LABOUR RIGHTS AND SOCIAL PROTECTION OF MIGRANT WORKERS: IN SEARCH OF A CO-ORDINATED LEGAL RESPONSE

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Labour rights and social protection of migrant workers: In search of a co-ordinated legal response

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1. INTRODUCTION

Developing a co-ordinated legal response to the labour and social protection situation of migrant workers is a challenging initiative. In many parts of the developing world, in particular, existing labour law and social protection regimes have traditionally been unable to offer effective responses to the present situation. In fact, it may be argued that there exists something of a lack of an integrated, holistic approach to the various challenges faced by migrant workers, despite the existence of well-established international standards operating in this area. This paper investigates the legal position of migrants from the perspective of both labour law and social protection rights, emphasising the relationship between these dimensions and immigration policy. The authors propose the development of a synergised legal regime in order to address the multifaceted problems associated with labour migration in an appropriate fashion.

In particular, it is noted that the current debate on the labour rights and social protection of migrant workers is informed by several new developments and dimensions. These need to be factored in when considering a coordinated legal response. The first is the tendency, increasingly, to superimpose immigration law on the social security legal and the labour law framework: for example, dependence on state social welfare (i.e. social assistance) constitutes a ground for refusing admission and/or permanent residence status and expelling migrant workers whose status has not become permanent. In addition, irregularly employed migrant workers may find it difficult to enforce their labour rights. These issues are discussed in more detail in this contribution. A second development discussed in this paper relates to the tendency on the part of migrant-receiving countries in the global north to increasingly restrict the extra-territorial application of social security entitlements, including the exporting of benefits acquired by migrants and even citizens. Paradoxically, in the third place, this has to be contrasted with recent steps taken by several migrant-sending countries of the global north to extend some form of social security protection and related support, also in terms of labour migration services at the pre-departure stage, during the stay in the destination country, and upon return. This is also reflected on in this contribution.

Fourthly, understanding the value of migration in relation to its developmental role in both the host and home country is a theme that enjoys significant support at the international and domestic

levels. Already in 1994, at the occasion of the Cairo Population Conference, the following objectives were included in the Conference's Programme of Action:[1]

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

These concerns also prompted the UN to set up a High Level Dialogue on Migration and Development in 2006; the General Assembly adopted by consensus a resolution on International Migration and Development,[2] which culminated in several useful findings, outcomes and suggestions aimed at strengthening the links between migration and development. A follow-up High Level Dialogue on Migration and Development will take place in October 2013 – its purpose is to identify concrete measures to strengthen coherence and cooperation at all levels, with a view to enhancing the benefits of international migration for migrants and countries alike and its important links to development, while reducing its negative implications.[3] At the national level, evidence of this emphasis on migration and development is to be found in important initiatives relating to the adoption of migration and development policies and strategies, streamlining remittance transfers, engaging the diaspora in development-oriented interventions in or for the benefit of the country of origin, and the conclusion of labour-exporting agreements between countries (often from the global north) experiencing skills shortages and countries that have excess human capacity to make available (invariably countries from the global south).

There is, in the fifth instance, a renewed interest in the treatment of irregular migrants and asylum-seekers. On the one hand, the policy and legislative domain tends to become more restricted, in particular in countries of the global north. On the other hand, from a human rights perspective it is evident that all migrant workers, including those who migrate and work as undocumented workers should be entitled to at least basic forms of social assistance and emergency care. In addition, human rights law also recognizes the special protection which is due to specifically vulnerable categories of migrants, including children and, in particular, unaccompanied children. The human rights framework and the implications flowing therefrom for the labour law and social security protection of migrants are discussed in this contribution. As a sixth matter, the interplay between migration and important cross-cutting themes is also appreciated. Three of these themes relate to migration and gender, migration and health, and migration and those who work informally.

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[1] UN *Report of the International Conference on Population and Development* (Cairo, 5-13 September 1994), A/CONF.171/13/Rev.1 (New York, 1995), Plan of Action, Title X, par A: International Migration and Development, p 67-68.
[2] Resolution A/RES/61/208. See http://www.un.org/esa/population/migration/hld/index.html.
[3] See http://www.un.org/esa/population/meetings/HLD2013/mainhld2013.html.

Finally, mention should be made of the increasing prevalence and importance of multilateral and to some extent bilateral agreements, in particular in relation to social security coordination. Despite the limitations of these agreements, they tend to extend protection to core categories of workers who are lawfully employed, by including them in the domestic social security system of the host country, and allowing for the incremental and cumulative built up of entitlements and exportability of benefits on a cross-border basis. Also the geographical spread of these agreements, in particular multilateral agreements, are increasingly expanding, covering certain geographical regions in the world and beyond, by linking countries in a certain region with those in another region (in particular the Ibero-American multilateral agreement covering 20 Latin American countries, in addition to Andorra, Portugal and Spain in Europa).

2. INTRODUCTION TO MIGRATION

People have migrated from the time the first people populated the earth, making migration 'as old as mankind'.[4] When the first civilizations began developing trade networks, products, knowledge and ideas started migrating across different locations and continents, allowing for the transmission of people and cultures, and being one of the greatest causes for human development and human integration worldwide.[5]

The number of migrants crossing borders in search of employment and human security is expected to increase rapidly in the coming decades due, in part, to the failure of globalization to provide jobs and economic opportunities. In this era of globalisation, almost all countries in the world are involved in migration as countries of origin, destination, or transit—or all three. There are presently about 214 million migrants, a significantly increased number in comparison with 75 million in 1960 and 175 million in 2004. This figure constitutes around 3 per cent of the world's population.[6] The ILO estimates that persons who migrate for employment (migrant workers) total approximately 105 million people.[7] Around 50 million are said to be undocumented or irregular. It is generally accepted that most of those who migrate do so for economic reasons, some for political or other reasons. The bulk of migration is within the same region, between neighbouring countries and within low- and semi-skilled job sectors.[8]

While international migration can be a positive experience for migrant workers, the consequences of migration have unfortunately included exploitative colonisation, slavery, the spread of diseases, proliferation of discrimination, racism and xenophobia, resulting in internal conflicts and regional problems.[9] This "insider / outsider" dichotomy continues to play an important role in understanding social exclusion, racism and ethnic violence, and prompts the search for alternative approaches to the difficulties associated with migration. Migration – whether voluntary or forced – continues to

[4] A Demuth "Some conceptual thoughts on migration research" in *Theoretical and Methodological Issues in Migration Research*, B Agozino (ed) (Aldershot: Ashgate Publishing, 2000) 21.
[5] N Szablewska and S Karim "Protection and international cooperation in the international refugee regime" in R Islam and JH Bhuiyan (eds) *An introduction to international refugee law* (2013) 191.
[6] UNDP *Human Development Report: Overcoming Barriers* (2009) 2.
[7] See L Lamarche "Migrant workers' human right to social security and social protection: An evolutionary process showing some progress" in *Migrant Workers and Social Security* (full details forthcoming) 1.
[8] *Ibid*.
[9] *Ibid*.

present a major challenge to societies worldwide, particularly in the context of globalisation and global financial crisis. Migration also raises a range of interesting and problematic issues pertaining to human rights law, labour law and social security law, and, as discussed below, brings the tensions between these areas of law and immigration law into focus.

3. THE MAIN PURPOSES OF IMMIGRATION LAW, SOCIAL SECURITY LAW AND LABOUR LAW

Immigration law is concerned with the regulation of admission of persons to, their residence in and their departure from a country. Countries generally seek to control the immigration of persons so that the process of migration occurs in an orderly fashion. Policy and legislation are often directed towards ensuring that temporary and permanent residence permits are issued as expeditiously as possible, following simplified procedures and criteria (also so as to minimise the burden on the country's administrative capacity). National law is also concerned with satisfying security considerations and with allowing states to retain control over the process of immigration of foreigners. Simultaneously, however, countries are becoming increasingly cognisant of the promotion of economic growth through the employment of needed foreign labour, the facilitation of foreign investment and the increase of skilled human resources. Immigration law attempts, on occasion, to regulate the contribution of foreigners in the labour market in a manner which does not affect existing labour standards and the rights and expectations of citizens.[10] Ultimately, modern immigration legislation endeavours to balance attempts to prevent illegal immigration and control migration, on the one hand, with due recognition of human rights and a human rights-based culture of enforcement, prevention of xenophobia and compliance with international (human rights) obligations, on the other.[11]

Although there is no universal consensus on an appropriate definition, *social security* has been described as an institution that provides to members of a given society social justice for a life in dignity, based on equal access and free development[12] and as "guaranteeing equality, security and a share of wealth to all".[13] Social security has traditionally, and somewhat restrictively, been associated with a risk-based approach aimed at individual income replacement and income adjustment.[14] Social contingencies or risks (for example, relating to health, unemployment, old age and employment injuries) are often referred to as the core elements of social security and the ILO Social Security (Minimum Standards) Convention[15] contains such a list of social risks.[16] Traditional notions and systems of social security have been restrictive in terms of both their range of coverage as well as the scope of persons covered by these systems. Social security is in fact concerned with a state's response to the risks experienced by persons living in that state, including the provision of

[10] See, for example, the preamble to the South African Immigration Act, 2002 (Act 13 of 2002).
[11] *Ibid*.
[12] E Riedel "The human right to social security: some challenges" in E Riedel (ed) *Social security as a human right – drafting a general comment on article 9 ICESCR – some challenges* (Springer 2007) 17 as cited by Lamarche 7.
[13] B Baron von Maydell 'Fundamental approaches and concepts of social security" in R Blanpain (ed) *Law in motion – International Encyclopaedia of Laws* (Kluwer, 1997) 1039 as cited in Lamarche 7.
[14] MP Olivier "The concept of social security" in Olivier, Smit and Kalula (eds) *Social security: A legal analysis* (LexisNexis, 2003) 39.
[15] Convention 102 of 1952.
[16] MP Olivier "Social security: Framework" in *LAWSA* (2nd Ed) (2012) (vol 13(2)) par 15.

(non-contributory) social assistance and forms of assistance such as the provision of health care. Berghman has suggested that the overall aim or ideal for social security should be to strive for a state of (complete) protection against human damage, which could be interpreted broadly to include both loss of labour income and loss of health or well-being.[17] "Such a broadened concept of social security covers not merely the fiscal and occupational welfare of the individual concerned, but also the handicap the damaged person encounters in his or her contacts with his or her human and material environment, in other words, his or her social welfare".[18] Others define social security purely in terms of the involvement of the state or in terms of the aims served by social security generally and / or particular schemes specifically.[19] Most systems in the world still place reliance on the traditional distinction between social assistance and social insurance, which is embedded in the concept of social security (which is often defined as an umbrella term so as to include both the concepts of social assistance and social insurance).[20] It has been suggested that social, fiscal and occupational welfare measures, collectively and individually, whether public or private or of mixed public and private origin, should be taken into account when developing coherent social security policies.[21] Different models of social security have developed in different parts of the world, including the Bismarckian system (which favours a number of employment-based public schemes devised to achieve income maintenance by providing earnings-related benefits derived mainly from employee and employer contributions), the Beveridge system (placing emphasis on minimum income protection for the whole population) and the Scandinavian model (which seeks to maintain relatively high minimum universal protection of all citizens and residents, funded by taxation and based on accepted moral and humanitarian principles).[22]

Labour law is equally difficult to define. The ILO Declaration on Fundamental Principles and Rights at Work highlights various universal principles as representing the core of labour law protection, including freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. "In general labour law is the totality of rules in an objective sense that regulate legal relationships between employers and employees, the latter rendering services under the authority of the former, at the collective as well as the individual level, between employers mutually, employees mutually, as well as between employers, employees and the state".[23] Deakin and Morris suggest that "the area of labour is defined in part by its subject matter, in part by an intellectual tradition. Its immediate subject-matter consists of the rules which govern the employment relationship. However, a broader perspective would see labour law as the normative framework for the existence and operations of all the institutions of the labour market: the business enterprise, trade unions, employers' association, and, in its capacity as regulator and as

[17] Berghman *Social Security in Europe* 20 as cited in Olivier (2012) par 24.
[18] Berghman 17-18 as cited in Olivier (2012) par 24.
[19] *Ibid*. The definition of "social security" is flexible, reflecting a country-specific content, and is subject to constant change and development over time: Olivier (2012) par 17.
[20] *Ibid*. There has been a convergence of social insurance and social assistance schemes, increasingly leading to a variety of mixed systems: Olivier (2012) par 19.
[21] Olivier (2013) par 25.
[22] Olivier (2012) par 18.
[23] Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 51.

employer, the state".[24] In general, labour laws serve to protect employees from employer abuses that result from the imbalance of power that is inherent in the relationship between employer and employee, offering a measure of protection to employees also so as to maintain labour peace, higher rates of productivity and to preserve the socio-economic fibre of society.[25] The ILO's Decent Work Agenda spans notions which are both labour and social security orientated, focusing on global opportunities for productive work that delivers a fair income, security at the workplace and social protection for families, better prospects for personal development and social integration, including equality of opportunity and treatment.[26]

4. THE RELATIONSHIP BETWEEN IMMIGRATION LAW, LABOUR LAW AND SOCIAL SECURITY

4.1 Superimposing immigration law on labour and social security law

The relationship between immigration, and labour and social security protection is notoriously complex.[27] Factors such as poverty in the developing world and the increasing demands for labour in ageing societies have ensured that immigration pressure remains high. High levels of immigration in turn accentuate fears and concerns by residents of countries which attract migrant workers, with arguments including the cost of providing benefits to non-citizens and the negative effect of migration on the cultural identity of host countries. As a result, states tend to be pressurised to restrict access to benefits for immigrants and to compel immigrants to participate in civic integration programmes, which makes it more difficult to access the social security system.[28]

The social security status of and labour law protection afforded to migrant workers in many parts of the world is complicated by the fact that immigration law (and policy) is often effectively superimposed on other guiding legal principles. As indicated above, the immigration framework may be geared towards restricting access, controlling movement and regulating presence in the host country, and not solely towards honouring a human rights approach or towards encouraging and supporting migration or ensuring appropriate social security coverage or labour protection for non-citizens. Immigration laws and policy generally tend to focus on the effects, rather than the underlying causes of migration and an increasingly forceful line on enforcement has been adopted in parts of the world.[29]

States are, also in response to the global economic crisis, increasingly attempting to defend their terrain against the swell of human movement, building increasingly high barriers to entry. Borders have been fortified further (US-Mexico), issuance of visas and work permits has been stopped or

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[24] Deakin and Morris *Labour Law* (1995) 1 as quoted in Vettori, S *Alternative means to regulate the employment relationship in the changing world of work* (University of Pretoria, 2005, LLD thesis) 23

[25] Vettori (2005) 51.

