Notre Europe

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The United Nations Convention on Migrant's rights, a Luxury for the European Union?

Marie Barral

In collaboration with Stephen Boucher, *Notre Europe*

Under the supervision of Manlio Cinalli, Sciences Po

Marie Barral

Research assistant at Notre Europe in the framework of her course at the Institut d'Etudes Politique, Grenoble, Marie Barral has written a dissertation on the reception of immigrants in France. Her current research focuses on the integration of migrant populations in Europe for the research master in European Political Sciences of the Institut d'Etudes Politiques, Strasbourg.

Stephen Boucher

Stephen Boucher, a French - American Dual national, holds a Master's degree in Public Administration from the Kennedy School of Government, Harvard, a master's degree in Comparative Politics and the Diplome de Science Po (*Summa cum Laude*).

Before Joining *Notre Europe*, he has run a cooperation programme between the Cairo School of Economics and Political Sciences and Sciences Po, Paris, acted as consultant on lobbying in Brussels and London, was an adviser on European and international affairs to the Belgian Deputy-Prime Minister and Minister for transport, and consultant in the field of energy policies. He has taught Lobbying in Europe at Sciences Po in Paris.

In 2006, he has published two books with Le Felin Publishers *La révolution de l'hydrogène – Vers une Énergie propre et performante? (The Hydrogen Revolution for a Clean and Efficient Energy?) and Les thinks tanks dans la guerre des idées (Think Tanks in the Battle of Ideas).*

ManlioCinalli

Manlio Cinalli is Senior Research Fellow at the CEVIPOV, Centre de Recherches Politiques de Sciences Po (its Centre for Political Research). He teaches the Master's degree course in the International program of the IEP, Paris. He is director of research for the French project of the European network LOCALMULTIDEM in framework FRDP 6, 2006-09. He is coordinating a comparative research project in The UK, Italy and France on the questions of immigration and ethnic relations. This research stems from theoretic work he had undertaken before joining Sciences Po, in a number of European universities. First at Queen's College, Belfast in the framework of a Political sciences thesis on nationalism and interethnic networks in Northern Ireland; then as Senior Research Fellow at Leeds University, in the UK; finally as Jean Monnet Fellow at the European University Institute in Florence (Italy).

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Foreword

Migratory issues vie for the front page of many a European news paper. Indeed, beyond the haunting pictures of shipwrecked huddles on Spanish beaches and failed postulants crammed in immigration detention centres on the perimeter of our airports and harbours, current migratory movements are bringing into question our societies' capacity for integration and whether they are prepared to honour their democratic traditions. They also put the European Union's claims to a global role to the test.

The fact is that our ageing European economies' competitivity rests on their capacity efficiently to absorb foreign workers. A harmonious working of the Single Market requires the solidarity and growing cooperation of the member states while our societies' cohesion depends on a successful integration of legal immigrants. This being so, immigration is at the core of the European contract as often defined by Jacques Delors: "Competition that stimulates, co-operation that strengthens, and solidarity that unites."

This Policy Paper centred on the United Nations Convention on Migrants Rights opens for us a new round of analysis on the issue of integration in the framework of our research pole "Competition, Cooperation, Solidarity"

in the light of the reforms recently introduced in some Member States, Marie barral takes a fresh look at the United Nations Convention as applicable to European countries. Her paper, drafted in collaboration with Stephen Boucher under the supervision of Mario Cinalli offers a sturdy base for critical thinking. It points a devastating finger at increasingly restrictive formulae devised in Western Europe and spreading by osmosis from one country to the next. It thus brings into light the growing gap between the fine theories for external consumption, urging democratic values of tolerance, non-discrimination and open-mindedness on the one hand, and on the other, the practices dictated by preoccupations with security and exclusion.

Unsurprisingly, this Policy Paper chimes in with the European Parliament, the European economic and Social committee and numerous non-governmental organisations when calling for a ratification of the United Nations Convention by the Member States. It also arrives at the conclusion that the elaboration of a legal European immigration policy is called for as a matter of urgency. This is a way forward that Notre Europe will explore in depth in research to come.

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Executive Summary

The European Union Member States have not ratified the United Nations Convention for the Protection of all Migrants Workers and their Families (passed in December 1990). The reasons given were many: National legislations offered more guarantees than a text, indeed fairly anodyne, and these States had already adopted a number of instruments for the protection of immigrants, notably through the International Labour Organisation (ILO) and the Council of Europe's texts.

However National legislations regarding immigration have undergone major changes leading to the erosion of migrants' rights. The rights to family reunion and social protection for seasonal workers from non EU countries are two cases in point showing the extent to which these recent measures prove to be both incompatible with Human Rights and counter-productive from the angle of integration seen as an aim at both national and community level.

Yet the Union has hardly proved pro-active when it comes to protecting migrant people. Furthermore the relative laxity of community standards affords Member States the option to legislate in a more and more restrictive direction. In this context there is every reason to wonder whether, from optional yesterday, the Convention has not become a useful safeguard for the protection of migrants' rights, the first stage towards a successful integration.

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"He who organically belongs to a civilisation is in no position to identify its ills. His diagnosis is of little moment; he is directly affected by the judgment he passes on it; he indulges it out of selfishness. Unfettered, freer, the new-comer observes it with no agenda of his own and has a better grasp of its flaws."[1]

The temptation to Exist

Emile Michel Cioran

[1] Translation by the translator of this paper

Introduction

Today the integration of incoming populations is a major concern both for the European Citizenry and for its leaders, at national and European level. It was taken as read that this mission came under both the Member States and the European Union's historical ambition to promote Human Rights and fundamental freedoms. But this ambition would appear to have been replaced by the notion that these rights were settled, that this was a done deal.

This is corroborated by the fact that EU Member States have never ratified the International Convention on the Protection of the **Rights of All Migrant Workers and Members of their Families** adopted unanimously by the General Assembly of the United Nations in December 1990 (Resolution No 45/158). This first text by the United Nations aiming to protect the rights of migrant workers is in fact nothing more than the transcription for that group of people of the rights enshrined in the 1948 Universal Declaration. Thus the convention may have seemed at the time, and occasionally still today, superfluous to European States like to other important immigration countries. Indeed, to date, no country has ratified it, whether in Europe, Northern America, Australia, India or even in the Gulf countries.

The growing awareness, in the seventies, of migrant workers' vulnerability had lead to the elaboration of the United Nations Convention. Firm in the belief that they were affording the latter a level of protection going beyond this conservative text (it did not create new rights, it only aimed to guarantee equality of treatment between migrant and national workers and the same working conditions), the member states disregarded it. On closer analysis, it becomes clear that it is today a mistake to think that Europe enforces *ipso facto* the respect of migrant workers' fundamental human rights and that such a text would only be of use to the country migrants are coming from and who signed it, such as Cape Verde, Syria, Nicaragua, Uganda. Whereas an increasing downgrading of migrants rights is observable in the Member States in the very name of self-styled "integration" policies.

This Policy Paper from *Notre Europe* proposes to **alert European political leaders to the erosion of the rights of regular immigrants**. It further aims to **stress the paradox between the declared will for integration and this erosion of rights**, which somehow manage to overlap each other.

After a reminder of the rights enshrined in the Convention, a survey of the legislation recently passed in seven EU Member States will show how these rights are being whittled away. Those countries, **Germany, Austria, Belgium, Denmark, Spain, France and the United Kingdom** were chosen because of their significance in European migratory flows and their influence on the elaboration of European policies in this field. Two key questions, related to the integration process will receive particular attention: **Family**

reunion, "one of the particularly resistant stumbling blocks"[2] in the convention and the restrictions imposed on "selected" migrants' installation by means of an analysis of the **Status of Seasonal Migrants**. These two rights answer two essential moments in the immigration process and represent prerequisite conditions to integration.

An attempt will then be made to grasp the **role of European legislation** in the erosion process: Is The EU driving it? Does she enforce the relevant texts she has passed?

Finally the extent to which **these restrictions not only run contrary to Human Rights but further undermine the stated aim of integration** will be scrutinised. This way, we will show the dire necessity of the United Nations Convention and we will round up with a few **recommendations**.

[2] "La convention sur les droits des travailleurs migrants : un nouvel instrument pour quelle protection ?" /The Convention on Migrants Workers' Rights a new instrument for what protection?)", Yao Agbetse, *Droits fondamentaux,* n°4, December-January 2004, page 62

Table 1. **Inflows of foreign nationals, 2003-2004**

Long-term inflows (harmonised statistics)

Receiving country	2003	2004	2003-2004	Percent change
Finland	7 500	5 600	-1 900	-25
Germany	238 400	202 300	-36 100	-15
New Zealand	48 400	41 600	-6 800	-14
Netherlands	60 800	57 000	-3 800	-6
Denmark	16 200	15 900	- 300	-2
France	173 100	175 200	2 100	1
Japan	85 800	88 300	2 400	3
Switzerland	79 700	82 600	2 900	4
Sweden	38 400	40 700	2 300	6
Austria	51 000	59 600	8 600	17
Canada	221 400	235 800	14 500	7
Australia	150 000	167 300	17 300	12
Norway	18 800	21 400	2 600	14
Portugal	11 100	13 100	2 000	18
United Kingdom	214 600	266 500	51 900	24
Italy	121 800	156 400	34 600	28
United States	705 800	946 100	240 300	34
Total less United States	**1 536 900**	**1 629 200**	**92 300**	**6**
Total above countries	**2 242 700**	**2 575 300**	**332 600**	**15**

Inflows according to national definitions (usually published statistics)

Receiving country	2003	2004	2003-2004	Percent change
Czech Republic	57 400	50 800	-6 600	-11
Hungary	19 400	18 100	-1 300	-7
Luxembourg	11 500	11 300	- 200	-2
Ireland	33 000	33 200	200	1
Turkey	152 200	155 500	3 300	2
Belgium	68 800	72 400	3 600	5
Poland	30 300	36 800	6 500	21
Spain	429 500	645 800	216 300	50
Slovak Republic	4 600	7 900	3 300	72
Korea	178 300	188 840	10 540	6
Total above countries	**985 000**	**1 220 640**	**235 640**	**24**

Notes: For information on the compilation of the harmonised statistics, see http://www.oecd.org/els/migration/imo2006. Note that because the data have not been harmonised in the bottom half of the table, the total may be adding up flows of different kinds across countries.

