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INTERNATIONAL LABOUR MIGRATION LAW OR THE MISFORTUNES OF VIRTUE

RÉSUMÉ

Cette étude cherche à clarifier les différents aspects des migrations aux fins de travail. Elle considère les préoccupations des Etats d'origine et d'accueil des travailleurs migrants ainsi que les objectifs des principales institutions internationales en charge de ces questions. Elle examine ensuite les règles supranationales applicables, en s'interrogeant sur leur capacité à résoudre les difficultés relevées. Les conclusions soulignent l'utilité des dispositions adoptées au niveau universel, mais aussi leurs lacunes et les besoins d'ajustement au mouvement accéléré de mondialisation.

MOTS CLÉS : *Migrations, travail, intégration, protection, respect de la différence.*

ABSTRACT

This study seeks to clarify the various aspects of labor migration. It examines the concerns of migrant workers' countries of origin and destination, and the goals of the major international institutions charged with addressing these issues. It then examines the applicable supranational rules, looking at their ability to resolve the difficulties observed. The conclusions emphasize the usefulness of the provisions adopted at supranational level, but also their shortcomings and needs in adjusting to the accelerating pace of globalization.

KEYWORDS : *Migration, Labor, Integration, Protection, Respect for Diversity.*

"TU LASCERAI OGNE COSA DILETTA
PIÙ CARAMENTE; E QUESO È QUELLO STRALE
CHE L'ARCO DE LO ESILIO PRIA SAETTA.
TU PROVERAI SÌ COME SA DI SALE
LO PANE ALTRUI, E COM'È DURO CALLE
LO SCENDERE E 'L SALIR PER L'ALTRUI SCALE"

No one undertakes to leave the country of their birth for no reason; separating from the people and places they love, the influence of education, culture, and the force of habit all make the decision to relocate a difficult one. Dante points this out in these admirable verses. In spite of the financial difficulties they face, southern Europeans have not been leaving to look for work in the north in such great numbers as was previously expected.² The causes driving their decision must therefore be of a more peremptory nature. Poverty is most often one of them, along with difficulties in finding a way to make a living closer to home; family reunification is another. It may also happen that ill persons travel across borders to seek treatment where medical care is better or cheaper.

Other reasons may arise from the political situation of the country they are leaving, whether they are forced to do so, given incentive to do so, or do so out of their own free will. Refugees flee their countries to escape danger (war, persecution). Tens of thousands of them have crossed the Mediterranean in recent times, suffering the many tragedies we have seen. Stateless persons were likewise forced to leave Eastern Europe en masse at the end of the Second World War. The refugee issue differs from other migratory phenomena due to its causes, which prompt more generous treatment, and, often, due to the large number of people that may be affected in a short period of time. This influx requires a redefinition of the policies on the integration of foreign populations.³ It would seem difficult to maintain a strict separation between the humanitarian and social aspects of this situation.

1 "You shall leave everything you love most dearly: this is the arrow that the bow of exile shoots first. You are to know the bitter taste of others' bread, how salt it is, and know how hard a path it is for one who goes descending and ascending others' stairs." Dante Alighieri, *The Divine Comedy, Paradise*, Canto XVII, 54-55.

2 C. Jolly, «Les Européens répondent-ils à la crise par la mobilité?», *Esprit*, no. 414, May 2015, pp. 92-98

3 European Commission, *Migration and mobility. Research and innovation projects in support to European Policy*, Brussels, EU, 2016; OCDE, *Recruiting Immigrant Workers: Europe 2016*, Paris, OCDE, 2016; Eurofound, *Challenges of policy coordination for third-country nationals*, Dublin, 2015; R. King, A. Lulle, *Research on migration. Facing realities and maximising opportunities: a policy review*, Brussels, EU Publications Office, 2016, pp. 124 et seq.

The status of refugee or stateless person in international relations has the meaning stipulated by the Geneva Convention of 28 July 1951 relating to the Status of Refugees and its 1967 Protocol, as well as by the New York Convention of 28 September 1954 concerning the status of stateless persons. These instruments, developed in parallel, let those concerned know that their situation imposes upon them certain obligations toward their host countries, including the obligation to comply with the laws, regulations and measures established for the maintenance of public order. In turn, after 3 years of residence, they are then provided an exemption from reciprocity and the right to take up paid employment.⁴ They then enjoy equal treatment in regard to labour law and social security.⁵ They therefore enjoy treatment in general more favourable than persons immigrating in seek of work. Germany, Denmark and Sweden, countries greatly affected by the flood of newcomers, began at the end of 2015 or in early 2016 to deliberate upon or take concrete steps to facilitate their access to the labour market.⁶ This was done in consultation with employers' organizations and trade unions.

Some governments require that persons wishing to leave the country obtain an exit visa, though the lack of effective control frequently permits the evasion of this requirement; this was however not the case in many countries of communist Europe until the end of the 1980s.

That said, labour mobility is not always characterized by the image of poor, unskilled immigrants. This observation may be true for some refugees. It is truer for higher education graduates seeking better paying jobs or better research conditions away from home.⁷

Our examination will focus on international labour mobility, whatever the causes underlying it, although population movements within a given country may give rise to similar social issues. This may be seen in the obstacles faced in the exodus of rural populations in pre-industrial Europe⁸ or in western China today. We will not address the issue of posted workers, who maintain an employment relationship with their country of origin.