[26] See ILO *Decent Work* (accessed at http://www.ilo.org/global/topics/decent-work/lang--en/index.htm) (accessed on 3 June 2013).

[27] See, for example, G Vonk and S van Walsum "Access denied; towards a new approach to social protection for formally excluded migrants" (Report for the Cross-Border Welfare State research programme) (2012) 1.

[28] *Ibid*.

[29] MP Olivier *Developing a policy for the inclusion of non-citizens in the South African social security system* (Draft policy document submitted to the Department of Social Development) (2013) ("DSD Policy Document") 45.

restricted (Malaysia, Thailand), quotas for skilled migrants have been limited (Australia, Italy, Kazakhstan, Russia), and migrants have been offered financial incentives to return home, on the condition that they would not return to the host country for a given period (Czech Republic, Japan and Spain).[30]

In other words, the right of entry for a non-citizen is limited and regulated by national considerations, as expressed through strict immigration provisions in policy and legislation.[31] Strict immigration laws are supported in a number of countries, often for reasons ostensibly related to public safety, health and job preservation.[32] Immigration law may operate on the premise that no non-citizen may enter the country concerned without that country's permission. The law of that country then defines the persons who may be entitled to permission, and under what circumstances. For example, a country's immigration law may provide that (some categories of) migrant workers (skilled or unskilled) may not enter the country without some form of certification.

To some extent, the policies adopted by countries to control migration are understandable, being focused on controlling the influx of migrants.[33] This results in fewer rights being afforded to irregular migrants (in particular) and incentives for such migrants to maintain relations with their countries of origin for purposes of potential return.[34] Such policies, however, are unlikely to solve the problem of irregular immigration. When these policies become overly harsh and oppressive, unwanted side effects materialise (such as social tensions, human trafficking, prostitution and the like).[35]

4.2 Towards a suitable inter-relationship

Perhaps surprisingly, the approach of superimposing immigration law on other areas of law in a fashion which is designed to reduce migration does not seem to have always resulted in effective barriers to entry. The push and pull forces at work (including the need for migrants to find work in order to support their families and the promise of a better life abroad) appear to ensure that migrants continue to find ways to enter (often through irregular channels).[36] In other words, the tightening of geographical borders by many governments, rather than deterring people from moving across countries and regions, has made it difficult for people to move across borders *legally* and has

[30] Arslan *et al* citing the IOM, 168.
[31] Szablewska and Karim 195.
[32] See, for example, NAFBPO "Why do we have immigration laws?" accessed at http://nafbpo.org/nafbpo_whylaws.html (accessed on 26 May 2013).
[33] Countries have the task of attempting to marry mutually divergent goals in arriving at a fair policy on migration, including factors such as economic objectives (such as increasing the supply of labour overall or where skill deficits exist or where nationals are reluctant to perform certain tasks), humanitarian objectives (such as reuniting families), cultural objectives (such as promoting ethnic and racial diversity) and political objectives (such as permitting certain political refugees into the country or, conversely, restricting access where it would create undesired economic or social consequences):
[34] The immigration policies of both developed and developing countries have been criticised for being short-sighted in approach. While developing countries are increasingly strengthening their emigration and diaspora policies, their own immigration policies remain restrictive, thereby affecting other developing countries adversely.
[35] Vonk & Van Walsum 35.
[36] Office of the High Commissioner for Human Rights (OHCHR) *Out of the shadows: a human rights perspective on irregular migration and development* (October 2012) 2.

been a contributing cause of irregular migration.[37] There have also been other adverse consequences of this approach. As has been noted, with reference to the United States of America:

> "Many such immediate responses are perceived as less than successful. The number of illegal immigrants residing in the US has reportedly declined…However, this decline may be short-lived. Tighter border controls coupled with increasing unemployment in the US and Mexico may cause illegal immigrants already in the US to stay put, rather than return home for extended stays (as they did in the past). Similarly, few immigrants have taken up financial incentives on offer in several countries that would oblige them to return home for an indefinite (or at least prolonged) period."[38]

It has been argued that "for migration to have its full developmental impact, the most beneficial policy change would be to reduce barriers to migration, at all levels and particularly for the poorest".[39] Strictly regulating the entry, stay and exit of non-citizens through rigid immigration law is an approach which, in addition, appears to fail to take cognisance of evidence which reflects that migration has a *net positive impact* on a host country.[40] The positive effects of migration are continuously overshadowed by various challenges which cause countries to develop protectionist policies and laws which serve to restrict the status and position of migrants. This impacts directly on the ability of migrants to access lawful employment in their country of residence, which further their entitlement to social security benefits and labour law protection, amongst other matters.

It is accordingly necessary to develop a principled approach for the preferred future position of migrant workers in society. Legal and concomitant policy changes affecting the labour and social security status of non-citizens have now been brought about in many parts of the world, via, for example, the development of international standards, bilateral and multilateral arrangements (dealt with below), court judgments, constitutional advancements and other unilateral or regional interventions (such as the EU Single Permit Directive, considered in greater detail, below). A consistent policy-based framework for the treatment of migrant workers (from the perspectives of both labour and social security law) is, however, lacking, yet urgently needed.[41] This part of the paper focuses on the key question of how different components of the law in a state may properly

[37] Office of the High Commissioner for Human Rights 15.
[38] Arslan *et al* 169.
[39] Richard Black, Director, Development Research Centre on Migration, Globalisation and Poverty, as quoted in Migration, Globalisation and Poverty *Making Migration Work for Development* (undated) 3.
[40] IOM *International migration and development* (April 2006) 3. It has even been argued that opening labour markets in destination countries in a way which is combined with measures to i) ensure the long-term stay of migrants (thus increasing the accumulation of migrants' skills and resources) and ii) encourage permanent or temporary return home, can promote "brain gain" and benefit both (host and home) countries as well as migrants themselves: Szablewska and Karim 193. Viewed in a positive light, migration brings a range of benefits to countries of destination, including greater social benefits (better welfare and increased social services for citizens) flowing from migration and the result of a larger tax base and greater social security funds, higher levels of entrepreneurship and a younger population in demographic terms. There is considerable support for the view that migrants create new businesses, jobs and fill labour market gaps, improving productivity and reducing inflationary pressures: Wold Bank *Global Economic Prospects 2006: economic implications of remittances and migration* (2006) xii.For a more conservative estimate on the impact of migration, see Arslan *et al* 163.
[41] See, in general, Olivier *DSD Policy Document*.

reflect the ideal balance between immigration policies and practices (which generally tend to be restrictive) and a social security and labour law system (which is increasingly protective).

4.2.1 The need for proper juxtaposition

As part of the desired approach, it is suggested, firstly, that the labour and social security position of migrant workers should not be completely isolated from the reality of immigration law and policy which aims to ensure that workers do not enter or remain in a country unlawfully. A proper juxtaposition of these areas of law allows for an approach which reflects the mutual recognition of the importance of social security, labour law and immigration law principles, so that no single set of principles is able to dominate.

Immigration policies inevitably impact directly on the shaping of the legal position of different groups of migrants. As has been noted in the context of social security, the level of protection enjoyed by migrants in social security law can be explained by the immigration policies in operation as well as the development of the welfare state itself.[42] As Vonk suggests:

> "It has been argued that the position of migrants balances between two opposing forces. On the one hand, states may be inclined to exclude immigrants from social security thereby reducing the long-term costs of immigration and reaffirming the temporary nature of immigration. On the other hand states must find ways to reconcile the phenomenon of temporary immigration with constitutional values regarding equality of treatment and the right to social security for all. These opposing forces often lead to tensions within the legal system between the legislature and the judiciary. When national treatment falls below certain standards migrants can invoke national judicial protection in order to improve their position."[43]

Immigration law, labour law and social security law require some careful juxtaposition so that they may combine to strike the appropriate balance in respect of, firstly, giving effect to everyone's right to have access to core labour and social security protection (even if only in the form of basic, minimum entitlements, such as emergency medical treatment, in some cases) and, secondly, ensuring that the state is not unnecessarily restricted in terms of deporting residents who are not lawfully present in the country. A more precise expression of the nuances and challenges involved in this process follows, below.

4.2.2 The human rights centred approach

Secondly, it is submitted that a human rights friendly approach may be justified with respect to the particular vulnerability of migrants, as well as due to the (positive) role migrants play in the societies in which they reside.[44] A human rights approach contributes to migration policies through the

[42] Vonk "Migration, social security and the law: Observations on the impact of migration policies upon the position of migrants in social security law in Europe" (2012) 2.
[43] Vonk 9.
[44] Migrants make very significant contributions to development (in home and host countries) and rights abuses nullify their ability to do decent work, and to support themselves and their families. Policies that deny

acceptance of common basic principles enabling international co-operation and consultation to take place within this framework.[45]

The human rights of migrants are interdependent and indivisible.[46] From a human rights perspective, states must respect, protect, promote and fulfil the human rights of non-citizens (including those in an irregular situation) and governments which exercise their ability to defend the sovereignty of their State are required to do so in full respect of their human rights obligations to migrants.[47] A rights-based approach constitutes a framework of action, as well as a set of guidelines and tools for migration policy-makers, developing the capacity of duty bearers to meet their obligations and enabling rights holders to claim their rights.[48] "Using a human rights-based approach will therefore enable policy-makers to identify who are the most vulnerable groups within their society, and to target their policy actions towards alleviating this vulnerability and promoting empowerment."[49]

The precise characteristics of this type of "human rights friendly approach" require examination. One starting point for this type of approach focuses on the *vulnerability* of the migrants themselves.[50] The *principle of non-discrimination* is another, inter-related pillar which supports the development of a proper approach to the relationship between immigration law, labour and social security law. Finally, an approach which favours *basic protection* for migrants, irrespective of the legality of their residence in the country of residence is supported. These components, when combined in an appropriate manner, may serve as a suitable starting point for giving expression to the appropriate connection between the various terrains of law in question. More specific legal principles and techniques, such as the use of a means of subsistence test, fit within this framework.

Recognition of the vulnerability of migrants

Non-citizens constitute an example of a vulnerable group of people, frequently existing at the margins of mainstream society and battling to make ends meet. This is as a result of evidence which demonstrates that they experience unfair discrimination and great difficulty in exercising their basic rights. In addition to this, specific categories of non-citizens (such as refugees, irregular migrants and disabled non-citizens) may deserve additional protection because they are even more vulnerable than other categories and often experience especially serious violations of human rights and other

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migrants access to social security on an equal basis with citizens often fail to take into account the fact that migrants, even when in an irregular situation, participate in the workforce and the economy of states of employment, and thus contribute to social security schemes. Even when they do not participate directly in contributory schemes, migrants often still pay into social protection schemes through the payment of indirect taxes: OHCHR 11. According to the ILO "it has been estimated that workers in irregular status in the USA contribute close to US$ 6-7 billion to the social security system without receiving any benefits. One estimate shows that about 3,8 million households headed by workers in irregular status generated $6,4 billion in social security taxes in 2002."

[45] Office of the High Commissioner for Human Rights 20.

[46] Lamarche 3.

[47] OHCHR 15.

[48] *Ibid*.

[49] *Ibid*. The Special Rapporteur of the Human Rights Commission on the rights of non-citizens has noted that all persons should, by virtue of their essential humanity, enjoy all human rights without discrimination: as cited by Lamarche 4.