Source: www.OECD.org

1. The Rights of migrants as enshrined in the United Nations Convention Deemed Unnecessary

The Convention on the protection of all migrant workers rights* does not create specific rights for migrants, it only applies Human Rights to that group **[1.1]**. The latest of international texts dealing with migrant populations, it comes behind several texts from the United Nations, the International Labour Organisation and the Council of Europe. Apparently, according to the Member States, the ratification of these earlier texts made the adoption of the Convention redundant. **[1.2]**.

* The full text of the «International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families» can be accessed at the web address: www.ohchr.org/english/law/cmw.htm

1.1. The rights

The **International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families** results from a long-drawn process which oversaw its drafting by a task force, created in 1980 under the leadership of Mexico. It was unanimously carried at the 69th plenary session of the General Assembly of the United Nations on 18 December 1990 (resolution 45/158).

The first states to approve this Convention were Egypt and Morocco in 1993. An out and out ratification campaign was launched in 1998, which would see the text come into force on 1st July 2003, after reaching the threshold of twenty ratifications. The implementation of the convention was supervised by a group of ten experts, elected by those same States, and named "Committee for the Protection for the Rights of all Migrant Workers and the Members of Their Families".

The Convention applies to **all migrant workers** – legal and illegal – barring people holding official positions abroad (notably diplomatic staff), people working in the framework of cooperation programmes, students, trainees, sailors, the employees of port installations, as well as refugees and stateless people.

When applying to **legal immigrants, with whom this *Policy Paper* is concerned**, the Convention specifically states the right to live as a family, and thus to family reunion, and equality in terms of labour law and social welfare[3].

[3] When applying to illegal immigrants, it sets down the equality of rights to social welfare, the education of the illegal immigrants' children, it forbids collective expulsions of illegal immigrants.

1.1.1. The right to Family Reunion

Article 44.2 of the Convention stipulates: " States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children."

This right to **family reunion** is drawn from the right to a family life invoked in numerous international and European texts. However it is **only fully spelt out in two texts: The United Nations Convention, and also Convention 143 of the International Labour Organisation** on migrant workers. Neither of them has been ratified by EU Member States.

1.1.2. Equality of Treatment in matters of Social Welfare

Article 27 of the United Nations Convention stipulates: "With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties." This article also goes for seasonal workers too.

Article 25 specifies "Migrant workers shall enjoy treatment not less favourable …" when it comes to remuneration, working conditions, overtime, paid leave, health and safety, "and any other matters which, according to national law and practice, are considered a term of employment", including social security benefits.

If the United Nations Convention leaves room for ambiguity by subjecting the principles it dictates to national legislations, the International Labour Organization's Convention n° 118 (brought into force in 1964) is, for its part, a lot clearer and more protective[4]. The principle ILO Convention 118 retains regarding social rights and territoriality of benefits is that equality of treatment must be granted to any person present on the territory of one of the signatory States, no matter how long or legal their stay (article 3)[5]. It is enough that one lives on the national territory to lay claim to benefits and the only objection to this right rests with a condition of permanent residence, conceivably of length of stay[6]. Article 4 provides as follows: " Equality of treatment as regards the grant of benefits shall be accorded without any condition of residence: Provided that equality of treatment in respect of the benefits of a specified branch of social security may be made conditional on residence in the case of nationals of any Member the legislation of which makes the grant of benefits under that branch conditional on residence on its territory.". For instance, convention 118 states that the

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[4] ILO : www.ilo.org/migrant

[5] Article 3 of Convention 118 on equality of treatment (social welfare) : *"Each Member for which this Convention is in force shall grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention."*

[6] It will be noted as a point of information that the illegality of the stay cannot justify the exclusion from social cover.

person must have lived in a place for at least six months in order to be entitled to maternity or unemployment benefits.

Unlike the United Nations Convention, this text has been ratified by several European states among which Germany, France, Italy and Sweden. Denmark, Belgium, Spain and the UK have not ratified it and the Netherlands terminated it in 2004.

1.2. Earlier Texts, Alleged Reason not to Ratify the Convention

Earlier conventions were resorted to as a reason not to ratify the United Nations text. The first international text dealing with immigration is indeed the International Labour Organization's Convention 97 brought into force in 1952, and which aimed to ease the movement of European work force towards other parts of the world after the war. It dealt only with legal migrant workers. This text was ratified by the European States.

During the sixties, in a context dominated by economic growth in Europe and a concern for the protection of minorities in the major Western States, the United Nations drafted the International Convention on the Elimination of All Forms of Racial Discrimination (in force since 1969) and international pacts relating to civil, political and economic, social and cultural rights (in force since 1976). All these texts, ratified by large immigration countries, can be called upon to protect migrants.

In 1975, the mood swung towards the desire to control migratory flows and to fight illegal migrations, as well as to promote equal opportunities between legal migrant and national workers. A new text was drafted by ILO: **Convention 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers** (brought into force in 1978), it complements Convention 97 of 1949 on migrant workers. Its object seemed in line with that of the countries in the European Economic Communities. Yet, only Italy, Portugal and Sweden have, to date, ratified this text.

Other legal instruments have been adopted by the **46 member strong Assembly of the Council of Europe**[7]:

- The **European Convention on the legal status of migrant workers** (brought into force 1 May 1983) is concerned with the legal status of nationals from Council of Europe Member States.
- The European **Social Charter** (adopted 24 November 1977, revised in 1996 and brought into force on 1st July 1999) aims to further social and economic progress among the Member States of the Council of Europe *"in particular by the maintenance and further realisation of human rights and fundamental freedoms".* It offers protection in many fields, particularly with regards to social welfare. But although its content is particularly rich, it can only be invoked by nationals from the signatory States (that is belonging to the Council of Europe) and only to support a collective demand before

[7] www.coe.int

the European Committee of Social Rights. It only applies to nationals from Council of Europe countries. The main migrants flows towards the European Union come from countries that are members of the Council of Europe (Romania, Bulgaria, Turkey, Ukraine, Russian Federation).

- Even more sweeping, the **European Convention of Human Rights adopted in the framework of the Council of Europe and brought into force in 1953** draws on the 1948 Universal Declaration of Human Rights. Its effects are universal, that is to say it applies to any person when on the territory of one of the signatories, their nationality and their situation as regards to residence legislation not withstanding.

Over and above these numerous international texts, the European States have justified the non-ratification of the Convention by their own legislations. A “safety net”, such as the United Nations text was deemed unnecessary. So, Angela Eagle, British Minister to Social Affairs, was claiming in 2002:

> "We have no plans at present to sign and ratify the convention. The Government considers they have already struck the right balance between the need for immigration control and the protection of the interests and rights of migrant workers and their families in the UK. The rights of migrant workers and their families are protected in UK legislation, including the Human Rights Act 1998, and the UK's existing commitments under international law."[8]

[8] http://www.december18.net/web/general/page.php?pageID=84&menuID=36&lang=EN, Network for the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

2. The Erosion of Rights in Europe

Meanwhile, there is no denying the fact that the national **texts have, everywhere in Europe, undergone deep modifications**, restricting the rights of legal migrants. A survey of the legislation recently passed or still in preparation on the admission of immigrants and their families goes a long way to invalidate the idea that the ratification of the convention is unnecessary:

- The French Law n°2006-911 24 July 2006 regarding immigration and integration;
- The Dutch Law brought into force 15 March 2006 and making the entry of aliens on the territory subject to their passing a language and citizenship test costing 350 euros, and taken over the phone from their home country;
- The 2000 Dutch law on aliens;
- Danish 2004 legislation concerning family reunion, Danish law 6 June 2002 defining a new immigration policy and modifying the existing law on aliens;
- The British Home Office stance in 2005 when it stated that there exists "no immediate or automatic right for relatives to bring in more relatives " and its desire to "end chain migration"[9];
- The bill passed by the Belgian Council of ministers 21 April 2006 modifying an earlier law on aliens;
- The German law 30 July 2004 on professional duties and the integration of foreigners on the federal territory (brought into force 1 January 2005);
- The Bossi-Fini bill passed by the Italian parliament in July 2002;
- The Austrian law brought into force 1 January 2003, which alters the 1997 law on aliens.

[9] *Controlling our Borders*, Home Office report, February 2005, page 9. This Home Office statement is expressed in the British Act coming into force in 2007 and which brings in a point system granted on the basis of age, qualifications, experience, fluency in English, previous salaries...

Definition – discretionary migration

According to the OECD, discretionary migrations include the categories below :

- All economic migrants, whether identified or not with an employer or selected by the host country ;
- The accompanying family of economic migrants
- Parents and other relatives ;
- Resettled refugees ;

Other categories specific to the country under conderation.