Host country attitudes vary greatly according to their characteristics and depending on the times. They still remain highly selective, based more and more frequently on the intellectual qualities sought among candidates to promote economic development, and always on employment requirements. Restrictions on long stays by foreigners do not prevent the entry of illegal immigrants, which may cause or exacerbate tensions with local nationals.

4 The influx of refugees from Africa and the Middle East led to the signing of an agreement by the ILO and the United Nations High Commissioner for Refugees (UNHCR) on 1st July 2016 to help displaced persons find work.

5 For details regarding these provisions, see Articles 2, 7, 17 to 19 and 24 of each convention.

6 See eurofound.europa.eu/observatories/eurwork/articles, in articles dated 17 December 2015 and 1 and 5 February 2016.

7 F. Docquier, C. Ozden, G.Peri, «Les effets des migrations sur le marché du travail», *Problèmes économiques*, n°3124, January 2016, pp. 17-23.

8 R. Castel, *Les métamorphoses de la question sociale. Une chronique du salarier*, Paris, Fayard, 1995; B. Anderson, "Precarious Pasts, Precarious Futures," in C. Castello, M. Freedland (dir.), *Migrants at work*, Oxford University Press, 2014, pp. 29-43.

Few social policies manifest so revealing a discrepancy between the expressed intention and the results actually achieved.⁹ This observation applies as much to host countries as to countries of origin. A notable exception is the European Union (EU), which has enshrined in law the right to free movement by its nationals, and has implemented sophisticated rules to guarantee it and even promote it, and to handle the consequences. It has expressly linked this right with employment policies. Still, competition among workers in this regard is not without its problems, and has stirred controversies.¹⁰

Immigration continues to increase. A joint report conducted by the United Nations and OECD counted the number of international migrants at approximately 232 million, six in ten of whom reside in developed regions. Since 1990, that number has risen by about 53 million (65%) in the Northern countries, and by around 24 million (34%) in the Southern countries.¹¹ These figures fall short of the reality, however, because of the problem posed by the growth in illegal immigration.

The first part of this study seeks to clarify the various aspects of a complex set of problems, considering the concerns of migrant workers' countries of origin and destination, and the goals of the major international institutions charged with addressing these issues (I). The second part will present a review of supranational regulations, examining their ability to resolve the difficulties observed (II). The conclusions emphasize the usefulness of the provisions adopted globally, but also their shortcomings and needs in adjusting to the accelerating pace of globalization.

I – AN AMBIGUOUS SET OF PROBLEMS

On the global level, the right to emigration and free circulation is not guaranteed.¹² In the absence of treaties to the contrary, States retain the sovereign power to deny some or all foreign persons access to their territory. However, the difficulties faced by public authorities in stemming the influx of undocumented immigrants are well-known. Adopting international standards to regulate migration flows requires that the interests of both origin and destination countries be taken into consideration, in many divergent respects.

9 See also S. Taweejamsup, «La Communauté de l'ASEAN à travers le prisme de la libre circulation des travailleurs: des besoins reconnus, une mise en place lente et difficile», *Revue de droit comparé du travail et de la sécurité sociale*, 2013/1, pp. 68-77.

10 From a legal perspective, see H. Verschueren "The European Internal Market and the Competition between workers", *European Labour Law Journal*, vol. 6 (2), 2015, pp. 128-151.

11 UN, *International Migration 2013*, New York/Geneva, 2013; *Les migrations internationales en chiffres*, Joint contribution by the United Nations/DESA and the OECD to the High-level Dialogue on International Migration and Development, 3-4 October 2013; International Labor Conference, (103rd session, 2014), *Migration équitable: Un programme pour l'OIT* Geneva, BIT, 2014, §50

12 C. Wihtol de Wenden, *Le droit d'émigrer*, Paris, Editions CNRS, 2013. See also, «Une nouvelle donne migratoire», *Politique étrangère*, 2015/3 (Autumn), pp. 95-106.

The jurisprudence of the Court of Justice of the European Union (CJEU) has sought in regard to third-country nationals to maintain a balance between respect for human rights and national sovereignty.¹³

Beyond the stated objectives, we must also analyse the underlying motivations that shape policies. Sometimes there is a great distance between the public discourse and the real motives. Governments certainly take the interests of migrants into account, but other considerations also come into play. To protect these human beings is one of the primary aims assigned to the universal institutions dealing with these issues.

We will now consider successively the views of emigration countries (A) and destination countries (B). We may note: countries such as Spain that have experienced both of these situations tend to be more sensitive to the difficulties faced by foreign workers in their territory. This may not be the case for other countries - yet even there, the current economic crisis is creating new tensions.¹⁴

A - EMIGRATION COUNTRIES

The attitudes of emigration countries towards their citizens abroad can hardly remain unambiguous. Though their duty requires them to be concerned for their fellow citizens living abroad, they have a vital economic interest in allowing the phenomenon to develop, if not in actively promoting it. The labour performed by their citizens in host countries is an important source of income for a poor nation when those citizens send part of their earnings back home to their families. According to the World Bank, these remittances totalled \$436 billion in 2014. In Nepal, they amount to practically double the revenue drawn from the export of goods and services; in Sri Lanka over 50%, and in the Philippines 38%.¹⁵ Moreover, migratory flow also absorbs a part of the labour surplus.

