At minimum, it is necessary to ensure that basic and emergency services are available without intimidation to all persons in need, including all migrants, documented or undocumented. Such provision, particularly in the health care field, needs to be made available without prejudice to the understanding that a more holistic health provision to all migrants within a State’s jurisdiction on the basis
of equality with nationals is in keeping with international human rights norms.\(^{88}\)

6. **Gender-sensitive migration measures:** The feminization of migration and the predominance of abuse of women migrants, particularly in those unregulated sectors of the economy (that is, domestic and care work) where women migrant workers comprise a disproportionate number, require recognizing gender equality as integral to the process of policy-making, planning, and programme delivery at all levels.

7. **A Plan of Action against discrimination and xenophobia:** The 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban articulated a major component of national policy on migration by defining a comprehensive and viable model plan of action specifically to combat discrimination and xenophobia against migrants at national, regional and global levels.\(^{89}\) It means using all appropriate legal and administrative means to repress racist violence and xenophobia against foreigners, and to prosecute perpetrators to the fullest extent of the law. This includes explicitly discouraging scapegoating of migrants in public discourse.

8. **Maintaining public and private support for employment recovery measures:** This support is particularly important to impede the continuing employment crisis from provoking resentment and scapegoating of foreigners and minority populations; also necessary is support for employment retention, for example, by job sharing and employment creation.

9. **Linking migration and development in policy and practice:** Migration has long been and continues to generate significant contributions to both development and social progress, and welfare in home and host countries alike. However, such contributions will certainly be enhanced by a broad array of policy measures ranging from reducing costs and constraints on transfer of migrant remittances to providing accessible mechanisms for regular migration and recognition of the employment contributions of all labour migrants.

10. **International consultation and cooperation:** Expanding dialogue and cooperation among States – including participation of concerned stakeholders – are essential in all regions. Of particular importance is expanding legal and operational regimes for freer circulation of labour/persons across regional economic integration initiatives, such as

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\(^{89}\) Main elements were established in the “Declaration and Program of Action” adopted at the World Conference against Racism, Racial Discrimination Xenophobia and Related Intolerance in Durban in 2001, which included 40 paragraphs on treatment of migrant workers, refugees, and other non-nationals. The full text is available at: www.unhchr.ch/pdf/Durban.pdf (last visited 20 Jun. 2010). See also www.unhchr.ch/html/racism/00-migra.html (last visited 20 Jun. 2010) for related documents and links.
in the Andean Community and MERCOSUR in the Americas, in the East African Community, ECOWAS and SADC in Africa, the CIS, as well as in the EU.

7. Conclusion

The challenges of meeting labour needs, ensuring productivity and competitiveness, and ultimately improving well-being in today’s globalized world necessarily mean migration and increasing diversity virtually everywhere. How migration is governed, and how migrants and refugees are treated as well as how diversity is incorporated will determine whether or not nation States evolve as societies of justice, dignity, democracy, and human security.

Commitment by governments to upholding and applying a rights-based approach is key to advancing development, as well as ensuring social cohesion and the well-being of citizens and newcomers alike.