- Non discretionary migrations include :
- Spouses and children;
- Betrothed or adopted children;
- Recognised asylum seekers, persons with protection status;
- Free movement entrants on a long-term stay

International Migration Outlook 2006 Annual Report, SOPEMI, OECD Publications, 2006, p.137

All these texts, purported to ease their integration, contribute to the marked erosion of the rights of incoming populations within the European Union.

Among the measures outlined in these diverse legislations, a good number aim to **limit "non-discretionary movements"**. They apply, according to the OECD (Organisation for Economic Co-operation and Development), to the flows of people *"countries* [lest we forget] *are more or less bound to accept on the strength of conventions and internationally recognised rights"*[10]: spouses, family reunion, asylum seekers, refugees. This intent rests on two premises: the notion that Europe needs to be protected from immigrants influx and the notion according to which a restricted immigration will, among other benefits, bring about a better integration of the people already in residence. **[2.1].**

This **logic which would "sacrifice" immigration for the "greater good" of integration** is taken to an extreme when extended **even to "discretionary migrants *"** (or "selected immigrants") who **are not or no longer treated as such**: their eventual settling on the European territory is considered less and less as legitimate. The situation of seasonal workers is a point in case: prospects of settlement are restricted, social cover is minimal, and this, even as their contribution to economic dynamism has been stressed by numerous OECD reports[11]. **[2.2].**

2.1. Restrictions on Non Doscretionary Mouvements: the Erosion of Family reunion

The right to family reunion recognized in the 1990 United Nations Convention has been slowly eroded in the main host countries in Europe. Thus, since 1 July 2002 in Denmark, family reunion is no longer recognised as a right, even for spouse and children, as each application is considered on its own merits. The Danish example is showing signs of spreading as indicated by the British act which should come into force in 2007 and which puts an end to the automatic implementation of family reunion. Automatic admission has already ceased in Austria, where the number of persons accepted on the basis of reunion is subject to quotas. With the result that even those approved to stay for an indefinite period, meeting all the

[10] "International Migration Outlook 2006 Annual Report", SOPEMI, OECD publications, 2006, page 125. N.B.Transaltion provided by the translator of this paper

[11] See in particular *Temporary Employment of Foreigners in Several OECD Countries*, Main Trends in International Migration 1998

required conditions for family reunion may find that it is refused to them[12]. Without necessarily disregarding this right formally like Denmark, other EU States (Western, and Northern even more so,) curtail it by introducing a range of conditions imposed on aliens **[2.1.1]** and their families **[2.1.2]**. In effect, for all that it is recognised as such in the texts, this right is increasingly fictitious.

2.1.1. Ever more Stringent Conditions imposed on Applicants

Before they may apply to bring their families and/or spouses aliens must meet certain conditions concerning the length of their stay. In Denmark, the law distinguishes between applications concerning the spouse and applications for family reunion. As from the 1 July 2002, aliens must hold a residence permit valid for at least two years on the territory if they wish to bring their family over, whereas a normal permit had been sufficient. The same law provides that if the migrants wish for their spouse (and not the whole family) to join them this **period** goes from 6 to 10 years. For it is necessary, before a spouse can be brought over to apply for a permanent residence permit, which can only be done after a seven years stay. As for **means-testing**, aliens' income must enable them to meet the needs of their families, and *"must be equal or superior to the sum of that to which each family member would be entitled to on grounds of family reunion",*[13] Most of the social benefits being excluded from these calculations. This amounts to 50 000 kronen (€ 6-700) for the mere reunion of spouses. This sum matches an assurance to meet the costs of potential public expenditures, in particular the aids allocated for new residents (social welfare and support to foreigners' integration). The duty to integrate comes at a price.

Just as restrictively, people living in Germany, France, in the UK, must demonstrate an adequate income (not including social welfare)[14]. All those legislations also mention the obtention of **housing** suited to the needs of spouse and children. In Germany, though the rules vary from one Land to an other, an area averaging 10 m² par head is recommended. In Denmark, the reckoning is of two people per room, alternately, the dwellers must enjoy 20m². The British administration provides for one room for two persons, two rooms for three, etc… Belgium dresses its now general requirement for the provision of adequate lodgings by the resident alien with humanitarian concerns, health and safety standards and the need to fight the "*sleep sellers*" who rent seedy cubbyholes[15].

There is good cause to call into question this making adequate lodging prerequisite to the right to family reunion. We are confronted to discriminatory principles in so far as only

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[12] These quotas have been reduced by half since the 90s. In 2004, 8050 persons were authorised to enter Austria in this capacity.

[13] " Le regroupement familial / Family reunion", The Senat (French upper House), Legal Service, February 2006, page 14

[14] In France, the alien's income must be equal to the monthly minimum wages, exclusive of social security benefit . In the UK, only some benefits are excluded, notably unemployment benefit.

[15] E-mail exchange with Christophe Delanghe, legal adviser for MRAX (Mouvement Contre le Racisme, l'Antisemitisme, la Xenophobie) Belgian association supporting foreigners, 15/06/06

comfortably off migrants, who are therefore economically integrated, or hail from the upper echelons of their home society, will be up to meeting such housing requirements.

This discrimination is particularly glaring in the Netherlands where the entitlement to residence on grounds of family reunion is subject to a fee, since July 2005 of up to 830 euros[16]. The transformation of this residence permit on grounds of family reunion to an individual permit costs 188 euros. Furthermore aliens living in the Netherlands must sign a declaration, valid for five years, whereby they commit to meet all costs the presence of their partner on Dutch territory is liable to cause, viz the integration seminar (sum kept down to 4357,80 euros). Nobody, not even members of their own families, can stand security for aliens.

[16] If several members of the family apply for reunion at the same time, the first pays 830 euros, the others 188 euros.

Table 2 –(a) Evolution of conditions fixed for family reunion

	Germany		Belgium		Denmark[17]	
Legislations	1990	2005	1980	Bill 2006	1993	2002
Period of time required before applying **Or** **Residence permit required**	Residence permit other than a mere visa	Residence permit: - permanent or - limited at least 5 years ago or - limited to less than five years the stay must be extended for another year.	Info	Residence permit superior or equal to one year	Residence permit other than that granted aliens in the framework of education and training *6 years stay*	secure Residence permit enabling the alien to live for at least 2 years on the territory *Residence permit for an undetermined period held for at least 3 years. This permit can only be obtained after a 7 years stay*
Means testing, health cover	Must be able to meet his family's needs, social security benefit included,	Must be able to meet his family's needs without the aid of social security benefit	Not required	Must have health insurance cover against risks in Belgium for the policyholder and the member of his family	Info	*Must have a bank guarantee to the tune of at least 55 241 kronen (7400 €). The alien must not receive any social aid for a year before the application for FR*
Housing preconditions	Must be able to house the members of his family	Must include a minimum number of rooms in proportion with the composition of the family	Not required	Adequate Lodgings for the housing of all the family members	Info	No more than two people per room Total floor area: at least 20m² per resident.
integration Conditions	X	The spouse's level of German must be such that it dispenses them from integration classes	X	X	*Both spouses' ties as significant as those they had elsewhere*	*Ties with Denmark superior to those they have elsewhere*

[17] *Italics : for aliens seeking to bring over only a spouse . The conditions aliens wishing to bring over a family are more accomodating. The fight against marriages of convenience is a stated aim of the Danish government closely followed by the British, French and German governments.*

Table 2 –(b) Evolution of conditions fixed for family reunion

	France		Netherlands	
Legislations	2003	Bill 2006[18]	2003	Bill 2006[19]
Period of time required before applying **Or** **Residence permit required**	One year stay	18 months stay	One year stay	18 months stay
Means testing, health cover	The income must be equal to the monthly minimum wages. Social security benefit are taken into account	Nearly all social aids are excluded from the reckoning	The income must be equal to the monthly minimum wages. Social security benefit are taken into account	Nearly all social aids are excluded from the reckoning
Housing preconditions	The accommodation must meet standards for: floor area (15 m² for a couple, 24 m² with one child), comfort, suitability for habitation	The accommodation must be *"seen as normal for a family of a comparable size living in the same region"*	The accommodation must meet standards for: floor area (15 m² for a couple, 24 m² with one child), comfort, suitability for habitation	The accommodation must be *"seen as normal for a family of a comparable size living in the same region"*
integration Conditions	X	The applicant must submit to the principles ruling the French Republic	X	The applicant must submit to the principles ruling the French Republic

[18] According to the bill passed on 17 May 2006 by the *Assemblee Nationale* (French Lower House).

[19] According to the bill passed on 17 May 2006 by the *Assemblee Nationale* (French Lower House).

2.1.2. LIMITS TO THE NUMBER AND CATEGORIES OF BENEFICIARIES

Limiting the categories of "claimants" represents a second way to limit the flows, if on the margin. The United Nations Convention passes as family reunion beneficiaries **the spouse and minor dependent unmarried children**. However, **Member States have set limits regarding the age of spouses and children**: In Denmark, since 2002, both spouses must be twenty-four and the law brought into force on 1 July 2004 lowered the maximal age allowing children to benefit from family reunion from eighteen to fifteen. Thus, children from fifteen to eighteen years of age are no longer entitled to join their parents in the country where they live. German and Belgian legislators are considering raising the spouses' age limit from eighteen to twenty one in their transposition of the European directive, meanwhile, in Germany, only children below sixteen are considered for reunion and in Austria, only children below fifteen. In the UK, prior cohabitation has been pushed up to two years before the status of a migrant worker's spouse be recognised[20], from one to three in Belgium and from two to three in France since May 2006. In Spain, it was possible to accept "the other members of the family" (brothers, sisters, uncles, aunts, etc) on " humanitarian grounds". This clause was suppressed by the organic law 22 December 2000 then that of 11 January 2000 (LO n° 4).