Authorities thus seek, at best, to simply ensure decent travel and employment conditions for their nationals. With the help of the ILO and the EU, Pakistan has created a website to facilitate the filing of formal complaints by its citizens abroad in case of allegations of fraudulent recruitment or of labour exploitation.¹⁶

Emigration may also present serious drawbacks for the States concerned.¹⁷ Besides depriving them of part of their lifeblood, the departure of their most qualified people also

13 J-Y Carlier, L. Leboeuf, «Droit européen des migrations,» *Journal de droit européen*, no. 227, March 2016, pp. 105-113; M. Ruhs, «Les droits des travailleurs migrants, un problème politique, économique et éthique,» *Revue internationale du travail*, 2016, vol. 155 (2), pp. 311-326.

14 J.L. Gil y Gil (dir.), *Migraciones internacionales e impacto de la crisis económica*, Lisbon, Ed. Juruá, 2013; I. Daugareilh, Fr. Vennat, *Migrations internationales et marché du travail*, Lyon, Chronique sociale, 2004.

15 Banque mondiale, *Migration and Development Brief*, 24, 13 April 2015: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/3349341288990760745/MigrationandDevelopmentBrief24.pdf>

16 www.ophrd.gov.pk

17 As far back as 1803, in his famous *Traité d'économie politique* (<http://pages.infinet.net/sociojmt>, Book I, Chapter 20, p. 185), Jean-Baptiste Say wrote that "there is no loss more unfortunate for the country abandoned."

causes them to lose a powerful driver of growth. Brain drain affects even highly industrialized countries: 40% of the top French researchers have expatriated.¹⁸

B - HOST COUNTRIES

1 - ACCESS TO THE LABOUR MARKET

It is an attribute of a nation's sovereignty that it may decide whether or not to accept a foreigner into its territory. States renounce this only by a voluntary act with respect to a limited number of countries, as is the case within the European Union.

Some of the "New World" Nations, starved for labour, have welcomed European emigrants with open arms. These pioneers marked the history of Argentina, Australia, Brazil, the United States and Canada long after their independence. Their policies have often changed. The need to protect their labour markets drives most countries to restrict immigration, requiring the acquisition, under strict conditions, of both a residence permit and a work permit.¹⁹

Naturally, whether the latter will be granted depends on the employment situation in the various industries and regions, so that the employment of national workers is not threatened. States normally grant these authorizations at first for a single job position, then for a fixed period of time, and then will grant more permanent authorizations. Newcomers therefore end up working in certain industries - agriculture, construction, hotels and catering, domestic service - that tend to be overlooked by national workers because the jobs are precarious, arduous and poorly paid. They thus emerge as a vulnerable workforce, whose employment situations may remain precarious a long while, when they were already vulnerable due to living as emigrants, often cut off from their families.²⁰ These workers, who are often among the least educated people in their countries of origin, experience ever-accumulating frustration. If they continue to suffer from job insecurity, their children and grandchildren may from time to time fall into delinquency or religious fanaticism.

Concerns about protecting the national labour market resonate strongly among national workers and their families, especially in times of high unemployment. Destitute emigrants will accept lower wages, and may end up competing for jobs where no collective

18 B. Jubin and P. Lignière, «Nos cerveaux sont-ils en fuite?», *Problèmes économiques*, no. 2944, 26 March 2008, pp. 39-42. See also P. Rivas Vallejo, «Migración española del siglo XXI y políticas migratorias públicas», *Revista General de Derecho del Trabajo y de la Seguridad Social* vol. 40, 2015.

19 Or a single document combining the two, as in European Directive 2011/98.

20 See M. Zou, "The legal construction of hyper-dependence and hyper-precarity in migrant work relations," *International Journal of Comparative Labour Law and Industrial Relations*, no. 31(2), 2015, pp. 141-162.

agreement or regulatory provisions on minimum wage are in place to require equal pay for all. For proof of this, one might simply re-read the book *The Grapes of Wrath*.²¹ When a crisis occurs, the presence of many migrants increases unemployment and labour tensions. Such unrest raises political problems and works to the benefit of certain electoral objectives.

Population mobility also requires special effort to be made by government administrations, which may need time to adjust.

Police and security regulations govern residence permits, even when a treaty may have been established to protect the free movement of people. This refers to the national legal provisions compliance with which a country has deemed crucial for the safeguarding of the elements in its national public interest, such as its political, social or economic organization, to such extent that it requires compliance with the same by any state of affairs existing within its jurisdiction.²² Thus restrictions do exist on the free movement of EU citizens, which may concern public order and public health, conditions regarding financial means, and healthcare coverage (so as to prevent dependence on public relief in the host country); others still may reserve positions in the public administration to local nationals, revealing the sovereignty concerns of host states. Difficulties also remain in regard to the recognition of equivalence for diplomas and qualifications.

Emigration also presents obvious benefits to host countries, which the international institutions emphasize.²³ It can compensate for demographic decline and population ageing. It helps fill deficiencies in the labour force and increases the resources of the social security system when demographic trends create a deficit. Something few studies dare point out is that this labour force also helps make products cheaper for consumers.²⁴

The technical revolution and the rise of a service economy have created new needs; these include the need for a highly qualified workforce with reduced barriers to migration, which thanks to its networks may even open new markets.²⁵ A European Directive 2009/50 of 25 May 2009 established special entry and residence conditions for these degree-holding persons. This simply followed the lead of an analogous policy in place in North America.