[50] See, in general, the Preamble to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Lamarche 3.

forms of unfair treatment.[51] Migrants are particularly vulnerable because they are outside the legal protection of their countries of nationality, often unfamiliar with national language, laws and practice and lacking familiar social networks, making them less able than others to know and assert their rights. Migrants in an irregular situation are even more vulnerable, as they can be denied access to public services in law, or are unable to access such services in practice through fear of detection:[52]

> "Public policies can often have the purpose or effect of denying access of irregular migrants to fundamental economic, social and cultural rights. Denial of access to these rights is officially justified as a deterrence measure to curb migration. Irregular migrants will often refrain from using public health or education services to which they are entitled in law for fear of detection. This is heightened when countries impose a duty on their public officials and service providers to report irregular migrants to immigration authorities. *Irregular migrants are, in addition, often invisible to official integration measures as well as action plans and national strategies on public services, such as housing, healthcare, leaving these migrants vulnerable to systematic exclusion, discrimination and abuse*" (own emphasis).[53]

Assisting non-citizens who, because of their vulnerability, find themselves in the position that they require emergency assistance or care, irrespective of other considerations, clearly correlates with the notion of human dignity and, generally, with a human rights friendly approach.[54] The High Commissioner for Human Rights has argued as follows in this regard:

> "While governments may be compelled to take decisive action to improve their economic situation, they should take great care not to introduce measures that impact on rights of those of the most vulnerable, including minorities, migrants and the poorest sectors of society who were already struggling to make ends meet".[55]

Guidelines adopted by the Human Rights Council of United Nations support this type of inclusive reading of the right to social security for everyone, with particular prioritisation for marginalised persons:[56]

> "States should develop a comprehensive social security system and allocate the resources necessary to progressively ensure universal access to social security for all and the enjoyment of at least the minimum essential levels of economic, social and cultural rights.

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[51] See, for example, the comments of the South African Labour Court in *Discovery Health Limited v CCMA* [2008] 7 BLLR 633 (LC); (2008) *ILJ* 1480 (LC); *Larbi-Odam v MEC for Education (North-West Province)* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC) par 23. In the Canadian Supreme Court decision in *Andrews v Law Society of British Columbia* 1989 CanLII 2 (SCC); (1989) 56 DLR (4th) 1 at 32 (cited in *Larbi-Odam* par 19), the court held that: "Relative to citizens, non-citizens are a group lacking in political power and as such (are) vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending."; Also see *Khosa* par 74.

[52] OHCHR 14.

[53] OHCHR 16.

[54] Olivier *DSD Policy Document* 161.

[55] OHCHR 3.

[56] Human Rights Council of the United Nations "Poverty and Social Security Guidelines" (2012) par 86 as cited by Lamarche 11.

While all persons should be progressively covered by social security systems, priority should be accorded to the most disadvantaged and marginalised groups".

Non-discrimination

Unlike citizens, migrants are generally only able to enter and live in another country legally through the express consent of that country's authorities. In essence, their vulnerability stems from past experience and knowledge of the discrimination and inequality (in terms of treatment and work opportunities) that migrants have experienced in their daily lives. In some countries, national employment law does not protect migrant workers, and migrants are usually more likely to work in those parts of the informal employment sector where labour standards are not applied. Migrants are also regularly forced to countenance racism and xenophobia.

By striving towards equal protection of fundamental rights to migrants and citizens, human rights law seeks to rectify imbalances between citizens and non-citizens in the enjoyment of rights.[57] The Universal Declaration of Human Rights, for example, draws no distinction as to nationality or immigration status, key rights being deliberately granted to "everyone" and proclaiming that "everyone is entitled to the rights and freedoms set forth in this Declaration without distinction of any kind".[58] The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families also provides notable legal (social security and labour law) guarantees for migrant workers, including for migrants in an irregular situation, and members of their families in the country of employment, on the basis of the principle of non-discirimination and equality of treatment with nationals.[59]

Relevant ILO Conventions and Recommendations protect the rights of all workers irrespective of citizenship, defining personal scope of coverage irrespective of nationality and invariably containing similar clauses on equality of treatment between nationals and foreign workers in the host

[57] For judicial expression of the principle of non-discrimination in the context of citizenship, see *Larbi-Odam* par 20 and *Khosa* pars 68-75, 80.

[58] See, for examples, Articles 1, 2, 22 and 25 of the Universal Declaration of Human Rights. Likewise, the International Covenant on Economic, Social and Cultural Rights draws no distinction between citizens and non-citizens and grants the human right to social security, the right to work and to the enjoyment of just and favourable conditions of work and other related rights to everyone: see, for example, Articles 7 and 8 of the ICESCR. Also see Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The UN Committee on Economic, Social and Cultural Rights (CESCR) has confirmed (in relation to the right to work) that the principle of non-discrimination should apply in relation to employment opportunities for migrant workers and their families: see General Comment No. 18. The ICCPR also includes non-discrimination provisions and nationality, although not explicitly mentioned in the Covenant, has been recognised as a likely unfair ground of discrimination.

[59] See, in general, Olivier, Dupper and Govindjee "Enhancing the protection of transnational migrant workers: a critical evaluation of regulatory techniques" presented at the *Eleventh International Conference in Commemoration of Marco Biagi* (Modena, 18-19 March 2013). Part III of this Convention deals with the principle of non-discrimination and equal treatment (between nationals and all migrant workers and their families) regardless of the legal status of migrants in respect of access to basic social rights (including social security, emergency medical care and access to education. Part IV affords more extensive social rights to regular migrant workers and their families (such as the right of access to housing, and equal access to social and health services) on equal terms with nationals. Article 25(3) of the Convention provides for the equality of treatment between nationals and migrant workers with respect to labour rights (and irrespective of any irregularity in the stay of employment: see Lamarche 18.

country.[60] The 1998 ILO Declaration on Fundamental Principles and Rights at Work, for example, confirms that universal principles and rights at work apply to all migrant workers without distinction, whether they are temporary or permanent, regular or irregular migrant workers.[61] Further examples may be found in the Conventions pertaining to equality of opportunity, treatment, and remuneration (including the elimination of unfair discrimination), which apply to nationals and non-nationals alike, and the supervisory bodies have frequently reaffirmed that migrant workers are protected by such instruments.[62]

It must also be noted, however, that some rights, including those relating to social security, are restricted to persons who are *lawfully* within a territory. For example, the Migrant Workers Recommendation, 1975 (No. 151) provides that migrant workers and members of their families *lawfully within the territory of a country* should enjoy effective equality of opportunity and treatment with nationals of the country concerned in respect of, *inter alia*, conditions of life, including housing and the benefits of social services and educational and health facilities. In terms of the Migration for Employment Convention (Revised), Convention, 1949 (No. 97), ratifying member countries are prohibited from discrimination against *immigrants lawfully within their territory* in respect of nationality, race, religion or sex.[63]

In fact, there is a discernable trend towards affording enhanced protection to regular and longer-term migrant workers.[64] The Inter-American Court of Human Rights Advisory Opinion on the rights of undocumented migrants provides some guidelines regarding the potential restriction of human rights in appropriate situations, indicating that:

- Rights may only be limited to the extent that the restriction is aimed at achieving a legitimate end provided for in international human rights instruments;
- The restriction must be established by a formal law, which must respect the principle of equality and be neither arbitrary nor discriminatory;

[60] Baruah and Cholewinski *Handbook on establishing effective labour migration policies in countries of origin and destination* 154-155 as cited in Olivier "Social Security: Framework" in *LAWSA* (13(2)) par 138. The ILO has adopted two Conventions (Conventions Nos 97 and 143) and two Recommendations in an effort to address the concerns of migrant workers. Convention No. 143 requires the adoption of a policy to promote and guarantee equality of treatment and opportunity between regular-status migrants and nationals in employment and occupation in the areas of access to employment, remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings. ILO Convention no 118 on *Equality of Treatment (Social Security)* (1962) confirms the right to equality of treatment between national and non-national workers and their family members in relation to social security for migrant workers.

[61] In addition the 1998 Declaration makes specific reference to groups with special needs, specifically including migrant workers. The recognition of the special status of these fundamental principles and rights, coupled with a campaign for the universal ratification of core ILO Conventions, have ensured that core standards which cover migrant workers along with all other workers are binding on a large majority of ILO member States. It must be noted, however, that certain rights which have labour and social security-related application, are extended only to those lawfully within a territory. For example, article 6(1)(b) of the Convention on the Migration for Employment (Revised Convention) 97 of 1949 provides that ratifying countries undertake to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals: see, in general in this regard Olivier, Dupper and Govindjee 8.

[62] See, for example, *CEACR Report*, International Labour Conference, 89th Session, Geneva, 2001: ILO 75.

[63] Olivier, Dupper and Govindjee 8.

[64] *Ibid*.

- There should be no alternative that would be less restrictive of the rights in question; and
- The State must justify not only the reasonableness of the measure, but must also examine whether it damages the principle of illegitimacy that affects all measures that restrict a right based on grounds that are prohibited by the principle of non-discrimination.[65]

The legal position is inevitably nuanced, influenced in part by the nature of the different categories of non-citizens as well as by the particular vulnerable situation in which some migrants find themselves in. The labour and social security rights of (categories of) non-citizens may justifiably be limited through legislation so that different categories of non-citizens (and non-citizens in particular situations of vulnerability) enjoy different levels of protection. For example, a distinction might legitimately be drawn between lawfully resident non-citizens and irregular migrants, with the latter group being restricted to accessing only basic forms of assistance. Particularly vulnerable groups of non-citizens, such as refugees, might also enjoy enhanced recognition of rights.[66]

While states may utilise this differential, nuanced approach to expel or remove migrants who are illegally in their territory, international human rights law is clear in its requirement that the State should generally protect the basic rights of everyone without discrimination for as long as they remain on its territory. It follows that migrants should be entitled to protection of a basic level of fundamental rights regardless of their immigration status, or whether they have been legally admitted to a country.

Basic human rights protection

As alluded to above, the right of states to regulate the entry, stay and exit of non-citizens should not be absolute and there are certain limitations on the scope of the discretion placed by the international legal system, including human rights law and international refugee law.[67] In the words of the Global Commission on International Migration:[68]

> "Entering a country in violation of its immigration laws does not deprive migrants of the fundamental human rights provided by human rights instruments…nor does it affect the obligation of states to protect migrants in an irregular situation."

Between them, the core human rights instruments respond to a variety of challenges faced by all migrants (regular and irregular), including rights in the immigration context (such as substantive limits on expulsion, procedural protections and detention) and economic, social and cultural rights of non-citizens.[69] Under their human rights treaty obligations, States are already obliged to aim for

[65] Inter-American Court on Human Rights, Advisory Opinion OC-18/03 *Juridical condition and rights of undocumented migrants* (2003) as cited by Lamarche 4-5.
[66] Olivier *DSD Policy Document* 24.
[67] *Ibid*. In the case of the latter, the protection is conditional on the person being able to secure the status of a refugee by meeting the relevant criteria.
[68] Global Commission for International Migration, *Migrating in an Interconnected World: New directions for action* (Geneva, 2005) 55.
[69] IOM 7. Various international instruments, including the ICCPR, ICESCR, CRC, ICERD, CEDAW and the ICMW are relevant. The latter, in particular, seeks to establish basic principles for the treatment of migrant workers

the access of all persons on their territory, including migrants, to at least a basic level of social rights (and bearing in mind the possible differentiated approach highlighted above) and to ensure the availability, accessibility, affordability, acceptability, adaptability and quality of services.[70] The non-binding ILO Multilateral Framework on Labour Migration confirms, for example, that a minimum access to emergency health care should be provided to irregular migrants, while regular migrants should benefit from all medical care services.[71] As a result, it has been argued that the international legal framework for protecting the human rights of migrants exists, but that what is needed is ratification of the relevant instruments, and their effective implementation in national law and practice.[72]

Jurisprudence in various parts of the world has also given content to the position of migrants who are unable to cater for their own basic needs (incorporating matters such as food, hygiene, shelter, health care or other social support).[73] When moving beyond rudimentary levels of protection for non-citizens, the position becomes more graded. A few core legal principles have developed in this regard and are useful for purposes of assisting states to manage the complex inter-relationship of factors and considerations pertaining to immigration law, labour law and social security law.[74]

Core legal principles applicable

At least two specific, related legal principles (coupled with related considerations, as explained below) have developed in order to assist states in managing the complex inter-relationship described above. Firstly, the principle of "lawful residence" (alluded to above) has been utilised by countries in order to differentiate between (enhanced) protection offered to "lawful residents", on the one hand, and the lesser recognition afforded to the rights of unlawful residents, on the other.[75] Secondly, the principle of requiring a "minimum level of subsistence" on the part of migrants (also referred to as a "means of subsistence test") has permitted countries to develop their own financial criteria for purposes of granting lawful residence status to migrants, implying that migrants who are unlikely to be able to support themselves and their dependants will be refused admission to that country and will be unable to enter that country lawfully.[76]

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and their families and to establish norms which will contribute to the harmonisation of states' attitudes towards migration through acceptance of basic human rights principles.

[70] OHCHR 16.

[71] Lamarche 17.

[72] *Ibid*.

[73] See, for example, M Hesselman "Sharing international responsibility for poor migrants? An analysis of extra-territorial socio-economic human rights law" forthcoming in *EJSS* (vol 15(2)) (2013) 16. The European Court of Human Rights has, according to Hesselman, distinguished between general lack of resources and the existence of intentional acts or omission or authorities, the latter instance resulting in a right of protection being more easily derived, while in the former case it is ruled to exist only in "exceptional cirucmstances of a compelling humanitarian nature". Also see *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 669 (CC).

[74] Part of this section has been adapted from Olivier *DSD Policy Document*.

[75] Reference to this test is found in international and regional conventions, such as the European Convention on Social and Medical Assistance and the UN Convention on the Status of Refugees.