Article 44.3 of the United Nations Convention stipulates: *"States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers."* Dependant parents could therefore be admitted *"on humanitarian grounds"*.

Convention n°143 of the ILO, which is not much more use to protect the rights of migrant workers because thinly ratified in Europe, proves to be more protective in this respect. For article 13.2 stipulates that dependant children and parents must be allowed in. This reference is more explicit than the mere notion of *"humanitarian grounds"*. So this text could have given grounds for proceeding against Italy who removed dependant parents from the list of beneficiaries when the Bossi-Fini bill was passed, or against Denmark who, since 2004 refuses to contemplate this contingency outside one to one interview.

[20] "Le pragmatisme pousse à l'extrême (Pragmatist to a fault)", *Plein droit*, n° 65-66, publication from GITSI (Group of Information and Support to Immigrants Workers), page 22

Table 3.1 (a) Conditions required from beneficiaries

		Germany		Belgium		Denmark	
Legislations		1990	2004	1980	Bill 2006	1993	2002
Spouses	**Socio-economic status**	X	The government is planning to limit family reunion to couples both members of which are over 21 The beneficiary will be expected to have a sound grasp of the language so as not to have to attend integration classes	18 years old for both spouses	21 years old for each spouse	When one of the spouses was between 18 and 25: ensure that the marriage met with the wishes of the one living in Denmark	24 years old for each spouse
	Length of cohabitation time for spouses	X	X	1 year	3 years	X	*Cohabitation of 1 year and 2.5 years for unmarried couples who or party to a civil union*
	Time it takes to obtain a autonomous residence permit	5 years	Autonomous residence permit after 5 years and subject to prerequisite conditions (specifically linguistic integration)	X	3 years	X	The spouse is granted a 2 years renewable residence permit. after 7 years: the permit becomes permanent.

		Spain		France		Netherlands	
Legislations		2000[21]	2004	2003	2000[22]	2004	2003
Spouses	**Socio-economic status**	Married with the applicant	X	Married with the applicant	Married with the applicant	X	24 years old for each spouse
	Length of cohabitation time for spouses	X	marriage predates application by 2 years	X	X	marriage predates application by 2 years	*Cohabitation of 1 year and 2.5 years for unmarried couples who or party to a civil union*
	Time it takes to obtain a autonomous residence permit	Autonomous residence permit after 5 years of family life or when in possession of a work permit	Option to ask for a resident card after 2 years. Before 2003, the reunited members had an automatic entitlement to it.	X	Autonomous residence permit after 5 years of family life or when in possession of a work permit	Option to ask for a resident card after 2 years. Before 2003, the reunited members had an automatic entitlement to it.	The spouse is granted a 2 years renewable residence permit. after 7 years: the permit becomes permanent.

[21] The two Spanish texts where, until then imprecise and decisions were moslty taken discretionarily by the administration. The Royal Decree of 30 December 2004, rather than hardening the texts, clarifies them.

[22] The two Spanish texts where, until then imprecise and decisions were moslty taken discretionarily by the administration. The Royal Decree of 30 December 2004, rather than hardening the texts, clarifies them.

Table 3.2 Conditions required from beneficiaries

	Germany		Belgium		Denmark	
Legislations	**1990**	**2004**	**1980**	**Bill 2006**	**1993**	**2002**
Children	Under 16 Discretionary for those below 18 or above if necessary	X	X	The applicant must have "custody and responsibility for the children; The concept of "custody" does not exist in Belgian law.	18 years	15 years (since 2004)
Parents	Parents are entitled to family reunion	No entitlement barring a particularly difficult situation (dependant parents)	No option except when more favourable bilateral conventions exist	No option except when more favourable bilateral conventions exist	Dependant parent s subject to one to one interview	No longer possible barring private circumstances

	Spain		France		Netherlands	
Legislations	**2000**	**2004**	**2003**	**Bill 2006**	**2000**	**2003**
Children	minors unmarried		minors	X	Minors and unmarried, legitimate, in exceptional circumstances dependant children over 18	minors belonging to the alien's family unit before the reunion: excluding any separation of more than 5 years
Parents	- Dependant parents of aliens and their spouses - Children whose legal representative the alien is, be they under or over 18 - other members of the family on *"humanitarian grounds"*	The other members of the family are no longer mentioned	X	X	Parents over 65 (if: living alone, with no other children in the home country, if all their children live in the Netherlands) Dependant grand-parents	X

2.2 CONTROLING THE INSTALLATION OF WORKERS: THE STATUS OF SEASONAL WORKERS

As will be seen [1.1.2.], the convention for the protection of migrants workers provides for equality of treatment as regards social welfare between national and immigrants, up to and including seasonal workers, between those legally employed and the others.

Governments cannot be blamed for showing reluctance towards a text that does not differentiate between illegal immigrants and legal ones[23]. Conversely, a justification of the inequality of treatment between national workers and seasonal migrants, which is rife in the European States today, seams hardly admissible from States preaching the respect of Human Rights.

Unlike the family members of migrant workers, seasonal workers are "discretionary" migrants **[2.2.1]**. Yet, it turns out that their rights (notably to social welfare) are not in keeping with the principle of equality of treatment as set in international texts **[2.2.2]**.

2.2.1. SEASONAL MIGRANTS : "SELECTED" MIGRANT S?

Seasonal workers are economic migrants participating in the dynamism of the European economy, more particularly in its agricultural sector. While they have the possibility to come and go between their home and their host countries, these migrants should be granted the same rights as any other worker in the European Union when present on her territory. Yet, facts show that these seasonal workers are denied the standards of care granted other workers, particularly when it comes to social cover. It would appear that, in view of the formal injunction they are under not to settle in the country where they work when their contract expires, they are treated like " non discretionary migrants", subjected to standards as stringent as those applying to categories of unwanted migrants (in particular the reunited people) in order to inhibit their installation en Europe

2.2.2. CONVERGENCE IN MEMBER-STATES POLICIES

If the situation of these workers was, to start with irregular, contracts were evolved in Europe similar to the French so called "OMI" contract (from the International Organization for Migration). This contract was brought in when legal immigration was stopped (1974) in order to meet the manpower needs in agriculture. They are restricted to nationals from third countries who have signed bilateral conventions with France: Moroccans, Tunisians and Poles. It enables them to work for six months (extendable by two months) at the end of which workers must leave the territory under threat of termination of their contract. This contract does not entitle them to income support, to an all year round social cover, theirs being concomitant with the period of their contract, to unemployment benefit, to the RMI

[23] As was the case for the Dutch government who, in 2000, made clear their reluctance towards a text which set down equality of treatment for social welfare regardless of the migrant's legal situation.

(occupational integration minimum income) – even though the workers have subscribed to the Assedic (Associations for Employment in Industry and Commerce). Besides it opens no route to a lasting residence permit. Up until recently, an illegal worker present in France for ten years could obtain a residence permit[24]. Whereas a worker with an eight-month a year OMI contract for twenty-five years has no entitlement. The Gisti, which provides information and support to Immigrants, offers one possible explanation to this defencelessness: *"the detail of these contracts are not subject to legislation relating to aliens nor to labour law neither of which have anything to say about them. Neither have any questions been asked in parliament about them."*[25].

The bill modifying the code for foreigners' admission and residence and for asylum seekers[26], with its temporary residence card stamped "seasonal worker", extends these contracts to all aliens and to all sectors, and adds a condition compelling the signatories to *"keep a habitual residence outside France"*[27]*.* Which could imply that these workers about to ply their trade in France would forego social welfare. Furthermore, there is good cause to wonder how the *prefecture* would be able to check this condition of habitual residence. Unlike the OMI contract, and in so far as it is signed by two anonymous persons, it affords the possibility to change employer during the season, and from one season to the next..

This withdrawal of the safety net has become widespread in Europe. Germany has passed bilateral agreements with Eastern countries in order to recruit her agricultural workers. Their status, set in 1991, restricts their stay to three months, but grants them the same salary as German nationals, and allows for subscription to social security, income tax, unless the worker works less than five days a year in which case he no longer has rights or duties. In Austria, in 2001, a new status for harvest helpers was created which *"smacks of OMI contracts"* [28] (Erntehelfer). Its holders can only stay six weeks on the territory, are not entitled to social security, the employer does not pay any contribution towards unemployment benefits, or pension scheme. Any eventuality of family reunion is of course excluded. Before 2000, seasonal workers could stay six months in the country. The regulation implemented in 2000 has besides made it possible to increase the yearly quota of seasonal workers. Such contracts have now been created in the UK where seasonal workers cannot hold a job for more than six months, and in Spain, Greece, and Hungary.

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[24] Which is no longer the case in the current bill.

[25] "Les saisonniers agricoles en Provence : un systeme de main d'œuvre / Seasonal Agricultural Workers, a Workforce System", Alain Morice, *Immigration et travail en Europe, les politiques migratoires au service des besoins economiques /immigration and Labour in Europe, migratory policies to serve Economic Needs*, Minutes of 21 March 2005, Page 19. Translation by the translator of this paper.