21 *The Grapes of Wrath* by John Steinbeck, [*Les raisins de la colère*] Paris, Gallimard (NRF), 1947 for the French translation. Of course, this book describes internal migration, but the problem is similar. See also: M. Rigaux, *Droit du travail ou droit de la concurrence sociale ?* Bruxelles, Bruylant, 2009, §§ 18-22; J. Buelens, *L'occupation de la main-d'œuvre étrangère dans le secteur de la construction. Décryptage et analyse critique de montages de concurrence déloyale* Antwerp, Universiteit Antwerpen, 2007.

22 CJEU ruling in the case of *Arblade and Leloup* (23 November 1999).

23 See the recitals of the Constitution of the IOM. See also World Bank, *Global Economic Prospects. Economic Implications of Remittances and Migration*, Washington, WB, 2006, pp. 25 et seq.; International Labor Conference (103rd session, 2014), *Fair Migration: Setting an ILO Agenda*, report I (B), Geneva, ILO, 2014, §24; International Labor Conference (105th session, 2016), *Promoting Fair Migration*, report III (Part IB), Geneva, ILO, 2016, §23 and 138.

24 C. Ozden, «Marché du travail et migration : la grande incompréhension», *Problèmes économiques*, n° 3112, 2015, pp. 25-31.

25 UK's Department for Business, Innovation and Skills (BIS), *The impacts of migrant workers on UK businesses*, London, Government Publications, 2015.

Nevertheless, electronic means of research and communication may disrupt this landscape, since specialized researchers and technicians can now be hired without requiring them to move physically.

Preventing the illegal employment of foreigners to the extent possible remains a priority in industrialized countries. They all advocate for it, but few achieve success. Smugglers and agencies that use misleading advertising play a particularly unclear role in this. The situation, again, is not without its ambiguities; many entrepreneurs and their representatives, at all levels, are perfectly amenable to a do-nothing approach when unskilled labour is scarce. For humanitarian reasons, illegal immigrants in Europe do receive the benefit of regular public services such as health care or children's education. The provision of free medical care to illegal immigrants who are unwell is based in the essential obligations human beings have toward one another. This does however result in losses for the health insurance system, to the extent that these persons may come seeking care for diseases that are expensive to treat (AIDS, etc.). The legalization of foreign workers without permits may, as I have said, help reduce deficits in the social security system, at least if such persons are not unemployed, as a result of the revenues that would then be collected.

2 - LIVING CONDITIONS IN THE HOST COUNTRY

Immigrants legally residing in the host country must receive equal protection for their working conditions and their social security, if not for their acquisition of a job or their receipt of other employee benefits. There is a great distance from theory to practice here; foreigners are more commonly subject to discrimination based on race, ethnicity or national origin than other persons.

The cultural integration of these "undesirables undesiring of us"²⁶ poses a challenge. They may not always want to become culturally integrated if they harbour hopes of returning home once their financial situation has stabilized. They may simply seek to live without facing harassment or ostracism, as in the case of purely temporary or circular migration.²⁷ Certain host countries, such as Israel or many of the Arab states, may not seek these persons' integration, for reasons related to religion or their ruling parties' vision for their nation. They will thus only permit them to work for a limited time, or only to do posted work. This is still the situation in States that deem the number of foreign workers residing there legally or otherwise to be excessive, and adopt voluntary return programs, often in exchange for financial compensation and/or training.

More frequently, policies towards emigrants are rooted in two conflicting objectives: both to enable newcomers to maintain links with their traditional culture, and to help them integrate harmoniously into the society that is hosting them. There are two opposing schools of thought at play here. Continental European policy in general, and French policy

26 M. Foessel, «Ces indésirables qui ne nous désirent pas» *Espirit*, No. 419, November 2015, pp. 106-107.

27 R. Owens, J. Howe (eds.), *Temporary Labour Migration in the Global Era; The Regulatory Challenges*, Oxford, Hart Publishing, 2016; A. Devillard, *Migration Circulaire Au-delà des promesses, quels risques, quelles opportunités ?* Geneva, IOM, 2011; Li-Chuan Liuhuang «La question de la migration circulaire : Un examen des droits des travailleurs migrants à Taïwan,» *Revue de droit comparé du travail et de la sécurité sociale*, 2016/1, pp.52-61.

in particular, favours assimilation, seeking to reduce differences;²⁸ the controversy over the Islamic veil, a claim to distinctive identity, has been a highly media-saturated manifestation of this. In North America there is an emphasis on respect for the traditions specific to each group, even at the risk of perpetuating discrimination. That region, indeed, has long been characterized by strong immigration, where assimilation to the majority population remained more unlikely. The result was the gradual creation of multicultural States. The significant rise in immigration to Europe today raises the question of a change in policy. Nevertheless, the search for a harmonious balance between concerns regarding integration and concerns regarding respect for cultural identity constitutes the great challenge and the tremendous problem faced by labour law in matters of emigration.

A minimal integration of foreigners into the various aspects of life in society is a prerequisite for social cohesion in host countries. Cultural integration has often had its failures. Proof of this are the manifestations of xenophobia, which though oft-reported are rarely punished.