[76] The test is directed towards ensuring that a person does not become a burden on a state which he / she is not a citizen of, serving as a barrier which prevents financially unstable persons from entering a country on a temporary basis and as a basis to exclude and remove financially dependent persons from the country.

Each of these principles may operate in such a fashion so as to influence the outcome of a particular (labour law, social insurance or social assistance) situation, with reference to a non-citizen, decisively. This is what makes these principles "core" legal constructs. Nevertheless, there may be a need to balance the application of such principles with other considerations and to appreciate that they do not always operate in isolation.

Most countries' immigration laws clearly provide for ways in which persons are able to lawfully enter the country concerned. From a legal perspective the importance of immigration law is reflected by the manner in which the lawful residence test serves to exclude (categories of) non-citizens from a range of entitlements. These exclusions are considered to be a logical and necessary consequence of the state of immigration law, which imposes by its very nature restrictive conditions on non-citizens. By the same token, however, restrictive provisions contained in immigration law cannot completely overrule basic human rights and humanitarian principles. In other words, and irrespective of immigration status, certain foundational, minimum entitlements (for example, to medical assistance in emergency situations) should be accessible when the circumstances require this.[77]

The application of the principle of legal residence may, for example, also be combined / qualified with the ancillary consideration of "tenuousness", so that non-citizens who have a more established relationship with a country because of the lengthy duration of their lawful residence in that country may enjoy additional entitlements. [78] Such principles may also be considered, in the area of social insurance, in conjunction with a requirement of lawful employment in certain instances before (social insurance) opportunities accrue to (categories of) non-citizens.[79] With specific reference to tenuousness, in terms of the EU Single Permit Directive, discussed below, Member States are permitted to apply restrictions in the field of social security to third-country workers with contracts of less than six months' duration. The Directive also guarantees, with reference to the principle of lawful employment, that "all persons working legally in Europe must have the same rights as European workers".[80]

The means of subsistence test, which is particularly important for issues pertaining to social assistance,[81] may be linked to the receipt of a favourable immigration status and / or to maintaining or retaining such a status. This test finds application mainly in relation to temporary residents (although it could also be applied prior to a person becoming a permanent resident). Other principles may have the effect of qualifying or limiting the impact of the application of the means of

[77] See, in general Vonk & Van Walsum 15, 21, who argue that the underlying current of (European) case law tends towards recognition of minimum social care responsibilities for irregular immigrants.

[78] This resonates with the concept of "habitual residence" as used by countries such as England and Ireland as a qualifications criterion for receipt of social security benefits. A further distinction of this sort may be drawn between the position of residents and workers while they are lawfully resident in the country, and the position of these people when they are outside the boundaries of the country.

[79] This principle may, for example, be inferred from the Migration for Employment Convention (Revised), 1949 (No. 97). As indicated elsewhere, the ICMW (1990), while providing a range of rights for all migrant workers, contains a special part which provides additional rights for regular / lawfully employed migrants.

[80] Migration Policy Group 1.

[81] This principle has important social security implications, in particular, also for purposes of protecting the state-funded part of the social security system. Non-citizens who do not have sufficient means to sustain themselves may be refused entry into a country, while permanent resident status may be refused on the same grounds.

subsistence test. For example, on humanitarian grounds, and given the vulnerable status of non-citizens pending deportation, it is arguable that such persons should at least be able to access basic social assistance and emergency health care. Of course, there is no reason why these non-citizens should not be able to benefit from the contributory part of the system (i.e. social insurance schemes) to the extent that they compulsorily or voluntarily participate in that part of the system.

Using a means of subsistence test as a requirement for obtaining legal residence in a country is not a novel idea: in the Netherlands, for example, this is one of the main criteria which have been employed for purposes of establishing legal residence.

In sum, it may be argued that the more immigration law systematically imposes a means of subsistence test, the more convincingly can the exclusion of non-citizens on grounds of their immigration status be argued. As a result, it is suggested that countries may find it useful to adopt legislative and administrative initiatives in order to systematically introduce the means of subsistence test in immigration law for purposes of determining residence status. It should be borne in mind, however, that this system can only operate effectively when there is an infrastructure for the exchange of data between the immigration and social assistance administrations and an effective system of deportation.

The core principles which have been discussed are closely related to a range of complementary principles, which may be applicable in certain situations and which must inform the application of the core principles. These include, for example, the best interests of the child principle (which elevates the position of children, because of their vulnerability, so that their welfare is of paramount importance in all matters concerning children) and the principle of non-discrimination. Proper application of the core and ancillary principles will enable immigration law, social security law and labour law to be properly juxtaposed.

4.2.3 Other recommendations

It is furthermore necessary to train policy makers and those officials enforcing national legislation on the rights and duties of the state in the management of migration, and to promote international migration law as an essential component of comprehensive migration management frameworks.[82] There is also a need to disseminate objective information to migrants on their rights and duties (both before departure and during the migration process). This would be aided by enhancing the effectiveness of consular protection and assistance for migrants abroad. According to the IOM, good practice includes that of Asian countries of origin in placing labour attaches abroad, which should be replicated.[83] In addition, civil society has a role to play in ensuring that migrants are assisted in terms of integration into their new environment and encourage communities of destination to accept migrants and the like.[84] These suggestions resonate with an approach which seeks to ensure meaningful access to justice on the part of migrants. For example, the Committee on the Elimination

[82] IOM 7. The IOM, for example, assists States parties to the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families in developing national legislation conforming to the Convention.
[83] IOM 7.
[84] *Ibid*.

of Discrimination against Women, when reviewing the Jordan Report in 2012, insisted on the need for female migrant workers to access to justice when try to secure their workers' rights.[85]

4.3 Concluding observations

Socio-economic rights access, including social security and labour law protection, constitutes a core component of the basic human rights protection envisaged for migrants. These rights, including the right to health, education, an adequate standard of living (including housing, food and water) are placed at risk in instances where immigration law is permitted to impose itself without any regard for the human rights of the affected migrants.[86] Allowing immigration law to completely dominate the position of (in particular, irregular) non-citizens so that they lose all entitlement to labour and social security law protection is, it is argued, an untenable scenario which may result in dire outcomes for the non-citizens themselves and for members of their families. Instead, basic principles of human rights recognition suggest that a more nuanced juxtaposition of these areas of law is required.[87] While immigration law has a role to play in the regulation of the entry, stay and exit of migrant workers, (and may also provide guidelines for determining access to labour and social security benefits), the human rights of migrant workers cannot be completely ignored. Such rights are characterised by the principle of universality which, as Vonk suggests, presupposes that persons who are in a vulnerable position should be protected not because of their status as a worker, or because of their nationality, but by virtue of their membership of the society.[88]

It is also suggested that there needs to be some distinction drawn amongst different categories of non-citizens / migrants for purposes of affording labour law and social security protection – a one size fits all approach is unlikely to be successful. Non-citizens who are at the margins of society, such as irregular migrant workers and asylum seekers, may deserve special protection given the position they find themselves in. There should, in other words, (always) be a minimum standard of protection for migrants, even when official immigration policies do not favour their stay in the host-state. It also follows, however, that regular non-citizens may justifiably be entitled to greater recognition and protection than irregular non-citizens, having managed to comply with the immigration law requirements of the host country. To some extent, this reflects that the notion of equality for non-citizens is not a simple matter requiring all non-citizens to receive exactly the same rights and entitlements as citizens.

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[85] UN Doc CEDAW/C/JOR/CO/5, par 44 *Concluding observations Jordan* (2012) as cited in Lamarche 10. Lamarche also cites the review by the Human Rights Committee of the Dominical Republic Periodic Report in 2012, which concluded that refugees and asylum-seekers unable to obtain legal residency had no access to formal employment opportunities or to basic social services and should be given such protection: Lamarche 11.

[86] OHCHR 11. Eg, a typical condition for enrolling in school or staying in long-term shelters is to have a social security number (which irregular migrants may have difficulty in procuring).

[87] The trend to criminalise irregular migrants who enter a country in an impermissible way has been noted: "The exclusion from social protection and the criminalisation of irregular migrants constitutes a challenge for human rights, which take human dignity as their very starting point". Vonk & Van Walsum 19-20.

[88] Vonk 3. See, for example, the UDHR formulation of the right to social security for everyone, as a member of society, and the ICESCR expression of the right to everyone to social security (Art 9 of the ICESCR) and s 27(1)(c) of the Constitution of the Republic of South Africa, 1996.

Practically speaking, the effect of this type of approach would be, for example, to allow irregular migrants to benefit from basic forms of labour and social security protection, including core social assistance and emergency medical treatment while they are in the country (albeit that they may be in the country unlawfully). Simultaneously, however, it is suggested that the immigration authorities would be completely justified in taking steps to deport unlawful immigrants – the fact that they may be in receipt of temporary forms of social security benefits, for example, will not prevent their deportation in such a case. States should, however, also ensure that systems are put in place to prevent unfair discrimination against non-citizens. This is, for example, likely to require a modified approach in respect of the necessary (identity) documentation and paperwork which is required of non-citizens as a prerequisite for accessing basic labour protection and social security benefits (this could, for example, be to the specific advantage of non-citizen children in the case of accessing survivors' benefits).

It must also be noted that there may exist some crucial differences in the position of migrant workers, depending upon whether the rights they seek to exercise are labour or social security orientated. Social insurance law has, in fact, gone some way to include all workers / the entire resident population in parts of the world such as Europe, (due in part to the fact that contributions which may have been received from such workers and because of the notion of property rights accruing to contributing workers). Although social insurance schemes do not always restrict coverage to nationals, implying that migrant workers could form part of the social insurance schemes of the host-state, a range of related problems nevertheless manifest:[89]

- Broken insurance records may result in reduced pension rights or, where minimum insurance requirements are not met, no rights at all;
- Territorial restrictions for the payment of benefits can be an obstacle to the payment of benefits abroad;
- Entitlement to benefits for non-nationals is occasionally made subject to the condition of reciprocity with the country of origin.

The General Agreement on Trade in Services (GATS) contains general rules and obligations applicable to all members of the WTO, including the "Most Favoured Nation" (MFN) rule, which requires of a WTO member state to grant equal treatment to services and service suppliers of different member states.[90] It is interesting to note that the operation of the national treatment principle may be of assistance to a temporary migrant worker who contributes to the social security system of a host country in that the migrant worker might be entitled to equal treatment with nationals of the host country in terms of accessing available social security.[91] According to one understanding of the GATS and its relationship with social security, the MFN principle would require governments "to eliminate social security discrimination among foreign nationals".[92]

With respect to social assistance, there is a long history, particularly in Europe, of restricting benefits to nationals, on the basis that states of origin were responsible for offering support to those in need

[89] Vonk 3.
[90] Article II.
[91] N Yeates *The General Agreement on Trade in Services (GATS): What's in it for social security* (2005) 9-21.
[92] Yeates 17.

(rather than host-states).[93] The nationality condition has slowly been eroded in parts of the world, partly due to the rise in prominence of equality rights, and has somewhat given way to a principle of territoriality:

> "The nationality condition and the territoriality conditions are intertwined by establishing links between the right to social assistance and the legality of residence…entitlement to social assistance depends on the legality of residence, while in its turn the legality of residence may depend upon the foreigner not claiming social assistance. Only for those with permanent residence status may such conditions be alleviated."[94]

Although the position of migrants in relation to access to social assistance has improved as a result of the weakening of the requirements of nationality (for purposes of claiming benefits), most states require legal residence of a particular nature (eg "habitual residence") and for a specified period prior to recognising the right to social assistance. Immigration law, by making the legality of residence dependent upon the condition that the non-citizen may not rely upon public funds, creates a conundrum for non-citizens.[95]

The position of irregular immigrants under labour law may be different from the problems associated with their entitlement to social assistance. For example:

> "While access to the labour market can be restricted to nationals and / or lawfully abiding or residing foreigners, once a person is working, there are a set of human rights and basic labour rights which must be respected, even if the work relationship is not in conformity with the law. This includes, for example, rights with respect to fair working conditions, unjustified dismissal, or freedom of association and access to justice for violations of these rights."[96]

In international law it is generally assumed that, contrary to social security benefits, employment-based rights should be granted regardless of legal status.[97] Employment-based rights also require

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[93] Vonk 4.

[94] Vonk 5. Social assistance was originally based on the idea of a unilateral charitable obligation (rather than a reciprocal insurance relation), and nationality requirements developed in the 19th Century, the prevailing opinion being (at least in Europe) that the state of origin was responsible for providing support to the needy. Following the Second World War, the nationality condition was replaced by the notion of territoriality, in line with the principle that modern states should take responsibility for the social welfare of all inhabitants. As Vonk & Van Walsum note (at 11), in almost all European countries the nationality condition and the territoriality conditions are intertwined by establishing links between the right to social assistance and the legality of residence, leading to a curious form of interaction between immigration law and social welfare law."

[95] See Vonk 5.

[96] European Union Agency for Fundamental Rights (2011) 11.