[26] Law n° 2006-911 24 July 2006 regarding immigration and integration published in the J-O du 25 July 2006

[27] Article 10.4, version 17/05/06

[28] "Le travail precaire agricole dans quelques pays de l'Europe du Nord/ Agricultural unprotected labour in some North-European Countries", Sissel Brodal et Dieter Behr, FCE, Printemps 2002.

Those contracts may be regarded as a progress in that they help fighting illegal immigration: the once illegal migrants now have a guaranteed salary. However, those are double-edged instruments, with the risk of *"replicating the advantages currently enjoyed by businesses but within a legal framework"* according Nicholas Bell, of the European Civic Forum[29]. For, though the migrant labourer henceforward enjoys a guaranteed salary, discriminations concerning workers rights and social protection have become legal because enshrined in contract.

[29] Interview with N. Bell 29/06/06 (Translation by the translator of this paper.)

3. European Legislation: driving a Crack down or Fostering Inertia?

The transcription of European directives has, in the countries under review, been used as a pretext to justify restrictive legislation, particularly in terms of curbing family reunion by means of directive 2003/86/CE concerning family reunion right, passed in 2003. The European Summit in Seville in 2002 signalled security induced misgivings about immigration. The Council insisted on fighting illegal immigration and the integrity of EU borders, Member States stressed the crucial importance they placed on the control of migratory flows. If this reflects the Union's distrust, to which extent is it possible to ascribe to the Community and to European directives the changes observed in the Member States?

On a matter as sensitive as immigration, States are not inclined to part with their sovereignty, never mind that title IV on asylum and immigration (part III) of the Treaty funding the European Community was moved from the third to the first pillar on the occasion of the Treaty of Amsterdam (1997), bringing it into the realm of community policies. What matters now is to study what, in the erosion of migrants' rights, can be blamed on the EU [3.1], and what is the doing of the States themselves [3.2], to understand the divergences within the European institutions [3.3] in order to know how to act at European level to advance the respect of migrants' fundamental rights and the adoption of effective immigration and integration policies.

3.1. European Standards: driving the crack down...

A study of European legislation could lead us to the conclusion that the European Union has a lot to answer for in the erosion of migrants rights in the Member States, whether in the matter of family reunion **[3.1.1]** or social welfare **[3.1.2]**.

3.1.1. A Family Reunion Directive of Little Worth

When it comes to family reunion, Community standards could be held responsible for the tough measures adopted all around. Indeed, **Member States legislation modifying the access criteria for the right to family reunion invokes the transposition of European directive 2003/86/CE**.

The Belgian bill presented by the government on 10 May 2006 modifies the provisions in the law of 15 December 1980 on family reunion, these modifications *" result mainly from the adoption by the Council of the European Union, on 22 September 2003, of directive 2003/86/CE on family reunion."* Now, **This directive has been denounced by the**

European Parliament, alerted by actors from "civil society"[30], as contrary to fundamental rights. The MEPs have presented an appeal before the Court of Justice of the European Communities (CoJEC) against three of the directive's provisions:

- Article 4, paragraph 1 last subparagraph enabling a State to enter an integration condition for the admission on the territory for family reunion purposes of a child over twelve years old;
- Article 4, paragraph 6 allowing the states to restrict family reunion to children under fifteen, by derogation;
- Article 8 allowing the States to demand of aliens a two year legal stay on their territory before they can apply for a family reunion, a period which could be extended to three years.
- To all these measures, the Parliament objected the fundamental rights and specifically the right to live as a family stated in article 8 of the European Convention on Human Rights.

3.1.2. Bilateral Agreements between the EU and third Countries: Social cover written off

Regarding social cover, The European Union would also appear to be party to the erosion of migrants' rights. The association agreements signed in the sixties between the EU and third countries regarding economic relations included social provisions and particularly equality of treatment in terms of social security. Since their renegotiation in 1995 with Tunisia, 1996 with Morocco, and 2001 with Algeria, these agreements make the availability of equal treatment subject to legality of stay[31]. The Cotonou agreements with the Africa-Caribbean-Pacific (ACP) countries, which superseded the Lome agreement on 23 June 2000, no longer carry an equality principle between African and European workers with regard to social security[32].

As a result, the ratification of the United Nations Convention as well as the application of Convention n° 118 of the ILO may well be seen, in this day and age, as the more fundamental since special rules provided in bilateral agreements are on their way out.

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[30] Among which European Coordination for Foreigners' Right to Family Life, created in 1994 by several French associations. cf. http://www.coordeurop.org/sito/en/00home/00en_site.html

[31] The agreements with Turkey were not renegociated on these lines as they had been drafted in 1963, with the adhesion of Turkey to the EEC in mind.

[32] On the Association Agreements in the framework of a Euro-mediterranean partership, see Study n° 28 by Notre Europe : *"Dynamiser l'esprit de cooperation euro-mediterraneen /For a Revival of the Euro-Mediterranean Cooperation Spirit"*, Bénédicte SUZAN, September 2003, page 21.

3.2. … Or Fostering Inertia?

It might however be hasty, on the basis of this range of texts, to blame the Union alone for the erosion of migrants rights in Europe, as the analysis of the directive regarding family reunion shows. First, in view of the possible range of interpretation **[3.2.1]**, its transposition has not necessarily impacted negatively on migrants' rights in the Member States. A closer look at the times when changes were brought about in the legislation of the Member States, shows that what drives them is not the Union but the Member States themselves **[3.2.2]**. Finally, this rather loose text is the result of differences between European institutions on this subject; this hardly amounts to proof that the European Union as a whole cares little for the respect of Human Rights for migrants **[3.2.3]**

3.2.1. Different Interpretations of the Directive on Family Reunion[33]

The bill presented by the Belgian government on 10 May 2006 opts on several occasions for a restrictive position when European legislation offers an option. Whereas no housing or sickness benefit conditions were made compulsory by the legislation in force, these conditions become the rule in the new bill. Meanwhile, Belgian associations for the protection of migrants thought that article 5 of the directive[34] would make it possible to apply for reunion in Belgium while today the formalities must compulsorily be conducted in the country of origin, *"causing all kind of difficulties"*[35] in Gisti lawyer Claire Rodier's view. This remains a forlorn hope since the government has upheld the system in its bill on the grounds that the application in Belgium *"would indeed cause an unnecessary administrative burden and a risk of dispersion of the documents created."*[36] Likewise, the French government drew from directive 2003/86/CE on family reunion to restrict the conditions of family reunion in its latest bill on immigration (CESEDA: *Code de l'entrée et du séjour des étrangers et du droit d'asile*, the code for foreigners' admission and residence and for asylum seekers)

Conversely, **in order to transpose this directive** the **Eastern States of the EU** seem to have **progressed their legislations more favourably**. Thus the 2004 Polish law on aliens, which subsumed a number of European Council directives, has taken from four to three years the period of residence entitling the immigrant to family reunion. When the directive did not strictly speaking liberalise the conditions towards family reunion, it has made it possible to

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[33] Directive 2003/86/CE Council 22 September 2003 regarding the right to family reunion, JO L251 p.12.

[34] Article 5 : Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

[35] "La directive relative au regroupement familial, une occasion manquée de faire progresser l'intégration des immigrés /The Directive Concerning Family Reunion, a Missed Opportunity to Advance Immigrants Integration)", Claire Rodier, Gisti, group providing information and support to Immigrants, *Nouvelle Tribune*, December 2003.

[36] E-mail exchange with Christophe Delanghe, legal adviser for MRAX (Mouvement Contre le Racisme, l'Antisemitisme, la Xenophobie) Belgian association supporting foreigners, 15/06/06

clarify its *modus operandi* in countries where legislation was still fluid and in the countries only freshly become immigration target: Greece and the Czech Republic, in particular. The positive impact of the directive have also been felt in France, where the bill allows for the family reunion of unmarried partners who have entered into a civil partnership (or, as the French have it, a civil solidarity pact or *PaCS*).

The diverging outcomes achieved in transposing the directive are obviously due to the **lack of stringency of the text**, and the available derogations it carries as a result of the difficulty Member States find in agreeing on a text that had to be unanimously adopted. It goes to show how much an **"ascending" approach to the Europeanization of policies prevails** on this account. Yves Surel, specialist of public policies in Europe defined the said ascending approach - or "bottom-up" - as a harmonisation at the national level, which would be later appropriated at European level. Harmonisation would not appear to be, at first sight, the outcome of an action led by Community institutions.

3.2.2. The impetus: the States, not the Union

In fact, a degree of emulation might explain the new restrictions in Western Europe, each government determined no longer to be seen by its peers – or by its public opinion – as the most liberal. This is certainly the way Kees Groenendijk, Sociologist of law at the University of Nijmegen, explains the evolution of **Dutch politics**. The **sentiment of being a liberal country** still remains however much *"the Netherlands are one of the most restrictive countries after Denmark"*[37], the latter now being one of the most stringent countries, as reflected in the many examples in this study addressing the Danish case. Representatives of the Belgian Ministry for internal affairs went on a study tour of Denmark in order to research the regulations concerning family reunion set in that country[38].

Neither should we conclude that Denmark is a European "archetype" in this domain. Danish evolutions cannot be accounted for by the transposition of the European directive, quite simply because that country is not party to the provisions in title IV of the Treaty establishing the European Community on asylum and immigration policies. Germany too may have been a "trend setter", and quite instrumental to the reduction of the content of the European directive during Council negotiations. It is indeed Germany who asked for a possible derogation towards children under twelve, a derogation which was granted. Yet it would appear that "*all the other countries seemed opposed to such a provision"*[39].