While the phenomenon is rather simple to explain, it is difficult to find a remedy. Immigrants arriving alone may have no choice but to blend in with the local nationals. But when on the contrary such immigrants are part of a larger group - one constituting 10% of the local population, according to some sociologists - they may easily carry on their ancestral customs, establish or patronize shops or meeting places reserved in practice for persons of the same origin, or follow the precepts of a religion other than that of the historic nationals. Cultures collide and differences arise, whether among eating habits, social manners, relationships between men and women, or even relationships with noise. These discrepancies may disturb, frighten, and lead to the creation of separate dwelling places; certain suburban developments turn into ghettos. Added to this is the widespread fear that certain people may be taking other people's jobs by accepting lower wages.

Immigrants normally do not enjoy political rights in host countries, except occasionally at a local level. They are deprived of such rights often, in practice if not by law, in the country of which they are no longer residents. They face a precarious situation, in an environment that is not their own; they may then either adapt, or take refuge in a fundamentalist defence of their native culture. Some of the most frustrated amongst them refuse to make any change, sometimes encouraged by emigrant religious leaders fearful of losing their flock due to immersion in a secular environment or another religion.

In such conditions it is unsurprising that national migration law is frequently reworked, and that European or international norms often face opposition, whether unspoken or overt. These regulations seek, with uneven success, to achieve the abovementioned balance between conflicting objectives.

Then there is an additional problem, complex but essential, that further complicates the picture: social security for migrant workers. Regulations in this regard have a dual purpose: to ensure equality of treatment with national workers, and to prevent changes of residence from leading to a loss of rights already acquired or being acquired. The benefits to which immigrants were formerly entitled must be provided by their host country, and

28 See J. Kristeva, *Etrangers à nous-mêmes*, Paris, Fayard, 1988, p. 288-289.

their acquired benefits maintained. This requires a determination of the applicable law, and cooperation among the government administrations concerned.

Beyond that, it is important not to err on the side of pessimism. Examples of people living together successfully, or positive stories, don't tend to be considered particularly newsworthy. Yet such successes, not to mention the reciprocal influence of immigrants on host countries, and of host countries on immigrants and their countries of origin, nevertheless remain common.²⁹

II - A LEGAL FRAMEWORK REFLECTING THESE ISSUES

Bilateral labour treaties have quite naturally established some preliminary attempts to establish the rights of foreign workers, but also to channel migratory flows; an example is the treaty signed by France and Italy in 1904.³⁰ Their aim was to oversee these workers' arrival and access to the labour market, as well as to facilitate their conditions of residence and employment.

Such agreements are still being signed today, such as the bilateral agreement signed between Ecuador and Spain on 29 May 2001. Soon after, on 17 February 2002, the Ecuadorian government entered an agreement with the International Organization for Migration (IOM), by which it would receive technical support in implementing the legal instruments, design, operation, assistance, efficiency and performance of a system for the selection and transportation of Ecuadorian emigrants. The Spanish-Ecuadorian agreement was intended to regulate migration between the two countries in a coordinated manner, to facilitate the acquisition of job vacancies in Spain by Ecuadorians qualified to fill them, and to ensure that Ecuadorian immigrants would effectively enjoy the rights recognized under the international legal instruments ratified by both States.³¹ This agreement was not the only one made between the two countries; they had already entered a social security agreement in 1960, an agreement to abolish visa requirements in 1963, and a legal instrument governing dual citizenship in 1964. Nevertheless, these legal instruments in principle only protect lawful immigrants.

More ambitious agreements have sought to permit the free movement of workers between two states or within a group of States. This is one of the great freedoms enjoyed in the EU. The issue of mutual recognition for academic credentials is a serious obstacle to cross-border activity. European legislation seeks to address this gradually. Ad hoc

29 Philippe Fargues, «Migration et identité: le paradoxe des influences réciproques», *Esprit*, January 2010, pp. 6-16.

30 N. Valticos, *Droit international du travail*, 2^e ed., Paris, Dalloz, 1983, paragr. 153 and 219. The first bilateral convention on social security seems in fact to have been the one signed between France and the Duchy of Parma in 1827; it concerned the payment of pensions owed by one of the signatory nations to citizens of the other: see Guy Perrin, "Histoire du droit international de la sécurité sociale" in A. Barjot (ed.), *La sécurité sociale. Son histoire à travers les textes*. Association pour l'étude de l'Histoire de la sécurité sociale, Paris, vol. V, 1993, p.17.

31 Cristina López Roca, *La inmigración laboral en España*, trabajo de doctorado, Universidad de Girona, Facultad de derecho, 2008;
http://suecia.embajada.gob.ec/wp-content/uploads/2013/08/relaciones_bilaterales_españa_embajada.pdf.

agreements have also been made, such as that which was entered between France and Quebec (Canada) in 2009. The issue of fluency in the local language adds another difficulty.

As far back as 1919, the Preamble to the Constitution of the ILO included “the defence of the interests of workers employed abroad” among the questions that body was intended to address; among the general principles enumerated in Article 427 of the Treaty of Versailles, we read as well that “the standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein.” Such protections, as well as measures to combat illegal immigration, were thus included among the central concerns of the founding fathers of the Organization; the two concerns are for that matter clearly related.

The international labour standards applicable to migrants³² are intended to integrate the objectives outlined in the introduction: both assimilation and respect for differences. They focus on illegal access to labour markets, while European law still leaves the issue largely to the laws of the Member States regarding third-country nationals. The level of protection they offer, however, remains well short of that granted to European citizens under EU law. The coordination among social security systems is a striking example of this.