[97] Cholewinsky (2005) 27-31 as quoted by Vonk & Walsum 38. Especially within the context of ILO instruments, this point seems to have become generally accepted: Committee on Migrant Workers (2004) para 27. According to Schoukens and Pieters, for example (2004), the labour law-related obligations of employers, unlike public social security schemes, arise from the employers' liability (which originated under civil law but has now been subsumed in many countries by way of legislation and the creation of public social insurance schemes), for example in relation to industrial accidents and occupational diseases. This is a matter which is addressed in greater detail, below. Labour law protection of non-citizens is accordingly a social need based on systematic reasoning: Vonk & Van Walsum 39.

effective remedies, so irregular migrant workers must at least be free to join trade unions and take part in their activities.[98] In other words, the effective protection of migrants' fundamental rights implies facilitating and not undermining those social relations that provide alternative forms of social protection to those offered by national state regulated institutions.[99] Whereas states may be reluctant to enable irregular non-citizens to benefit from social grants, on the basis that citizen and permanent resident taxpayers alone should enjoy such benefits, preventing irregular non-citizens from accessing labour protection may result in abuse on the part of employers, who may, for example, be incentivised to employ irregular migrants in an attempt to reduce operational costs.

The right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity, being essential to the survival of the individual and to that of his / her family as well as to the individual's development and recognition in the community.[100] The primary barrier in the ability of migrants to access their right to work is that migrants in an irregular situation are officially barred from the labour market of the host country. In practice, however, migrants are often employed illegally in the informal economy and exploited, often working in inhumane conditions for unequal wages (in comparison to nationals or regular migrants performing the same work).[101]

The ability of migrants, including irregular migrants, to access work opportunities in their host country is crucial to their ability to survive with dignity. The right to work and labour rights affords everyone, including migrants, the rights to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; to equal pay for equal work; to just and favourable remuneration, an existence worthy of human dignity and the right to form and to join trade unions. Although the CESCR has recognised that the right to work does not imply "an absolute and unconditional right to obtain employment", it has identified the core obligations in relation to the right to work to include the following:

a) Ensure the right of access to employment, especially for disadvantaged and marginalised individuals and groups, permitting them to live a life of dignity;
b) Avoid measures that result in discrimination and unequal treatment of such groups;
c) Adopt and implement a national employment strategy and plan of action on the basis of a transparent and participatory process.[102]

There is growing recognition among commentators and advocates that "the access of migrants to adequate housing, health care, education, social security and decent conditions of work is not a matter of charity, and not exclusively dependent on the legal status granted to them by states…protecting economic, social and cultural rights is important in order to promote the social inclusion and integration of migrants, thus enabling them to lead economically productive and culturally and socially enriching lives."[103]

[98] Vonk & Van Walsum 38.
[99] *Ibid*.
[100] *Ibid*. The term work is understood as "decent work", which entails the obligation to respect "fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration".
[101] OHCHR 14.
[102] OHCHR 13.
[103] *Ibid*.

Similarly, the proper application of a human rights approach requires a multi-layered approach, systematically building upon rights to equality, dignity, work, labour law protection and access to social security and other forms of social protection, with due recognition of the vulnerable situation that migrants often find themselves in and with proper appreciation of the mutually supporting and indivisible nature of human rights and through proper application of the core and ancillary principles previously described.[104]

5. BILATERAL, MULTILATERAL AND UNILATERAL ARRANGEMENTS[105]

5.1 Background: host and home country system limitations and deficiencies

5.1.1 Legal system limitations

Legal system restrictions in both the host country (i.e. the destination country) and home country (i.e. the country of origin) generally impose significant barriers to migrants' access to social protection. This applies in particular to social security coverage and less so to labour law protection. Nationality and residence requirements may impede access to social assistance and even contributory schemes (especially national contributory schemes) in the host country; in the case of social insurance schemes, minimum periods of contribution, employment or residence could have the same effect. In addition, the legal principle of territorial application of national laws results in the exclusion of migrants from the operation of social security laws of the home country/country of origin.[106] In fact, as has been noted, migrants move between distinctively regulated labour market and social security systems, which creates specific vulnerabilities; furthermore, they may be separated from their home community and have no access to important informal social networks and safety nets.[107] The precarious position of migrant workers is further exacerbated by the fact that they often tend not to be organised, as a result partly of the fact that their work context (in particular informal work) generally lacks unionisation and partly the generally weak state of unionisation in the developing world. In addition, social security benefits to which they may be entitled may not be portable – not only as far as host country benefits are concerned, but often also home country benefits. In fact, as discussed below, the picture is increasingly ambivalent. On the one hand, in some migrant-receiving countries, notably in Europe, there has been a marked tendency to restrict the extension of social security rights in the extra-territorial context: subject to international law obligations (including obligations flowing from bilateral treaties), the exportability

[104] See, for example, the application of such an approach in judgments of the Constitutional Court of South Africa in, for example, *Khosa* and *Larbi-Odam v MEC for Education (North-West Province)* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC).

[105] This part of the contribution is an elaborated version of an earlier contribution co-authored by among others the authors of this paper: see Olivier, M; Dupper, O & Govindjee, A *Enhancing the protection of transnational migrant workers: a critical evaluation of regulatory techniques* (Paper presented at the eleventh international conference in commemoration of Marco Biagi Modena, Marco Biagi Foundation, 18-19 March 2013).

[106] M. Olivier & O. Dupper, 'Migration patterns and social protection responses: Perspectives from South and Southern Africa', paper given at the International Social Security Association 6th International Policy and Research Conference on Social Security (Luxembourg, 2010), 8.

[107] Sabates-Wheeler, R & Koettl, J "Social protection for migrants: The challenges of delivery in the context of changing migration flows" *International Social Security Review*, Vol. 63, 3-4/2010, 116-117.

of benefits has been restricted or abolished.[108] On the other hand, and largely due to inadequate social security protection/coverage provided by destination countries, several migrant-sending countries have started granting social security rights and broader forms of protection and support to their citizens/residents working abroad.[109] Also, anti-discrimination law may also not extend its reach to include migrant workers; as has been noted, with reference to a 2004 ILO Migration Survey,[110] "one-third of countries surveyed did not apply their anti-discrimination laws to migrant workers covering, for instance, minimum wage legislation and access to social services."[111]

As discussed earlier in this contribution, immigration law may impose additional restrictions: access to labour market and social security protection may be restricted to certain categories of migrants (e.g. permanent residents) and not be available to others (e.g. undocumented migrants), and may discriminate against certain types of employment.[112] This may have a decisively gender impact – for example, out of the 63 countries surveyed by the ILO in 2009, 23 considered domestic employees (many of whom may be recruited from abroad) ineligible for basic forms of protection such as the minimum wage.[113] Strict visa and employment conditions may expose migrant workers to employer abuse and exploitation, as their bargaining power may be significantly limited. This will especially be the case where overly restrictive immigration laws and policies incentivise informal employment, leaving informal – and for that matter often irregular – migrants particularly vulnerable.

5.1.2 Evaluation

In essence then, the picture which emerges is that laws and policy in host countries, also in the developing world, emphasise the tightening of controls, the monitoring of borders and deportation of irregular migrants.[114] In fact, as far as the Southern Africa Development Community (SADC), one of the regions in the world with considerable intra-regional migration flows, is concerned, it has been remarked that "[N]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books."[115] An increasingly forceful line on enforcement is adopted.[116] In essence, immigration laws and practice in SADC, as is the case in many migrant-receiving countries and regions, especially in the developing world, are not geared towards honouring a human rights approach and towards encouraging and supporting migration, but towards restricting access, controlling movement and regulating presence in the host country.[117] In

[108] Vonk, G and Van Walsum, S "Access denied; towards a new approach to social protection for formally excluded migrants" *European Journal of Social Security* (EJSS), vol 13(5), 2013, ….
[109] See par … below.
[110] ILO *Migration survey 2003: Country summaries* (2004).
[111] Sabates-Wheeler & Koettl 116-123.
[112] Par … above.
[113] *Ibid* 117.
[114] See, for example, as far as South Africa is concerned, Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 23; Siddique, M *South African Migration Policy: A Critical Review* (University of Western Australia Business School) 32.
[115] Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 10, 24.
[116] *Ibid* 25.
[117] According to Williams, all SADC Member States have immigration laws and policies based on three fundamental principles: (a) the sovereignty of the nation-state; (b) the integrity of national boundaries; and (c)

addition, as discussed above, there is an evident tendency to give primacy to immigration laws and policy, at the expense of social security laws and labour laws, impacting negatively on the position of irregular migrants and asylum-seekers in particular.[118]

It would seem that the position outlined above applies in particular to social security. Two interrelated reasons may explain why this is so. Firstly, social security is often treated as a matter which has historically belonged to the domain of national sovereignty and preference. It has been argued, even if this is in certain respects debatable, that determining the scope and content of national social security systems inherently falls within the domain of national states, given the very nature of the area concerned. It is an area, secondly, it is maintained, that should therefore be less infused by binding international standards. This seems to be borne out by the exceptionally weak ratification rate of ILO social security Conventions, in particular as far as developing countries are concerned. For example, Convention 102 of 1952 on Minimum Standards in Social Security has to date been ratified by 48 countries only, including only a handful developing countries. The ILO Convention, which regulates the maintenance of social security rights of migrants, Convention 157 of 1982, has been ratified by 4 countries only. In fact, other migration-focused Conventions of the ILO and the UN, impacting on both labour law and social security, have been similarly poorly ratified – ILO Conventions 97 and 143, discussed in par 3 above, have been ratified by 49 and 23 countries respectively, while the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) has to date been ratified by 46 countries. Labour market regulation, in contrast, has been more extensively influenced by (binding) international norms as is apparent from the very high ratification rate of the ILO core labour standards.[119]

5.2 Bilateral arrangements

5.2.1 Context and origin

Bilateral labour and social security agreements are a widespread phenomenon. And yet it would seem that these are usually treated as silo arrangements, with little congruence and synergy. It is perhaps a reflection of the uncoordinated nature of labour and social security law and policy, even though, from a worker perspective, the very same persons (and their dependants) are affected. To some extent these agreements are also inherently different in scope and purpose – bilateral labour agreements often attempt to regulate entry into, sojourn in and exit from the host country and, at

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the right to determine who may enter its national territory and to impose any conditions and obligations upon such persons: Williams, V *An overview of migration in SADC region* (Paper presented at SAMP/LHR/HSRC workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002) 65.

[118] Par … above, See in particular Vonk and Van Walsum "Access denied; towards a new approach to social protection for formally excluded migrants" (2012) 4-5; G Mitchell, S *Migration and the remittance euphoria: Development or dependency?* (NEF (New Economic Foundation) 2006) 22; Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* (Report prepared for the World Bank) Social Protection Discussion Paper, No 0908. (2009) 101 [http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf]. See now, however, the judgment of the South African Labour Court in *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).

[119] Olivier, MP "International Labour and Social Security Standards: A Developing Country Critique" – vol 29(1) *The International Journal of Comparative Labour Law and Industrial Relations* (2013) 21–38, at 30-31.

times only, equality of treatment of lawfully employed migrants. In fact, these labour agreements seem to primarily serve the interests and migration policy objectives of the host country, as they are embedded in immigration needs and priorities of the host country.[120] The extension of labour rights, and in particular social security entitlements, usually does not form part of the key focus of these agreements. Nevertheless, it would also seem that under the influence of the widely recognised core labour rights developed under the auspices of the ILO, recent bilateral labour agreements effectively endorse the notion of extending core protection in labour law terms to at least lawfully employed migrants. In addition, modern agreements regulating the exporting of migrant labour to countries in search/need of certain categories of skilled/unskilled labour, invariably contain explicit guarantees of labour rights in the host country.

Bilateral social security agreements may, in addition to requiring equality of treatment, regulate other matters – as appears from the discussion below. For current purposes, therefore, the focus falls on bilateral social security arrangements. It is often said that these agreements (in particular when supported by an overarching multilateral agreement) constitute universal world-wide best practice.[121] The first such agreement of 1904, recognising the principle of equal treatment in the area of employment injury benefits, implied a radical departure from the territorial restriction on access to welfare,[122] and supported the notion of a personal entitlement to benefits, which follows the person/worker concerned, irrespective of his/her geographical location. Pursuant to the 1904 agreement, bilateral agreements have extended their scope to cover a range of social security benefits for a variety of beneficiaries, on the basis of certain social security principles (often referred to as coordination principles). Especially since the Second World War the number of bilateral social security agreements expanded significantly, totalling more than 2000 today.[123]

5.2.2 Rationale and core principles: bilateral social security arrangements

Lack of portability of host country social security benefits may lead to a loss or substantial reduction of these benefits and may, in fact, impede labour migration. As a result, the return of migrants to their countries of origin may be undermined, while these countries (many of them developing countries) may be deprived of beneficial development effects.[124] Also, targeted country-specific cross-border bilateral agreements between states have the advantage of incorporating regulations and standards that pertain specifically to the unique migratory patterns that may exist between the two states as well as the specifics of their respective national social security schemes and associated legal systems. The establishment and enhancement of an appropriate array of bilateral

[120] The various labour agreements entered into by South Africa with a number of its neighbouring countries, serve as a clear example: see M. Olivier, 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)', *SADC Law Journal* 1 (2011).

[121] See Holzmann, R., Koettl, J. & Chernetsky, T. (2005) *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (World Bank: Social Protection Discussion Paper No. 0519) 32, where they remark: "The administrative approach to achieve the portability for both pension and health care benefits seems to be reasonable cost-effective after a bilateral or multilateral agreement has been successfully concluded."