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[37] Seminar : "Immigration, integration and the situation of aliens, Netherlands, France", CERI, Challenges, 24/04/06.

[38] *Current Immigration debate in Europe : Belgium,* Sonia Gsir, Marco Martiniello, Katrien Meireman, Johan Wets, a publication of the European Migration Dialogue/ Migration Policy Group, September 2005, page 5

[39] "Le regroupement familial des ressortissants des Etats Tiers face au droit communautaire, La directive 2003/86/CE du 22 septembre 2003 /Family Reunion for Third Country Nationals before Community Law, Directive 2003/86/CE 22 September 2003" ; Cecile Poletti, Master's thesis Human Rights and Public Liberites, University Paris X – Nanterre, Under the supervision of Daniele Lochak, Academic year 2002-2003, page 55.

It must be made clear that a **number of legislative changes were brought about before the transposition of the directive**, as is the case in particular for the Spanish organic law of 11 January 2000, the Bossi Fini bill of 12 July 2002, Portugal and its 2001 law and also the German text of 22 March 2002, which in the end never came into force and was replaced by the Resident Act of 30 July 2004. Thus, the texts discussed here have, for the most part, been passed during the negotiations on the directive, for all that the European Social and Economic Committee signalled that the States were asked not to modify their legislation before the adoption of the directive[40].

3.3. The Union Divided: Debate between the Institutions

Even though the directive on family reunion thus offered the Member States the opportunity to take protective or restrictive measures, the Commission proposals and the European Parliament's reprimand give a better idea of the role the Union could play as guardian of the Conventions on the Rights of Migrants.

3.3.1. The Original Proposals of the Commission: Missed opportunities?

The debate around the directive under scrutiny shows by default European contradictions as to the recognition of rights enshrined in international conventions. For instance, t**he first directive proposal from the Commission was supported by the NGOs** and a support campaign had been organised by the European Coordination for Foreigners' Right to Family Life. According to Claire Rodier, it *"lead the way towards an relatively liberal acceptation of the notion of family, allowing, in particular, for unmarried partners, including same sex, and not excluding parents or children over eighteen"*[41]. Unlike what was adopted by the Council, the Commission *"did not set any income and housing standards as non-negotiable prerequisites"*[42]. The Member States had the "*possibility*" to define criteria concerning floor space and level of income.

It now remains to be seen whether the Commission's directive proposal concerning seasonal workers will go the same way. It would be hard to find any evidence in there of the higher authorities of the Community's lack of commitment to the respect of international conventions. The Commission, in its policy plan regarding legal immigration has come up with a dual document residence/work permit which should enable the alien to work *"for a certain number of months per year for 4-5 years […]. The aim is to provide the necessary manpower in the Member States while at the same time granting a secure legal status and a regular work prospective to the immigrants concerned, thereby protecting a particularly weak category of*

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[40] *Ibidem*

[41] "La directive relative au regroupement familial, une occasion manquée de faire progresser l'intégration des immigrés /The Directive Concerning Family Reunion, a Missed Opportunity to Advance Immigrants Integration)", *op.cit.*

[42] *Ibidem*

workers"[43]*.* This proposal is certainly a move in the right direction, towards reducing those employees' defencelessness.

3.2.2. COMMUNITY AUTHORITIES ALERT TO MIGRANTS'S RIGHTS

While the Council adopted the directive on family reunion on the basis of its third very restrictive version, proposed by the Commission, the Parliament opted to ensure the fundamental rights mentioned in the ECHR, and the general principles of community law by its appeal before the Court of Justice of the European Communities. Even though the judgement returned by the Court on 27 June 2006 rejected this appeal[44], this business shows once again the **split within the European institutions,** on the issue of fundamental rights, **between the community authorities on the one hand, and the intergovernmental authorities on the other**. Rather than the political will to deny migrants their rights, what this business shows is the difficulty governments experience in letting go of what is, particularly in the eyes of their electorate, the sensitive issue of legal immigration control.

[43] "Policy Plan on Legal Migration", Commission Communication, COM (2005)669 final.

[44]For the first time, the Court gave an opinion on a European directive, even though, it is undeniably competent in this domain under article 230 al. 1 TCE

4. Contradictory Integration Drives

Today the integration of migrants and their offspring constitutes a major headache for European governments and for the European Union [4.1]. It translates into a desire to restrict the number of migrants authorised to enter the EU, and to recruit productive migrants, that is workers. The policies advocated by the states [4.1.1] and the Union [4.1.2] go against both migrants' rights [4.2], the recognition of which is prerequisite to any useful policy, but also the very logic of group integration they have undertaken [4.3].

4.1. Unashamedly Interventionist Policies

4.1.1. The Member States agenda: induction and Integration Programs

The European Commission notes, ***"Integration is a major concern in a number of EU policies."***[45]. The summit on integration held on 14 July 2006 in Germany and rated an *"almost historical event"* by Angela Merkel, like the Franco-German forum on The Future of Europe through Integration and Equal Opportunities held in Paris on 18 July last come to confirm the Commission's observation. The creation over recent years of integration programmes which offer language and citizenship to the newly arrived bear this out. Such programmes are currently run in Germany (2004), Austria (2002), Belgium (Flemish community, 2003), Denmark (1986), Finland, France (2003), Greece, the Netherlands (1998), and Sweden. They are being considered in Latvia, Luxembourg, and the UK.

4.1.2. The Union's Agenda: the Hague Objectives

* The Hague programme (pluriannual, 2005-2010) aims to reinforce States coopération in the field of justice and internal affairs so as to create a « space of freedom, safety and justice ». In its « intégration » dimension, it follows on that score from the 1999 extraordinary European Council at Tampere where for the first time the need for a dynamic integration policy was highlighted, to ensure that third country résidents enjoyed rights and duties comparable to those of EU citizens.

The European Union, relaying the states' interests, seized on the subject for the first time at the time of the Tampere Council (1999). Integration was then defined as a "*major aim*". Yet nothing emerged until the **Hague programme ***, adopted by the European Council at its 4-5 November 2004 meeting when a definition was arrived at. **Integration** is then conceived as a **two way process**, implying rights and duties. The stated aims are seamlessly congruent with the Convention: improve the Union and its members' joint capability to guarantee the fundamental rights, minimal standards of procedural safety, and access to justice for the

[45] "A Common Agenda for Integration - Framework for the Integration of Third-Country Nationals in the European Union", COM (2005) 389 final.

protection of the people in need of it, the regulation of migratory flows, and the control of the EU's external borders[46].

If, as the Commission stresses, **integration *"is global in its implications, above all when it fails,"***[47] language and citizenship courses such as are being set up in Europe cannot alone amount to a worthwhile integration policy. How indeed is one to **do a good job of the "migrants' integration in Europe"** dimension as defined in the Hague programme if the **newly arrived are denied such rights as family reunion or the right to settle in the country where they work**, whereas these rights are, jointly with language and citizenship courses, non-negotiable prerequisite to this much sought after social insertion**?** It seems hardly feasible thus to divorce the foreign labour force from European residents as practiced in the sixties[48] whilst wishing to construct a shared space of freedom, safety and justice.

4.2. Interventionism in conflict with the Erosion of Migrants Rights

All considered, it does not seem unreasonable to consider that the right to family reunion **[4.2.1]**, and that to equality of treatment in the field of social welfare **[4.2.2]** are mandatory prerequisites to integration.

4.2.1 Family Reunion: Prerequisite to Integration

Family reunion has long been seen by European governments as a factor of migrant workers' social integration, indeed of social stability by virtue of the fact that it broke the migrants' isolation. Thus, women were identified as "integration vectors" as academic Françoise Gaspard explains[49]. Family reunion guaranteed both social stability to the states, and their right to the migrants. Nowadays, social peace supposes a fight against mass migrations, not to mention marriages of convenience. Henceforward, the right to family reunion is restricted to those migrants more or less integrated before the arrival of their kin.

For the presence of the family to advance social insertion, its members must themselves have access to integration. During the eighties, in Europe, the idea that a safe legal status would help people to integrate became accepted. Danièle Lochak French Lawyer specialised in migrants rights asserted in a recent lecture on integration policies[50] that the "*acquisition of a safe residence permit for migrants is now conditional to their integration*". The increase in the time lag before

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[46] European Council 4/5 November 2004, Presidency Conclusions, 14292/1/04/REV 1

[47] European Parliament memorandum on "Common Agenda for integration and framework for the integration of third-country nationals in the Union", Rapporteur, Stavros Lambrinis, 3/02/06

[48] Immigrants in the post-war years of reconsruction of Europe were indeed seen exclusively as manpower. "Exclusively" since the migrants' presence was thought temporary, while they lived in "workers hostels" and family reunion was not yet allowed. This only happened as Europe closed its borders in the seventies. In France, after several unsuccessful aid to return policies in the 80s, the awareness that immigrants were there to stay took hold.

[49] "De l'invisibilite des femmes migrantes et de leurs filles à leur instrumentalisation /From the Invisibility of Migrant Women and their Daughters to their instrumentalisation", by Françoise Gaspard, *Migrants-Formation,* CNDP, Juin 1996

[50] Seminar : "*Immigration, integration where does that leave the aliens in theNetherlands and, France"*, CERI, Challenges, 24/04/06.

the obtention of an autonomous status for "reunited" spouses bears this out. This period has been extended in France by two or three years upon the reform of the Code for Foreigners' Admission and Residence and for Asylum Seekers, and this obtention has become an option whilst it used to be a right before 2003. In Germany, a person must wait five years to be entitled to this autonomous title, seven in Denmark.