A significant demonstration of the difficulty reaching a minimal consensus on these issues is the fact that international instruments, despite their fairly general wording, have received few ratifications. The most recent ILO Convention on the subject, Convention No. 143 of 1975, has (as of 1 February, 2018) only obtained 23 ratifications, only three of which (Italy, Norway, Sweden) were by northern countries. As for the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990, that agreement only obtained the twentieth ratification necessary for its entry into force on 1st July 2003³³ and it has still been ratified mostly by migrant-sending countries. It emerges from an exegetical analysis of the instrument that its provisions are intended more to facilitate and supervise legal migration than to promote residence, employment and integration among the persons concerned.

Most international and national labour standards omit any specific mention of foreign persons (1); the general nature of their wording most often allows interpreting bodies to conclude that they do apply fully to that group of workers. Nevertheless, like the UN, the ILO has adopted specific provisions in respect of foreign workers (2). These provisions specify their scope of application and deal with conditions of access to foreign job markets, as well as protections for migrant workers lawfully admitted to and employed in host countries (equality of opportunity and treatment and of working conditions) and their integration into the societies to which they immigrate. A complex problem, already mentioned, has to do with social security for migrants (3).

A series of examples drawn from practice should help clarify the scope of these standards and the limits to their effectiveness (4). Bilateral treaties between two countries, such as the one mentioned above between Spain and Ecuador, can also add further

32 The reader will find a more complete analysis of these standards, including specific references to the applicable provisions, in my book *International Labour Law*, The Hague, Kluwer, 5th ed., 2017, §§754-796 and 1011-1023.

33 It now has 51, as of 1 February, 2018.

safeguards to those provided under the laws of the international institutions that promote such agreements. The last section seeks to identify the means used by European law to better address the legal issues of free movement (5).

1 - THE GENERAL INSTRUMENTS OF THE ILO

International labour standards apply in principle to all workers, including migrants. Those concerning the abolition of discrimination based on race or national origin, established in ILO Convention No. 111, take on a special meaning in this regard. Migrants must be respected for their differences, but must accept the diversity of their host countries, and in particular their ethnic diversity.

The same applies in the extreme cases discussed in Convention no. 29 of 1930 on Forced Labour. External or indirect constraints affecting the freedom of labour may arise from practices such as withholding the identity papers of a migrant worker.³⁴ Cases of bonded labour appear where you least expect them, as in the 26 July 2005 ruling in the case of *Siliadin*, and the 11 October 2012 ruling in the case of *C.N. and V.*, pronounced against France by the European Court of Human Rights. More generally to render the issuance of a residence permit contingent upon the conclusion of an employment contract with a specific employer may lead to abuses, as has occurred with domestic workers.³⁵

In Qatar, migrant workers who have obtained a visa must have a sponsor who will execute the formalities required to obtain a residence permit; when this process has been completed, the employer is obligated to return the worker's passport. In principle, workers are not permitted to change employers or to leave the country, whether temporarily or permanently, without an exit visa issued by their sponsor; a special procedure is provided in case of refusal. The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) observed in this case the existence of practices of forced labour, including contract substitution, restrictions on the freedom to terminate the employment relationship and on the freedom to leave the country, non-payment of wages, and threats of reprisals. The Committee strongly recommended that interested parties must be able to effectively assert their rights in court and that violators must face sanctions.³⁶

Convention no. 110 of 1958 on Plantations states that it applies to all workers without distinction of nationality; this further precision is doubtless superfluous from a legal standpoint, but not from the point of view of labour policy in light of the problems faced by migrants in this sector.

34 M. Kern and C. Sottas, «Liberté des travailleurs : l'abolition du travail forcé ou obligatoire» in ILO, *Les normes internationales du travail. Une approche globale*, Geneva, 2001, p. 61-62.

35 See the ruling of the Supreme Court of Israel in the case of *Kav LaOved*, cited in E. Albin, "The Sectoral Regulatory Regime. When Work Migration Controls and the Sectorally Differentiated Labour Market Meet" in C. Castello, M. Freedland (dir.), *Migrants at work*, Oxford University Press, 2014, pp. 141-143. See also J. Fuge, K. Strauss, "Migrants, Unfree Labour and the Legal Construction of Domestic Servitude", *ibid.*, pp. 160-179.

36 International Labor Conference (104th session, 2015), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), Geneva, ILO, 2015. pp. 190-192.

2 - SPECIFIC INTERNATIONAL STANDARDS FOR MIGRANT WORKERS

a - SCOPE OF APPLICATION

The United Nations Convention applies to all persons that will engage, are engaged, or have engaged in remunerated activity in a State of which they are not nationals, as well as to their family members,³⁷ without distinction, for the entire duration of the migration process (from preparation and departure to eventual return).