[122] *Ibid*.

[123] Sabates-Wheeler & Koettl 127.

[124] *Ibid* 118.

arrangements is particularly significant given the expected length of time which is necessary to develop comprehensive multilateral agreements.

The general principles which constitute the content of bi- and multilateral arrangements in this regard, usually relate to:[125]

- The choice of law principle, identifying the legal system which is applicable;
- Equal treatment (in the sense that discrimination based on nationality is prohibited);
- Aggregation of insurance periods (in that all periods taken into account by the various national laws are aggregated for the purposes of acquiring and maintaining an entitlement to benefits, and of calculating such benefits);
- Maintenance of acquired benefits;
- Payment of benefits, irrespective of the country in which the beneficiary resides (the "portability" principle);
- Administrative cooperation (between the social security institutions of the parties to the agreement); and
- Sharing of liability to pay for the benefit (i.e. pro-rata liability of the respective institutions).

For the reasons given, one of the core principles is therefore portability. Portability has been defined as "the ability to preserve, maintain, and transfer vested social security rights or rights in the process of being vested, independent of nationality and country of residence".[126] Portability is important for two reasons: (i) to prevent financial losses on the part of the migrant (e.g. when he/she contributes in the host country to a pension scheme and stands to lose part of his/her contributions and benefits when he/she returns to country of origin); and (ii) actuarial fairness (the returning migrant benefits from social security or the health care system in the country of origin after returning despite having lived most of his or her productive life in the host country and contributing to the system of the host country).[127] Portability must be distinguished from exportability, however. Exportability requires no such cooperation as the social security institution of one country alone determines eligibility and the level of benefit.[128] Nevertheless, benefits could in principle be payable—hence exportable—also in other countries.

5.2.3 Evaluation

[125] See Olivier, M "Social security: Framework" in *LAWSA (The Law of South Africa) - Labour Law and Social Security Law* Vol 13, Part 2 (LexisNexis, Durban, 2012) para 138; art 4(1) of ILO Convention 157; art 8 of ILO Convention 118. See generally, for these principles and their operation within the framework of the European Community, ILO *Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009* (ILO, 2010).

[126] J. Avato & J. Koettl, 'Social Security Regimes, Global Estimates, and Good Practices: The Status of Social Protection for International Migrants', *World Development* 38(4) (2010): 456.

[127] *Ibid*.

[128] Sabates-Wheeler & Koettl 120. The principle of "exportability" is firmly established in the European Union, providing that a person who is entitled to specifically defined benefits (those covered by article 4 of Council Regulation (EEC) No 574/71) and who resides in another member state is entitled to have the money (benefit) transferred to his or her foreign bank account (minus the cost of transferring the amount such as postal and bank charges). See C. Reyes, *European Portability Rules for Social Security Benefits and their Effects on the National Social Security Systems- Discussion Paper No. 1* (International Tax Coordination SFB, date unknown), 11.

Although entering into bilateral social security agreements is generally seen as the preferred way to guarantee social security entitlements of migrants, this practice, as noted by Holzmann *et al*, "[n]ecessarily results in a highly complex and hardly administrable set of provisions on the portability of social security benefits".[129] In addition, such agreements may end up granting differing rights and entitlements to migrants, which could undermine regional integration. One way to counteract this is to establish common standards in a regional – or multilateral – framework against which all bilateral agreements can be measured. This is the case in the EU. Despite the multitude of bilateral agreements that exist in the EU, the fact that they are all based on a single legal source, namely EU Regulation 883/2004, ensures some degree of convergence.[130] More recently, the EU Commission has proposed a new instrument, namely an EU social security agreement.[131] As noted, this " … would allow a more flexible approach to social security coordination than is possible under current association agreements and could also be concluded with countries with which no association or cooperation agreement exists."[132]

In order to achieve full portability, some cooperation between the social security institutions of the origin and the host country is required. Cooperation is required to ensure a joint determination of benefit levels for a particular migrant. However, the administrative and technological capacity, in particular in but not restricted to developing countries, to achieve this may be lacking.[133] It may also be that there may be compatibility problems as regards similar social security schemes in the countries concerned – a matter discussed further in the next section, dealing with multilateral frameworks.

Furthermore, while equality of treatment is a core principle, it should be noted that this principle generally operates within the framework of, and for purposes of giving effect to the bilateral agreement. Only those (potentially) covered by the terms of the agreement, and as a rule only to the extent of the agreement, can benefit from the operation of the equality of treatment principle. In other words, bilateral agreements do not provide a general guarantee of equal treatment in the social security system of the host country for migrants. Also, and flowing from this, these agreements do not create a general foundation for invoking a human rights basis for the treatment of migrants, including particularly vulnerable migrant groups such as informal workers and undocumented migrants. In fact, in the developing world, given the preponderance of informal workers, bilateral agreements are unlikely to extend any meaningful coverage to them. Finally, these agreements may be limited as regards their material scope of coverage: as noted, health care benefits are to a much lesser extent subject to social security agreements, while purely tax-funded

[129] Holzmann *et al* (2005: 8, 12, 25); R. Holzmann, 'Toward a Reformed and Coordinated Pension System in Europe: Rational and Potential Structure', in *Pension Reform: Issues and Prospect for Non-Financial Defined Contribution (NDC) Schemes,* ed. R. Holzmann & E. Palmer (Washington DC, World Bank), 24.
[130] EC Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.
[131] European Commission *The External Dimension of EU Social Security Coordination. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (Brussels; COM/2012/0153 final).
[132] Van Ginneken, W "Social protection for migrant workers: national and international policy challenges" *European Journal of Social Security* (EJSS), vol 13(5), 2013 ….
[133] Sabates-Wheeler & Koettl 132.

benefits like social assistance or maternity allowances are usually explicitly exempt from portability.[134]

In essence then, though bilateral social security agreements may constitute an important legal technique for coverage and protection where there is relatively substantial cross-border migration, even if only uni-directional, their effectiveness may be seriously hampered, firstly by key problems related to their operationalisation/implementation and, secondly, their generally focused and exclusionary impact. Bilateral labour agreements generally, in particular in the developing world, do not extend comprehensive labour law protection to migrants, and are as a rule not aligned to the social security context of those migrants covered by the said agreements.

5.3 Multilateral frameworks

5.3.1 Context and origin

In this part, the focus is not so much on the general framework of international labour and social security standards, but on (other) multilateral labour and social security frameworks specifically created for the migrant worker context. The first impression one is left with is that such migrant-oriented multilateral *labour* agreements are conspicuous by their absence. The second impression is that multilateral *social security* agreements are by and large restricted to what has become known as social security (cross-border) coordination agreements. As is the case with bilateral social security agreements discussed above, the principle of coordination of social security is primarily aimed at eliminating restrictions that national social security schemes place upon the rights of migrant workers to such social security.[135] Coordination rules leave national schemes intact and only supersede such rules where they are disadvantageous for migrant workers.[136] The European Court of Justice has confirmed this on numerous occasions, emphasising that EU regulations coordinating Member States' social security systems do not in any way affect the freedom of Member States to determine the content of their own social security schemes 'as long as cross border-elements do not play a role'.[137] This is confirmed by the latest regulation, namely Regulation (EC) No 883/2004. Therefore, multilateral social security agreements do not set minimum standards for the treatment of migrant workers other than for purposes of coordinating social security schemes and migrants' entitlements flowing from such coordination. It is not even required that social security schemes be harmonised for purposes of coordination, although it could be argued that there should at least be some compatibility of social security schemes to render coordination effective.

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[134] Van Ginneken, W "Social protection for migrant workers: national and international policy challenges" *European Journal of Social Security* (EJSS), vol 13(5), 2013, ….; Holzmann, R and Koettl, J *Portability of Pension, Health, and other Social Benefits: Fact, Concepts, Issues* (Discussion Paper No. 5715, 2011) 32-48 (32).

[135] Pennings defines coordination as follows: "Coordination rules are rules intended to adjust social security schemes in relation to each other (as well as to those of other international regulations), for the purpose of regulating transnational questions, with the objective of protecting the social security position of migrant workers, the members of their families and similar groups of persons." (Pennings, F *Introduction to Social Security* (1993) 6)

[136] *Ibid* 7.

[137] See Cornelissen, R '50 Years of European Social Security Coordination', 11 (2009*) European Journal of Social Security* 17, and the cases referred to there.

Multilateral social security agreements have a more recent origin than bilateral social security agreements. The first such agreements were entered into soon after the end of the Second World War.[138] The first (multilateral) measures to coordinate social security within the EU (then nascent EEC) followed in 1958.[139] Of importance is the rationale of the passage of the EU regulations. The concern was economic, namely that lack of coordination of social security would inhibit freedom of movement of persons – one of the four pillars[140] of the EU.[141] Since its inception, therefore, coordination of social security in the EU has been closely related to the free movement of persons among the Member States.[142] In fact, the former (coordination) is generally considered to be a necessary condition for the latter: in order to have genuine freedom of movement, labour migration within the common market should not lead to a loss of social security entitlements. As a result, Article 48 of the Treaty of Lisbon assigns the Council with the task of unanimously adopting such measures in the field of social security as are necessary to provide freedom of movement for workers.

Currently, worldwide a number of multilateral social security agreements exist, the most significant of which are the agreements of the European Union (1958), CARICOM (i.e. the Caribbean countries) (1996), MERCOSUR (i.e. Latin American countries) (2005) and, most recently, the Ibero-American Social Security Convention (2011).[143] This latter agreement is particularly noteworthy as it involves 20 Latin American countries and 3 European countries (two are simultaneously EU members), i.e. Andorra, Portugal and Spain, and provides for old-age, survivors, disability and work injury benefits based on combined contributions across participating countries. Multilateral regimes in the Asian context are also developing. In 2006 the Gulf Cooperation Council (GCC) adopted the Unified Law of Insurance Protection Extension for GCC state citizens working in other GCC countries. It has been noted that this law has resulted in better pension protection and greater labour mobility.[144] In the ASEAN region, member states agreed to the *Declaration on the Protection and Promotion of the Rights of Migrant Workers* (DPPMW) (2007). ASEAN's *Vientiane Action Programme* (2004-2010)[145] mandated elaboration of an ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers (AIMW). However, the AIMW drafting process has stalled; the implication is that there are no standards contained in a multilateral document or agreement within ASEAN on migrant workers and social protection.[146] The need for a multilateral social security framework in Asia is also

[138] See Roberts, S 'A Short History of Social Security Coordination', in *Fifty Years of Social Security Coordination: Past-Present-Future*, ed. Y. Jorens (European Commission, 2009), 15.
[139] Regulation No 3 (OJ 30, 16.12.1958), accompanied by its implementation Regulation, Regulation No 4 of 1958.
[140] The other three being free movement of goods, services and capital.
[141] This is because social security rights are usually related to periods of employment or contributions or residency. See W. Van Ginneken, 'Making social security accessible to migrants', paper given at the World Social Security Forum (Cape Town, 2010), 2.
[142] This is an important point to remember when considering the introduction of coordination rules in SADC, where free movement of persons is not yet a reality. See the contribution by M. Olivier, 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)', *SADC Law Journal* 1 (2011): 123-127.
[143] The Convention was signed during the 17th Ibero-American Summit of Heads of State and Government held in Chile in November 2007. It involves Latin American countries, as well as Andorra, Portugal and Spain.
[144] Van Ginneken "Social protection for migrant workers: national and international policy challenges" ….
[145] Section 1.1.4.6.
[146] Hall, A *Migrant Workers' Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore and Thailand* (Migrant Forum in Asia/Friedrich-Ebert-Stiftung, 2011) 28-29.

endorsed in the 2005 Baku Declaration.[147] While acknowledging the need for improved bilateral and multilateral coordination to better protect migrant workers, the members of the Working Group came to the conclusion that MERCOSUR's experience in implementing its multilateral social security agreement through its simple and efficient administrative mechanism, especially in terms of recognition and portability of social security rights, may represent a very valuable example to follow in the Eurasian region.[148] Developments towards multilateral social security frameworks have also been taking shape in Africa. This is evident from the (not yet in force) coordination arrangement covering certain West and Central African states,[149] and similar interventions foreseen within West[150] and East Africa.[151] A now defunct but successful multilateral agreement operated in the Great Lakes area between 1980 and 1987.[152]

EU regulations related to the portability of social security benefits are the most advanced examples of multilateral arrangements. EU regulation 883/2004 is an extensive legal provision that ensures far-reaching portability of social security entitlements within the European Union. When moving within the European Union, even third-country migrant workers enjoy the same rights as EU nationals with respect to the portability of social security and benefit entitlements after five years of residence within the European Union.[153] The European Union is also leading efforts to enhance social security cooperation within the Euro-Mediterranean Partnership (EMP). Social security agreements with Morocco, Tunisia and Algeria have been concluded under this initiative. Outside this multilateral framework, many EU member states have also concluded bilateral social security agreements with non-EU countries and have created an extensive global network of portability arrangements.