Likewise, if *"an effective and responsible integration of immigrants into the labour market is an important element in achieving the Lisbon Objectives"*[51], this principle should apply to the members of the migrant worker's family. The Austrian legislation calls this principle into question. The reunited spouse must wait for a year before taking up a paid job.

4.2.2. Social Protection: Optional for Integration?

For all that work is essential to integration, there is no need to go over the top and grant migrants the right to work and nothing but. That, however is the situation faced by seasonal migrant workers in Europe, as described above. Because integration must be a *"global phenomenon"*, EFFAT (European Federation of Food, Agriculture and Tourism Trade Unions) launched in 2003 a campaign for the social and unionised integration of seasonal migrant workers, on the basis that these workers' return in their country at the end of their contract *"creates new problems, for, in the old days, these people settled in the host country with their family. Nowadays, employers do not give them the means to integrate"*[52]. The integration of these people is obviously deemed unnecessary since they are not allowed to settle down.

Now, are we really dealing with "seasonal" workers, when it turns out that these people *"work every year for fifteen/twenty years"*[53], their contracts, in France at least, mostly extended to the maximum, that is eight month, and for working hours well above the weekly 35 hours? Those look more like *" full timers"*[54], who should be treated accordingly.

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[51] European Parliament memorandum on "Common Agenda for integration and framework for the integration of third-country nationals in the Union", Rapporteur, Stavros Lambrinis, 3/02/06

[52] Arnd Spahn, secretary General of EFFAT for agriculture in "Migrants in European agriculture: the New Mercenaries ?", Anne Renaut, page 26-27.

[53] Entretien avec M. Gouyer, of CODETRAS, le 11/07/06

[54] *Ibidem*

5. Some Recommendations

The analysis conducted above leads to the considered opinion that an actual integration of immigrant populations can only take full effect if their rights are respected, which a ratification of the United Nations Convention would guarantee - at least to some extent **[4.1]**. Furthermore, this integration policy will remain useless at European level if it is not conceived jointly within a European legal immigration framework, yet to come **[4.2]**.

5.1 Ratifying the Convention

Today the United Nations Convention is ratified essentially by the migrants' home country, who sees in it a way to protect their citizens abroad. Its ratification by the transit and destination countries, i.e. the EU Member States would give it a lot more clout at international level. At the moment, the majority of the States who signed it have not ratified it and host only a minority of the migrants liable to benefit from the protection it offers, so its impact is still limited. In Europe, it could offer a safety net in a shifting legal and political context **[4.1.1]**, the more so since, short of being radical, it is legally binding **[4.1.2]**.

5.1.1. The Convention as a Safety net

The European Convention of Human Rights and the United Nations Convention regarding the Rights of the Child, two texts calling for the protection of family life and the taking into account of the child's welfare, were called upon by the CoJEC to justify the rejection of the Parliament's appeal against directive 2003/86/CE. According to the judges' ruling, these conventions *" do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification."*[55] Whereas the United Nations Convention on the Protection of Migrants Workers stipulates in its article 44.2 that the states must take measures in order *"to facilitate the reunification of migrant workers with (their family)".* Had the Member States ratified this text, it could conceivably have been invoked to quash the European court judgement.[56]

The ratification of the Convention, conservative though it was, offered *"nevertheless a safety net."* according to Adeline Toullier, lawyer with Gisti[57], particularly in view of the **evolution of**

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[55] Judgment of the CoJEC 27 June 2006 on directive 2003/86/CE Judgment of the Court of Justice in Case C-540/03

[56] "European Parliament resolution on the EU's priorities and recommendations for the 61st session of the UN Commission on Human Rights in Geneva to be held 14 March to 22 April 2005, P6_TA-PROV(2005)0051. The European Parliament calls on "the Member states to ratify the Convention of the United Nations on Migrant Workers and to support its universal ratification" (§22)

[57] Entretien avec Adeline Toullier, Lawyer with Gisti, 21/06/07

Member States legislations regarding migrants rights, the which fluctuate as political majorities change. The new Portuguese – Left wing – government is thus looking into authorising the filing of application for family reunion directly after obtention of a residence permit, instead of waiting for a year as provided by the legislation in force. The advent of the Prodi government in Italy has raised the hopes for adjustments to the Bossi-Fini bill, and the subject will undoubtedly be on the agenda in a few months in Rome.

In the face of prevailing uncertainties and given the politically sensitive character of the subject, **the adoption of the text would allow for a degree of stability and**, to quote UNESCO[58]. **a *"moral standard"***

5.1.2. The Benefits of a Binding Text

By definition, a United Nations convention is normative and binding. Its ratification by a State entails that the latter's legislation will comply with the principles stated in the Convention. Moreover, the United Nations convention answers to the **principle of universal application**, which can be seen as a strength since **the text must be respected regardless of the position of the other party to the contract[59]**.

Furthermore, the application of this text is supervised by an expert group. In that it is **binding**, this convention would allow a Europe intent on *"the development of these common values* [Human dignity, freedom, equality, solidarity...]" *"to strengthen the protection of fundamental rights in the light of changes in society, social progress"*, as is stated in the preamble of the Charter of Fundamental rights of the EU.[60]

Indeed, the European Parliament has supported the principle of its ratification, in 2002 and 2005, as has the European Economic and Social Committee in 2004[61].

5.2. For a European Immigration Policy

The call for a ratification of the Convention by the Institutions of the European Union should round off their drive towards integration. Yet it will make no sense so long as a real legal European immigration policy has not been brought into being. The study of the links between family reunion and integration highlights the link between immigration and integration. More

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[58] UNESCO, *ibidem.*

[59] Unlike, for instance, most of the ILO's texts which operate under a condition of reciprocity, which means that the State pledges to ratify the Convention on condition that the other contracting party also respects its obligations.

[60] Preamble of the Charter of Fundamental rights of the Union, text on the European Commission Web site : http://ec.europa.eu/justice_home/unit/charte/index_en.html

[61] Resolution of the European Parliament for the 61st session of the Human Right Committee of the United Nations, (P6_TA-PROV(2005)0051 – 24 February 2005) ; Opinion of the European Economic and Social Committee on "the International Convention on Migrant Workers", (2004/C 302/12)

broadly, a better integration is wholly dependant on a well thought through immigration. However, the EU's legal immigration policy is, to date, sketchy and boils down to two directives: the directive on family reunion and the directive on the legal status of long-term migrants (directive 2003/ 109/CE).

This is now about making the case for a strong legal European immigration policy **[5.2.1]**, and to identify the means to that end **[5.2.2]**.

5.2.1. Of the Necessity of a European Immigration Policy

As all EU Members States admit, immigration is an economic necessity **[A]**. The establishment of a legal framework for immigration will besides make operative what already exists at community level, namely the fight against illegal immigration **[B]**. The two necessities are accounted for by the constitution of a large borderless space: the Schengen space.

Economic Necessity

Following in Germany's footsteps, a number of European Union Member States have implemented policies of workers quota in order to allow in the best qualified. The law passed by the Blair government due to come into force in 2007, will ease the entry of qualified workers by means of a point system, the same which is supposed to discourage the others. A quota policy is already in place in Italy, Denmark, the Netherlands and Austria.[62]

These workers are indeed essential to European economy. Eurostat projections precise that *"Population growth in the EU25 until 2025 will be mainly due to net migration, since total deaths in the EU25 will outnumber total births from 2010. The effect of net migration will no longer outweigh the natural decrease after 2025."*[63]

The effectiveness of such a policy, given the freedom of movement within the Schengen space, requires action to be taken at community level.

Necessity to Fight Illegal Immigration

States who can come to a swift agreement to pool their strength in the fight against illegal immigration, should have no trouble in reaching an understanding towards a common immigration policy. Today, for want of a clear framework addressing legal immigration at European level, entry counties like Spain and Italy bring about mass regularisation policies, undermining via the Schengen space their neighbours' attempts to close their borders. And yet, it is because of the very existence of this space "of freedom" that quota policies will only

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[62] In France, selective immigration exist as and when. In 1998, the gouvernent had allowed via an administrative memo to bring in foreign IT specialists to deal with the millenium bug. In 2002, a memo allowed some students and qualified workers from developing countries to come and work in France if their job fitted in a the framework of a co-development project.

[63] "Policy Plan on Legal Migration", COM(2005) 669 final, page 5

be applicable if they are worked out together, and with them the policies fighting illegal immigration. Both are linked since, as political scientist Patrick Weil says, even if the conditions permitting to family reunion are strongly curbed, *"it is not possible to keep a family apart for ever. So family reunion will be effected illegally"*[64].

5.2.2. THE MEANS TO IMPLEMENT SUCH A POLICY

For this ambitious program of the Commission to be successfully carried out, the Member States must imperatively accept to let go of this politically contentious subject, by cooling the debate [A], by avoiding the pitfall already identified through the analysis of directive 2003/86/CE [B], and putting an end to family reunion policies incompatible with the workers' needs [C].

A DISPASSIONATE DEBATE

Getting public opinion to keep cool about immigration would be a first step towards a Community approach. To this end, the Spanish authorities run campaigns actively promoting the acceptation of immigrants. This might be an easier thing to do in Spain than in France or in Germany, since it boils down to reminding the Spaniards that twenty years ago, THEY were the immigrants.