The Convention specifies the provisions of Part IV (regular employment) applicable as such or in modified form to frontier workers, seasonal workers, itinerant workers, project-tied workers, workers admitted for a specific job, and self-employed workers. Self-employed workers enjoy all the rights provided in Part IV, with the obvious exception of those only applicable to employees. If they stop working, their permission to remain in the State of their employment or to engage in remunerated activity shall not be automatically withdrawn, unless their residence permit is expressly dependent on the specific remunerated activity for which they were admitted. Frontier workers, seasonal workers and migrant workers enjoy rights "by reason of their presence and work in the territory of the State of employment." Thus, frontier workers generally residing in another State cannot claim equality of opportunity and treatment for "access to housing," but may form a union in their country of employment. The Convention lists the articles that are unenforceable in whole or in part for project-tied workers and specific-employment workers (posted workers). The Convention does not apply to seafarers and workers on offshore installations who are non-citizens and non-residents.³⁸

ILO Convention no. 97 and Recommendation no. 86 of 1949, Convention no. 143 and Recommendation no. 151 of 1975, as well as Recommendation no. 100 for "underdeveloped countries and territories" deal specifically with migrants. These provisions apply to migration for employment. This lattermost term, in the English influenced sense of the word, does not include self-employed workers.³⁹ Convention no. 97 and Recommendation No. 86 state this expressly; they also exclude frontier-workers, seafarers, and the short-term entry of "members of the liberal professions and artists." Part II of Convention no. 143 contains

37 Another UN Convention, the 1989 Convention on the Rights of the Child requires the States that have ratified it (practically every one) to establish minimum ages for admission to employment; asks that they provide childcare for the children of working parents; and establishes the principle that every child has the right to benefit from social security, medical services, and specific measures if they are physically or mentally disabled. It advocates for the reunification of families; children must not be separated from their parents against their will. Children whose parents reside in different States have the right to maintain personal relationships and to have direct contact on a regular basis with both parents, save in exceptional circumstances. To this end, States Parties shall respect the right of children and their parents to leave any country, including their own, and to return to their own country.

38 Part V, however, contains no specific articles regarding seafarers and workers on offshore installations who are non-citizens but have been admitted as residents of the State in which the vessel is registered or the State in whose jurisdiction the installation is being operated.

39 ILO, *Migrant Workers*. Report III (part 1B) to the International Labor Conference (87th Session, Geneva, 1999, para. 110.

an identical provision on equality of opportunity and treatment;⁴⁰ it also excludes persons immigrating to pursue their education or training, and those temporarily admitted upon their employers' request in order to perform specific duties or tasks.

b - CONDITIONS OF ACCESS TO FOREIGN JOB MARKETS

The UN Convention on the Rights of All Migrant Workers and Members of their Families does not seek to promote migration. None of its provisions "shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families." The instrument focuses on combatting the illegal movement and illegal employment of foreigners, as the end of the preamble emphasizes. The rights to liberty and security of persons, equality with host country nationals before the courts, protection against the unauthorized confiscation of documents, equal treatment in working conditions and other terms of employment, and to social security, have been formulated in such a way as to render the presence and work of undocumented persons economically and administratively unattractive, contrary to the position of regular workers.

The distinction between the rights all migrants should enjoy (part III) and the rights applicable only to legal migrants (part IV) can be made clearer by juxtaposing a few examples. Thus, legal migrants have the right to transfer their earnings and savings, in particular the funds required for the care of their family, from their State of employment to their State of origin or any other State, without any specific restrictions. All migrants enjoy a certain number of rights granted them by legal procedure in case of expulsion; legal migrants or their family members also enjoy greater security, in that they cannot be expelled other than "except for reasons defined in the national legislation of that State," and in no case in order to deprive them of the rights granted by their residence authorizations and work permits.

Like the United Nations convention, the Convention 143 of the ILO requires states to work to suppress illegal migration and the illegal employment of migrants; they will collaborate to attain such aims. Convention No. 97 calls for an exchange of information between States and the ILO, as well as cooperation in terms of employment services. Member States are to establish a free service to help migrant workers, and in particular to provide them with accurate information (Article 3 requires them to take measures to suppress misleading propaganda). The instrument also suggests measures to be taken where necessary to facilitate the departure, journey and reception of concerned parties, and provide them with the proper medical assistance. Two appendices are included, dealing with regulations concerning the conditions of recruitment for migrant workers⁴¹ depending on whether they are hired as part of government-sponsored arrangements for collective migration. A third deals with the importation of personal effects, tools and equipment.

40 The first part, which deals with migration in abusive conditions, applies to all migrants illegally "employed" within each Members' territory. See also the United Nations Convention against Transnational Organized Crime of November 15, 2000 and in particular its Protocol against the Smuggling of Migrants by Land, Sea and Air.

41 On the abuses practiced by private recruitment companies, see ILO, *The cost of migration: What low-skilled migrant workers from Pakistan pay to work in Saudi Arabia and the United Arab Emirates*, Geneva, 2016.

Recommendation No. 100 also proposes measures to protect the workers to whom it is addressed, as well as their family members, during their journey out and back, and prior to the period of their employment (means of transport, rest camps, travelling expenses, medical care, etc.). It also covers measures to discourage migratory movements that are undesirable both for the persons concerned and their countries of origin.