5.3.2 Rationale and core principles

According to Baruah and Cholewinski, multilateral agreements "[h]ave the advantage that they generate common standards and regulations and so avoid discrimination among migrants from various countries who otherwise might be granted differing rights and entitlements through different bilateral agreements."[154] As such, multilateral frameworks/agreements can address the

[147] ISSA *Declaration of the International Social Security Association and the International Association of Pension and Social Funds on "Social protection of migrant workers in Eurasia* (2005).
[148] See article 7 of the Declaration.
[149] See the CIPRES Inter-African Convention on Social Security of 2006; Adrien Dioh *Migration flows and the access to social security rights for nationals and resident migrant workers in West Africa* (ICMPD & FIIP Meeting of Experts on the Social Rights of Migrants and their Portability under a Transnational Framework publication, 2011).
[150] I.e. the ECOWAS General convention on social security.
[151] Discussions on the introduction of a multilateral arrangement for the East African Community (EAC), within the context of the EAC Common Market Protocol, are ongoing.
[152] Papa, KS *Migration and social security: The issue of social security for migrants in the Democratic Republic of Congo* (paper presented at an international conference on "Migration and Social Protection: Exploring Issues of Portability and Access", organised by the Sussex Centre for Migration Research, the Development Research Centre on Migration, Globalisation and Poverty, and the Institute of Development Studies (IDS), held at the University of Sussex, United Kingdom, 5-6 November 2008) 7-9.
[153] See the discussion on the impact of the recent EU Single Permit Directive in par 5.4 below.
[154] See Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office) (2006) 156.

very shortcomings of bilateral social security agreements, in relation to problems experienced with a plethora of such bilateral agreements, as discussed above. A multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement.[155]

Furthermore, multilateral agreements can serve the purpose of regional integration, and values and core principles associated therewith, such as freedom of movement and equal treatment of residents of the region. Regional adjudicative bodies have held that instruments that draw a distinction between nationals of particular countries bound together in a regional framework (such as the European Union) are, in principle, permissible. This is on the basis that member states of a particular regional entity form a special legal order, which has effectively established its own 'citizenship'.[156] This could imply that an approach which adopts specific (i.e. more preferable) arrangements for migrants from a particular region (without excluding or unnecessarily reducing the protection for migrants from other areas) might be acceptable. In the area of social security, this could best be achieved by the adoption of an appropriate multilateral social security agreement.

Also, multilateral agreements can establish a standardised framework for more detailed, context-sensitive and country-specific bilateral agreements. It has been remarked that:

> "Such a multilateral instrument, which draws its principled framework from international and regional standards, should from an overall perspective and in framework fashion stipulate the overarching and generally applicable principles, standards, institutional mechanisms and channels to guarantee entitlements, rights and obligations, and facilitate and streamline portability of benefits and the implementation of other common arrangements. A multilateral agreement therefore effectively undergirds bilateral agreements, which should contain specific and appropriate cross-country arrangements."[157]

Besides establishing a standardised framework for bilateral agreements, another important advantage of such a multilateral framework agreement is that it can provide for a phased and incremental approach in relation to (i) the types of schemes covered; (ii) the benefits provided for;[158] (iii) the categories of persons covered by such an agreement;[159] and (iv) the countries included in the

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[155] *Ibid*.

[156] See Weissbrodt, D *Final report on the rights of non-citizens* (UN Doc. E//CN.4/Sub.2/2003/23 (2003)) accessed at http://www1.umn.edu/humanarts/demo/noncitizenrts-2003.html (June 2004) 10; *C. v. Belgium*, Eur. Ct. H.R., Reports 1996-III (1996) (European Court of Human Rights) and *Belgian Linguistic Case*, 6 Eur. Ct. H.R. (ser. A) (1968) (European Court of Human Rights); Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (OC- 4/84) (Advisory Opinion of the Inter-American Court on Human Rights); and Communication 964/2000, CCPR/C/74/D/965/2000 (2002) cited in E/CN.4/Sub.2/23/Add.1 (2003) par 27-29 (Human Rights Committee).

[157] Olivier, M *Report prepared for the International Labour Office - Reflections on the Feasibility of a Multilateral SADC Social Security Agreement Involving South Africa and Lesotho, Mozambique, Swaziland And Zimbabwe* (ILO, 2010), 189.

[158] For example, it could provide for the payment/portability of those benefits which may be common to a number of countries in a particular region. It has been suggested, in the Southern African context, that employment injury benefits could first be covered, due to the fact that this is a matter of particular concern in the SADC context, and since this is a benefit provided by all SADC countries.

[159] Also, at the beginning certain categories of persons, for example migrant workers and their dependants could be beneficiaries of the cross-border social security arrangements. This could over time be extended to

agreement.[160] This may be particularly relevant in a context where social security may be underdeveloped in a particular region and/or countries in the region may have vastly different social security regimes in place, or may be at different stages of development of their respective social security systems. In addition, core social security coordination principles may be introduced, or implemented, progressively, rather than at once, if a rationale for doing this exists in a particular region.[161]

5.3.3 Evaluation

In essence then, multilateral labour and social security agreements could effectively extend some forms of coverage and protection, available under the system of the host country, to migrants. However, they do not, as such, constitute standard-setting arrangements. These agreements effectively set a framework for bilateral agreements (to be) entered into within the regional context covered by the multilateral agreement, give expression to considerations of regional integration and could be designed with flexibility in mind, allowing for incremental extension and implementation.

And yet, the challenges facing bilateral social security agreements in relation to administrative and technological capacity, the limited applicability of the principle of equality of treatment, and the absence of a broader human rights focus are equally relevant here. In particular, for these reasons multilateral social security agreements are unlikely to extend any meaningful coverage to informal workers and undocumented migrants. To this it may be added that effective multilateral social security agreements, as is the case with bilateral agreements, would require that the social security schemes forming the subject of entitlements under these agreements should at least to some extent be compatible. This may pose particular challenges in a developing world context. For example, it would be difficult to develop a coordination regime for the portability of retirement benefits, if some countries covered by the agreement have public retirement schemes, while others may rely solely on private and occupational schemes, alongside non-contributory benefits. Of course, this might be the very reason why an incremental approach, regarding countries and types of schemes and benefits covered by (certain parts of) the agreement, is called for.

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include other categories of non-citizens, for example, self-employed workers – as is the custom in most other regions where a multilateral agreement is in operation, such as in the EU and in the Caribbean countries.

[160] It might be advisable to initially include within the sphere of operation of a multilateral agreement those countries which at an initial stage have the most urgent need to enter into appropriate arrangements. It has been suggested, from the perspective of a possible multilateral SADC agreement, that there is ample reason to believe that countries such as Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe have much in common in terms of (lack of) access to certain South African social security benefits to justify their inclusion within a multilateral framework. Other countries could from time to time be added as the need to do so arises: M. Olivier, *Report prepared for the International Labour Office- Reflections on the Feasibility of a Multilateral SADC Social Security Agreement Involving South Africa and Lesotho, Mozambique, Swaziland And Zimbabwe* (ILO, 2010), 189.

[161] For example, the absence of pension-oriented public retirement fund schemes in a region may render it prudent to provide for the principle of aggregation/totalisation of insurance periods/contributions in relation to public social security schemes of the various countries, but to postpone the operationalisation and implementation of this principle until such time that the social security reform processes obtaining in the relevant countries have converged in the establishment of, for example, pension-oriented public retirement fund schemes, which are amenable to cross-border coordination.

Finally, it should be emphasised again that multilateral social security agreements are also limited to the extent that they do not set or create minimum social security standards outside the coordination framework. Furthermore, as is the case with bilateral agreements, tax-funded social assistance benefits are as a rule not covered in multilateral agreements. Finally, it is clear that minimum labour law standards for migrants are also not specifically addressed, given the absence of multilateral labour agreements (other than the conventional instruments of, for example, the ILO).

5.4 Unilateral arrangements

5.4.1 Context

Absent or inappropriate portability regimes operating in host countries add to the precarious position of migrant workers. This is the reality despite the growth in number of bilateral labour and social security agreements world-wide and new multilateral social security frameworks developing in and even linking different regions of the world. It is therefore imperative to improve the access of migrant workers to social security *both* in their home countries (or countries of origin) as well as in their host countries (or countries of employment).[162] In the case of both home and host countries, measures to attain improved social security access could be extra-territorial in nature. This implies a departure from the territoriality principle. Save for the operation of private international law arrangements, the extension of labour law protection would for most part be of a domestic nature, as opposed to transnational/extra-territorial measures.

As noted above,[163] current state practice regarding the extra-territorial extension of social security protection leaves one with an ambivalent picture. In the absence of binding international law norms flowing from multilateral (including supranational) and bilateral arrangements, migrant-receiving countries in the global north appear to adopt increasingly restrictive approaches regarding the extension of protection, including the portability of benefits, when citizens and even migrants move abroad, for example when migrants return to their countries of origin. And yet, such extra-territorial application of relevant domains of a social security regime could be a powerful mechanism to support the return of migrants. On the contrary, there is a clear tendency of enhanced extra-territorial benefit and support provision on the part of several migrant-sending countries of origin.

5.4.2 Unilateral arrangements: extension of host country protection

Aside from the reality of more restricted extra-territorial extension of social security protection, host countries are supposed to extend labour law and social security protection to migrants on the basis of at least binding international norms, to the extent that domestic law and practice do not yet reflect these very standards. And yet, this area remains fraught with problems. Despite the widespread ratification of core labour standards, lack of application of these very standards has prompted alternative approaches to monitoring, enforcement and persuasion, reflected in part by

[162] W. Van Ginneken, 'Making social security accessible to migrants', paper given at the World Social Security Forum (Cape Town, 2010), 2.
[163] Par ….

(voluntary) private arrangements reflected in so-called multi-stakeholder initiatives (MSIs).[164] In social security, as indicated, core standards have not yet materialised, apart from the fact that international social security instruments have been poorly ratified. Much can, therefore, be done to enable greater access to labour law and social security benefits for migrants in host countries. This will among others entail the identification of discriminatory legal provisions and administrative practice.[165] This remains an ongoing task of international and regional supervisory bodies, but may prove to have limited impact, given past experience.

The recent adoption of the EU Single Permit Directive[166] provides an important example of a supra-national arrangement, which compels host countries (i.e. EU Member States) to extend both labour law and social security protection to lawfully residing migrants, in principle on the same basis of protection extended to their own nationals. This Directive establishes a single application procedure for third-country nationals to reside and work in the territory of a Member State, together with a common set of rights (including decent, basic working conditions and access to social security) for third-country workers *legally residing* in a Member State.[167] Third-country nationals will specifically be granted treatment equal with that of EU nationals in matters concerning pay and dismissal, health and safety at work, the right to join trade unions, and access to public goods and services, if they are working legally in Europe.[168] Equal treatment is also provided for as regards social security, subject to some restrictions, such as that Member States are permitted to apply restrictions in the field of social security to third-country workers with contracts of less than six months' duration. The Directive essentially guarantees, with reference to the principle of lawful employment, that "all persons working legally in Europe must have the same rights as European workers".[169] It is also important to note that this Directive appears to adopt an *integrated* approach towards the areas of labour law and social security coverage and application, which is potentially relevant for the construction of a more co-ordinated legal response to the challenges associated with migrant work. This matter is discussed in further detail in conclusion.

5.4.3 Unilateral arrangements: extension of home country protection

In response, and given the lack of social security coordination arrangements involving many migrant-sending countries of the global south and the absence of sufficient (social security) protection and coverage being extended by host countries, some migrant-sending countries in Asia and elsewhere in the developing world have taken stock of the vulnerable social and economic position of their citizens living and working in other countries. As a result they have sought to extend some form of

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[164] See Olivier, Dupper & Govindjee *Enhancing the protection of transnational migrant workers: a critical evaluation of regulatory techniques* (2013) par 5.
[165] *Ibid*.
[166] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.
[167] Article 12 of the Directive. See Migration Policy Group "EU Single permit Directive granting third-country workers rights passes final hurdle" in *Migration News Sheet* (undated) accessed at http://www.migrationnewssheet.eu/eu-single-permit-directive-granting-third-country-workers-rights-passes-final-hurdle.
[168] *Ibid*.
[169] Migration Policy Group 1.

protection in social security terms to their citizens employed as migrant workers and also created a supportive framework for the employment of these workers in host countries. These migrant-sending countries (i.e. home countries/countries of origin) seek to protect the rights and interests of migrant workers abroad through specific interventions. The interventions are guided either by the countries' constitutions, or a statutory framework providing for such protection. The extension of protection of migrant workers abroad via unilateral arrangements has among others been achieved through[170] –

- the adoption of constitutional guarantees and statutory frameworks facilitating the protection of migrant workers abroad – such as the 1987 Constitution of the Philippines and the Migrant Workers and Overseas Filipinos Act of 1995; see also the wide-ranging provisions of the Constitution of Ecuador
- provisions in bilateral agreements providing for continued coverage of certain categories of migrant workers in the social security system of the labour-exporting country – e.g., the India-Belgium agreement of 2006
- the establishment of Special Overseas Workers Welfare Funds by national and even (in the case of India) state governments, extending protection to workers and at times also their families – e.g. India, Philippines and Sri Lanka
- voluntary affiliation in national social insurance schemes – e.g. Philippines, Jordan, Albania, Mexico, Mozambique, South Korea
- measures and schemes aimed at supporting the flow of remittances and social insurance contributions to the sending country
- exportability of social security benefits and provision of related services (e.g. medical care) abroad

These extension mechanisms are often undergirded by a range of complementary measures introduced and supporting institutions set up by governments of sending countries, such as –[171]

- the establishment of a dedicated emigrant Ministry and/or specialised statutory bodies to protect the interests of their citizens/residents in the diaspora (e.g. India, Philippines, Bangladesh, Ecuador)
- information on recruitment contracts and consular support
- generally, providing support services to migrant workers at three stages: pre-departure, at destination (i.e. in the host country) and upon return (e.g. via return settlement programmes)
- lobbying for the protection of migrant workers

[170] *Ibid*; Hall, A *Migrant Workers' Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore and Thailand* (Migrant Forum in Asia/Friedrich-Ebert-Stiftung, 2011); ILO *Best practices on social insurance for migrant workers: the case of Sri Lanka* (ILO Asian Regional programme on Governance of Labour Migration, Working Paper 12, 2008); Ruiz, N *Managing Migration: Lessons from the Philippines* (Migration and Development Brief No. 6) (World Bank, Washington, DC, 2008).