More broadly, it is going to be necessary to: review the representations and use of figures which have a bearing on public opinion in order set the debate in its correct context. For it is not easy to make dispassionate decisions under the effect of pictures such as arrivals of illegal migrants at Ceuta and Melilla in the autumn of 2005. A recent publication of the European People's Party would have us believe that *"the pressure for immigration from the European Union's neighbouring countries, especially North Africa, is constantly increasing "*[65]*.* Yet, in Spain after the 2005 mass regularisation, it emerged that 40% of the regularised people came from Europe, 26% from South America, populations hailing from North Africa amounting to a clear minority[66]. Broadly speaking, according to OECD figures, migratory flows into European OECD countries in 2004 originated in majority from Eastern Europe: Romania, Poland, Morocco, Bulgaria, Turkey, and the Ukraine[67].

Finally, the fight against discriminations and for the integration of migrants must endeavour to loose its "hot potato" status. The year 2007, officially the year of equal opportunities, opens a window for awareness. Martin Schain, professor at New York University, assures us that when

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[64] "Lettre ouverte à Nicolas Sarkozy sur sa politique d'immigration /Open Letter to Nicholas Sarkozy on his Immigration Policy", P. Weil, *op.cit*, page 83.

[65] "Immigration policy in Europe", Dr Ioannis Varvitsiotis, MEP with the cooperation of Gavril Kampouroglou, A Publication of the EPP-ED Group in the European Parliament, March 2006, Foreword, page 7.

[66] Jose Manuel Albarez, Spanish Embassy adviser at the OECD, Conference- Debate organised by the collective *Sauvons l'Europe* le 28/06/06.

[67] "Main Trends in International Migration , Annual Report", OECD, *op.cit*, page 35

immigration is considered a challenge to national identity, as is the case in France, the question is perceived in political terms. Conversely, when the question is seen as economic, and therefore concerned with answering the needs of the labour market, as is the case today in the United States, *"the question is about bringing in the immigrants needed and is an administrative matter"*[68]*.* Paradoxically then, viewing migrants as economic actors may allow the implementation of more effective migratory policies. So as not to repeat the sixties mistakes whereby immigrants were seen as nothing more than cheap labour, the protection of fundamental rights through the adoption and respect of international conventions is a matter of urgency.

PREVISION OF THE PROCEDURES FOR ADOPTION OF EUROPEAN DIRECTIVES REGARDING LEGAL IMMIGRATION

SHELVE UNANIMITY VOTING:

Shifting to majority vote on legal immigration matters would avoid a repeat of Germany's blocking of directive 2003/86/CE, when Germany refused family reunion rights to children over twelve without integration conditions. This condition was implemented in the text.

EXTENSION OF CODECISION TO LEGAL IMMIGRATION MATTERS:

The extension of codecision to legal immigration matters would be a second "safety net" for migrants' rights in Europe. The very fact that codecision procedures be extended to other domains under title IV of the TCE[69] comes once more to show the reluctance of Member States to relinquish this sphere of intervention in which community measures are no less urgently needed.

Less ambitiously, before the adoption of a codecision procedure, the **respect of article 67 of the Treaty of Amsterdam covering the policies in the first pillar** could be insisted on **–** as is the case, since the treaty of Amsterdam, for asylum and immigration policies. It does after all state that the ***"Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament".*** Now while drafting the directive on family reunion, the Council did not await the Parliament's opinion to arrive at a political agreement on the directive, on 27 and 28 February 2003, whereas the last consultation of Parliament took place in March. While the directive was formally adopted only on 22 September 2003, it remains technically in **breach,** all be it indirect, **of the consultation procedure**.

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68 CERI seminar "Comprendre la difference entre la politique americaine et la politique française d'immigration ? (Understanding the Difference between American and French Immigration policies)", Seminar included in the CERI's transversal project , Migrations and International Relations, 28 April 2006.

69 The European parliament is denied codecision in the spheres of legal immigration and judicial cooperation in civil matters whereas the other matters under Title IV of TCE (asylum and fight against illegal immigration illegale in particular) fall under this principle.

On this front, the Commission, in its capacity as guardian of the treaties must show greater circumspection. It should have been on the alert at the time, as the European Parliament had just approved its first proposal for directive (01/12/1999), which it deemed *"globally positive."*[70] Disciplining the Council before the CoJEC could have been a way to reassert its priorities. It would have made no difference to the outcome: the Council is not bound by Parliament's opinion. It remains that if the Union is to rest on *"the principles of democracy"* as the preamble of the *Charter of Fundamental rights of the Union*[71] states, the removal of this stage in the legislative process seems problematical.

FOREGO THE REDUCTION OF FAMILY REUNION POLICIES

The Member States' aim to reduce discretionary movements seems to have worked since the number of entries on the European territory through family reunion has dropped. In Germany, after a steady rise from 1996 to 2002, entries fell by 10% between 2002 and 2003; in Denmark they have plummeted: from 15 370 in 2001 to 5 838 in 2004, finally in the UK, they passed from 66 075 in 2003 to 34 905 in 2004.[72]

An other type of non-discretionary movement, asylum requests have also dropped considerably over the passed few years as a result of the more and more rigid policies of the European Union towards refugees, castigated in a report from the High Commissioner for Refugees (UNHCR)[73] made public 19 April last[74:] "In five years the applications to Member States have diminished by half and reached their lowest level since 1988", thus Samuel Boutruche, UNHCR delegate before the European Institutions.[75]

The limitation to family reunion does not appear consistent with the desire to bring in immigrant workers: Patrick Weil, historian of director of research at the CNRS's French analyses: *"it will undermine France's attraction in Northern countries: How do you reckon to attract the least American or Japanese worker when their right to bring their family over is subject to an adequate knowledge of the French language?"*[76] This goes for the European model?

In this respect, the example of **Germany** is instructive. The **"quota law",** brought into force in 2000 to make up for the lack of qualified workers, particularly in the field of new technologies, imposed tight quotas for each type of jobs alongside which, in order to curtail family reunion, it forbade the alien's family members to work during the two first years after

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70 "Le regrouppement familial des ressortissants des Etats Tiers face au droit communautaire, La directive 2003/86/CE du 22 septembre 2003 /family reunion for third country nationals before Community law", op.cit, page 65

71 Op.cit

72 Owing in particular to the inforcement of the rule according to which the reunion of unmarried couples is only possible after a period of cohabitation of at least two years

73 UNHCR: www.unhcr.org

74 "The State of the World's Refugees 2006, Human displacement in the new millennium", UNHCR,

cf. http://www.unhcr.org/cgi-bin/texis/vtx/template?page=publ&src=static/sowr2006/toceng.htm

75 Conference organiseed by ISI-Challenge on 8 June 2006

76 "Lettre ouverte à Nicolas Sarkozy sur sa politique d'immigration (Open Letter to Nicholas Sarkozy on his immigration policy)", P. Weil, op.cit, page 83.

their arrival in Germany. Three years after the inception of the law, only 16 000 authorisations had been granted, *"a result the government deemed insufficient"*.[77] The **law *"considered too restrictive"*[78] has accordingly been dropped towards the end of 2004**. A new text, brought into force 1 January 2005 grant highly qualified workers' family members the right to take up a job right away.

77 "Vers une immigration selective en Europe (Towards Selective Immigration in Europe)", Gregory Lecomte, 6 April 2006

[78] *Ibidem*

Conclusion

The protection of the fundamental rights as applying to migrants is eminently desirable per se but even more so since the integration of third country nationals on the European territory rests on the respect of these rights and cannot be combined with the flow controls imposed today.

Initially disadvantaged by its rather conservative approach the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was dismissed by the most advanced countries who saw no great use in its formulation. Today, it is liable to be received with scepticism, in the name of what has become known as realpolitik. For, some will say, aren't we about to encourage further droves of migrants by granting them rights that make our countries even more attractive? Shouldn't our priority be to discourage those contemplating emigration?

In fact experience shows that family reunion helps integration, and that fluid relations between the country they leave and the country they enter is likely to eschew the all or nothing logic which effectively cuts migrants off from their home country connections to come to Europe.

As the UNESCO reminds us, "*[the Convention] is not proposing new human rights for migrant workers*"[79]. It enables migrants to remain in contact with their home countries, with a right to return, right to occasional visit, right to upholding cultural links; the participation of migrants to the political life of their home country; and the right of migrants to transfer money from their earnings to their home country. This does not make it a pole of attraction as such, but rather an integration enabler and a detente factor in the relations with the exit country.

Finally, in Europe like elsewhere in the world, migrants are faced with social, legal, and often economic difficulties greater than those experienced by the host country's citizens. It is incidentally legitimate for the former not to have the same rights as the latter. However, whilst such distinction is realistic, the logic of differentiated treatment can, as we saw, lead to situations bordering on discrimination, which is not acceptable. The wrong move can in no time be turned into a symbolic obstacle to the tolerance of incoming populations and send signals inhibiting the integration of immigrant workers.

One way to avoid that stumbling block and not to give into that trend undoubtedly consists in ratifying the Convention of the United Nations. This option lays no claims to solving all the problems but it represents a strong signal much needed in Europe if she means to hold a significant rank in the world.

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[79] UNESCO, Dossier d'information, *La convention des Nations Unies sur les droits des migrants*, 2005, www.unesco.org/migration

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