[171] See Ginneken, W "Social protection for migrant workers: national and international policy challenges" *European Journal of Social Security* (EJSS), vol 13(5), 2013 ….; Vonk and Van Walsum "Access denied; towards a new approach to social protection for formally excluded migrants" (2013) ….

The unilateral measures are of relatively recent origin, but seem to be growing in extent and popularity. They cover sizeable numbers of migrant workers – in the case of Philippines, 8 million and in the case of Sri Lanka, 2 million migrants. International standards instruments do not regulate this particular phenomenon; yet, it is of interest to note that reference to this is increasingly being made in what can be regarded as soft law and explanatory/implementing instruments – for example, in the 2008 UN General Comment No 19 on the right to social security (in relation to the UN International Covenant on Economic, Social and Cultural Rights) and the 2007 ASEAN Declaration on Protection and Promotion of the Rights of Migrant Workers (DPPMW). Of particular relevance is also the ILO Multilateral Framework on Labour Migration,[172] which provides a comprehensive overview of principles and guidelines as to how labour protection for can be improved. As has been noted, such promotional measures would principally affect those involved in circular and temporary migration, and could be defined and strengthened through international migration agreements.[173]

5.4.4 Evaluation

While host countries would generally endorse labour law protection for migrant workers, unilateral arrangements in the area of social security emanating from host countries appear to be particularly problematic, to the extent that binding international norms flowing from ratified and/or supranational instruments, or from bilateral agreements are not evident, and in the absence of appropriate and effective monitoring, enforcement and persuasion mechanisms. In addition, several host countries have been adopting increasingly restrictive approaches towards social security protection for migrants both within these countries and extra-territorially. On the other hand, unilateral arrangements emanating from countries of origin provide interesting and important avenues of coverage, protection and support. These arrangements and interventions can provide some protection and may be easier to adopt than bi- and multilateral frameworks. And yet, it should be clear that they cannot effectively provide for the full extent of social security protection which a host country would be able to extend. Also, these arrangements and interventions imply a shift of the social security burden to the home country and its structures, despite the fact that migrant workers also contribute to the development of the host country concerned.

Furthermore, at this stage affiliation to social security institutions in and access to social security arrangements of the home country are mostly of a voluntary nature. Evidently this impacts on the efficacy of unilateral mechanisms. Also, these arrangements do not generally cover informal workers and undocumented migrants – unilateral arrangements emanating from the country of origin therefore also do not guarantee a rights basis for the treatment of these vulnerable categories.

5.5 Overall evaluation

The discussion in this part of the contribution highlighted the insufficiency of bilateral, multilateral and unilateral arrangements as mechanisms to effectively extend adequate labour law protection to migrant workers. On the other hand, it is evident that multilateral and bilateral agreements play a

[172] ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach in labour migration (ILO, Geneva, 2006).

[173] Van Ginneken, W "Social protection for migrant workers: national and international policy challenges" *European Journal of Social Security* (EJSS), vol 13(5), 2013….

profound role in cementing the protection of certain migrants' social security entitlements. To illustrate the point: had it not been for the incorporation of the portability principle in most multi- and bilateral agreements, fewer than the 30% of migrants worldwide who return to their home country would have done so.[174] This could have important implications for both host and home countries. In addition, unilateral arrangements emanating from the country of origin are important, but limited in impact and effect. It is suggested that eventually and in order to achieve meaningful protection and coverage, they need to be integrated with and supported by appropriate bilateral agreements and standards emanating from multilateral and bilateral instruments/regimes. In addition, there may be a clear need for one or more international instruments that contain a clear set of norms to be adopted and applied unilaterally by both destination countries and countries of origin, applicable to both social security and, to the extent relevant, labour law.

6. CONCLUSIONS

Developing a coordinated legal response in relation to the labour law and social security protection of migrant workers is a multi-faceted theme, and needs to be informed by a principled and normative approach. It is suggested that the an appropriate approach is to be found in the universally applicable human rights framework, which has developed over many years. Viewed from this perspective, the other elements of this multi-faceted theme include the juxtaposition of immigration law, labour law and social security; the improvement and expansion of the international standards framework, linked to accelerated ratification of relevant standards; the complementarity of unilateral, bilateral and multilateral mechanisms; addressing the labour law/social security dichotomy; and extending the scope of coverage to include informal (migrant) workers and undocumented migrants.

6.1 Human rights perspectives

A human rights centred approach is crucial to the understanding of the legal position of migrant workers and their families. International law clearly indicates that legal implications flow from the vulnerable status of migrants, in particular certain categories of migrant workers, their entitlement in principle to equal treatment with nationals, and the need to ensure the protection of their human dignity. These binding human rights norms do not depend on reciprocal treatment: countries bear these obligations irrespective of whether other countries reciprocate. In fact, even modern co-ordination law places less emphasis on citizenship and reciprocity, a tendency which is also confirmed by the reference in the most recent international ILO instrument, which suggests the extension, in principle, of a national social protection floor to "all residents".[175] The human rights framework is pivotal for the development of a coordinated legal framework, as appears from the rest of this conclusion.

6.2 Immigration law, labour law and social security juxtaposed

[174] Paparella, D. 2004. *Social security coverage for migrants: Critical aspects* (ISSA European regional meeting: Migrants and social protection, 21-24 April) 3, 6.
[175] Recommendation 202 of 2012, on National Floors of Social Protection.

Human rights law does not negate the authority of states to determine migration policies and construct country-specific immigration law frameworks. However, in doing so, states are required to ensure full respect of their human rights obligations to migrants. This implies that countries have to respect, protect, promote and fulfil the human rights of non-citizens generally, and be sensitive to particular forms of protection and support recognised by international law in relation to specific categories of migrants, including refugees, asylum-seekers, irregular migrants, and (unaccompanied foreign children) or migrants who find themselves in a particularly vulnerable situation (e.g. in need of emergency medical care). Subject to these qualifications and constraints, it would be possible for states to draw distinctions between different categories of migrants as regards the nature and extent of their social security protection, but invariably and for most part not in relation to labour law protection, with reference to, for example, the duration of their stay in the host country and/or whether they would become a financial burden on the state. International law literature and comparative best practice suggest that certain guiding principles may assist in drawing the perimeters of permissible state intervention. These guiding principles include, in particular, the lawful residence, lawful employment and means of subsistence criteria, supported by more specific criteria, such as giving priority to the best interests of the child in the event of child migrants.

6.3 International standards

International standards are supposed to constitute the baseline for extending labour law and social security protection. And yet it is clear that this is often not achieved, and that the very deficiencies associated with these standards and their enforcement have prompted alternative approaches, which in turn also display certain shortcomings – e.g. unilateral, bilateral and (other) multilateral interventions. These standards appear to be insufficiently developed and weakly implemented in the social security sphere: a core set of appropriate and binding social security standards has not yet developed, and the standards that do exist have all been poorly ratified. This applies in particular to and impacts on migrants and their families. The analysis of the scope, content and impact of multilateral, bilateral and unilateral arrangements indicates some improvement on the situation described above, though considerable challenges exist. There has been a much clearer development of (core) labour law standards, as is reflected in the high ratification rate of labour law standards, in particular the core/fundamental labour rights. And yet, the application and enforcement of these standards, especially as far as migrant workers are concerned, is problematic. It is argued, also below, that there is a need to improve and expand the scope and content of relevant international standards, to vigorously advocate for the ratification of these standards, and for the effective implementation of the standards.

6.4 Complementarity of unilateral, bilateral and multilateral mechanisms

Important advances have been made in the areas of bilateral and multilateral arrangements – in particular from the perspective of extended coverage from a person and geographical sphere of coverage. Significant progress has also been seen as regards unilateral arrangements, in particular those emanating from initiatives taken by countries of origin to extend protection to their citizens/residents abroad – especially in the sense of rendering support and extending unilateral social security coverage. It is suggested that none of these measures, on their own, will extend meaningful coverage and protection. In addition to the general shortcomings applying to this

combined area, there may be a clear need for one or more international instruments that contain a clear set of norms to be adopted and applied unilaterally by both destination countries and countries of origin, applicable to both social security and, to the extent relevant, labour law. The recently adopted EU Single Permit Directive, discussed above, provides an important example of such an approach.

One is also left with the impression that the non-binding and voluntary nature of unilateral (home country) arrangements restricts the efficacy and impact of these arrangements, especially as regards the labour law and social security position of migrants and their families, irrespective of the role that these interventions play. This stresses the importance of instruments that could – and do – indeed provide not only a framework of enforceable labour and social security norms, but also effective monitoring mechanisms. Bilateral and multilateral agreements do not seem to fill this particular void, given the narrow orientation of social security agreements and the absence of labour agreements. It could also be considered to make some of the voluntary mechanisms introduced by countries of origin to extend social security coverage to their people working/residing overseas compulsory. It also has to be noted that some Latin American countries have started taking steps to compel self-employed workers to join social security schemes, also by offering incentives to them to do so.

Furthermore, it is crucial that bilateral and multilateral labour law and social security frameworks be developed which go beyond the current narrow confines of coordinating social security agreements – frameworks at this level should in fact help to define appropriate standards, also for the treatment of migrant workers and their families. However, as is the case with international instruments, these frameworks need to be aligned with comparative best practice and to be accompanied by effective monitoring mechanisms. Multilateral agreements effectively set a framework for bilateral agreements (to be) entered into within the regional context covered by the multilateral agreement, give expression to considerations of regional integration and could be designed with flexibility in mind, allowing for incremental extension and implementation. Consideration should be given for the incremental development of bi- and multilateral agreements regarding the types of schemes being covered; the benefits provided for; the categories of persons covered; and the countries included in the multilateral arrangement. Much can also be achieved in terms of extended protection, if a further geographical widening of multilateral agreements were to occur. The ever-expanding range of multilateral social security agreements, and the cross-continental linking of existing multilateral agreements could do much to achieve coherent, consistent and expanded coverage – subject to conflict rules that may need to be developed to take care of the potential overlapping of various multilateral agreements becoming applicable.[176]

6.5 Addressing the labour law/social security dichotomy

This apparent labour law/social security dichotomy as regards the legal position and treatment of migrants is evident from the analysis of all the relevant interventions surveyed in this contribution, even though the reason for this may differ and may at times be justified – for example, extending

[176] Vonk, G "Social security rights for migrant workers: links between hemispheres. Some remarks from a European Union perspective" in Blanpain, R; Ortiz, PA; Oliver, M & Vonk, G *Social Security and Migrant Workers. selected studies of cross-border social security mechanisms* (Kluwer, 2013, forthcoming).

home country labour law protection to migrant workers generally appears inappropriate. For the rest, however, it is clear that an integrated labour law/social security approach towards dealing with the plight of migrant workers (and their families, where appropriate) is absent, and yet evidently called for. The recently adopted EU Single Permit Directive, discussed above, provides an important example of such an integrated approach. Furthermore, as indicated, the social security position and protection of migrants tends to be much weaker developed than the labour law framework – bilateral and multilateral social security agreements do not address this deficiency, given the limited focus of these agreements.

6.6 Scope of coverage: informal workers and undocumented migrants

Finally, the interventions investigated in this contribution fail to consider and address the plight of two of the most vulnerable migrant categories: informal workers and undocumented migrants. This is of particular concern in the developing country context. A clear case for the introduction of a human rights standards basis that also appropriately deals with the position of these two categories in terms of labour law and social protection is called for. In fact, it might be worth taking note of important comparative developments in the treatment of these two categories, in particular in the social security field. For example, as regards undocumented/irregular migrants, the provision of basic forms of social assistance and emergency health care is clearly developing as the mainstream intervention.[177] As regards informal workers, innovative and to some extent unprecedented interventions (consisting of the conceptual adjustment of the "worker" and related concepts as well as comprehensive and vastly varied institutional arrangements) have been introduced in Asia, Latin America and Africa to increasingly extend coverage and protection. These developments should be of value to migrant workers who work informally as well.[178]

[177] K Kapuy *The social security position of irregular migrant workers* (2011).

[178] See generally see Olivier M, "Informality, Employment Contracts and Extension of Social Insurance Coverage" (Report prepared for the International Social Security Association (ISSA)), (2009) (A study produced under the ISSA Project on "Examining the Existing Knowledge on Social Security Coverage Extension", Working Paper No. 9 International Social Security Association, Geneva) – available at http://www.issa.int/content/download/91354/1830644/file/2-paper9-Olivier.pdf,