The measures proposed by Recommendation No. 86 include the provision of advice in a language that the persons concerned are able to understand, the facilities to be provided them for purposes of administrative formalities, the preparatory courses that should be organized, housing assistance, access to schools, vocational training, and facilities for currency transfer, medical assistance, etc.⁴² Any intermediary, the recommendation continues, should be required to carry a written order from the employer involved in the recruitment of the migrant workers. If the latter or their family members return to their country of origin, that State should then admit such persons to the benefit of measures for the provision of poor relief and unemployment relief. More generally, the instrument suggests the conclusion of bilateral agreements on the temporary and permanent migration of workers, including refugees and displaced persons, and proposes a standard document as an appendix.⁴³

Recently, the ILO undertook to examine the migratory routes, the routes taken between countries of origin and destination (such as those between Zimbabwe and South Africa, Paraguay and Argentina, Nicaragua and the Dominican Republic, Indonesia and Malaysia, Nepal and Lebanon, as well as between Ukraine and Poland). This exercise is intended to help develop strategies and frameworks for transnational cooperation. It has proved a complicated task, due to policy differences and tensions between countries of origin and destination. The ILO has so contributed to bringing about legislative reform in regard to immigration policy between Nicaragua and the Dominican Republic. In 2013, Argentina and Paraguay concluded a cooperation agreement on training, validation of competences, and social security (which in particular provided portability guarantees for pension rights); unions in the two countries signed an agreement for the creation of a union network via the Internet, a communications strategy to promote the rights of domestic workers and migrant workers, and measures to strengthen unions representing domestic and similar workers, in coordination with the Trade Union Confederation of the Americas workers and the International Domestic Workers Federation.⁴⁴

42 See also Recommendation No. 100.

43 See C. Forde, R. MacKenzie, Z. Ciupijus, G. Alberti, "Understanding the connections between temporary employment agencies and migration, *International Journal of Comparative Labour Law and Industrial Relations*, no. 31(2), 2015, pp. 357-370.

44 ILO (104th session, 2015) *Labor protection in a transforming world of work*, Report VI, Geneva, ILO, 2015, § 145.

Pursuant to Convention no. 143, foreign workers whose residence in a country is legal cannot become illegal residents as a result of losing their jobs;⁴⁵ they are protected against automatic expulsion. They should enjoy benefits equal to those of local nationals regarding security of employment, possibilities for alternative employment, retraining, and relief work. Recommendation 151 requires that migrant worker then be provided with a period of time to find a new job at least equal to the period of time covered by their unemployment benefits. In case of appeals against dismissal, the person must be permitted to remain until a final decision is pronounced and, if satisfaction is obtained, must enjoy the same conditions as nationals in regard to reinstatement, compensation and acquiring new employment. Persons subject to deportation orders must have a suspensive right of appeal (except where barred by duly substantiated requirements of public order or national security) and, whether or not their residence was lawful, must enjoy the full rights to which they are entitled as a result of their prior employment in regard to remuneration, social security and other benefits.

ILO Recommendation no. 195 of 2004 on the development of Human Resources discusses their specific needs, such as to have a guarantee of the validation of their professional skills and qualifications. Recommendation no. 198 of 2006 on the employment relationship also mentions them as among those workers for whom the existence of an employment relationship is uncertain, who require special protection against violations of their rights.

Convention no. 189 of 2011 on domestic workers, responding to the abuses to which migrant workers are subject more than others in this sector, requires them to receive a written job offer or contract of employment addressing the terms and conditions of employment before they cross national borders. The supplementary Recommendation no. 201 adds that States should consider specifying the conditions under which migrant domestic workers are entitled to repatriation at no cost upon the termination of their contracts. More generally, according to the convention, domestic workers must enjoy effective protections against abuse, harassment and violence, especially if they are recruited or posted by private employment agencies; in this case, the law will specify the respective obligations of the private employment agency and the household vis-à-vis the domestic worker, and provide for sanctions, including the banning of private employment agencies that commit abuses or engage in fraudulent practices. Whether independently or through a representative, they must have effective access to the courts or other mechanisms for dispute resolution.

C - EQUALITY OF OPPORTUNITY AND TREATMENT

The United Nations Convention accords basic rights to all migrants, including those whose situation is irregular: non-discrimination in respect of rights recognized by the Convention, the right to join a union and to participate in its activities, and the right to treatment no less favourable than that received by local nationals with regard to pay, other employment conditions, and social security. Part III deals with the right of access of children to preschool or public school, respect of cultural identity, and the migrant worker's right to transfer earnings and savings when leaving the host country.

45 See also Convention no. 97 (cases of illness or accidents) and Recommendations no. 86 and 151.

Much broader rights are granted to workers whose situation is regular: the right to form an association or union, equality of opportunity and treatment for many economic and social benefits, protections against dismissal, the right to unemployment benefits, and the right, subject to certain restrictions and conditions, to freely choose a remunerated activity.

ILO Recommendation no. 100 contains detailed standards concerning guarantees during employment; these are related in particular to the determination of wages, access to skilled jobs, safety and hygiene at work, social security, and trade union activities. More specifically, Convention No. 97 establishes that legal immigrants, regardless of nationality, race, religion or sex, must receive treatment no less favourable than that of nationals in respect of remuneration, the duration of working time, restrictions on home-based work, the minimum age for employment, apprenticeship and training, women's work and the work of young persons "in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities." The same applies to membership of trade unions and enjoyment of the benefits of collective bargaining, accommodations, social security, taxes, dues or contributions payable in respect of the person employed, and lastly legal action "relating to the matters referred to in this Convention."

Recommendation no. 86 stresses that interested parties and members of their families authorized to accompany them should be able to be employed under the same conditions as nationals; their employment conditions should be subject to special oversight. Convention No. 143 broadens the question; it requires States to formulate and implement a policy for equality of opportunity and treatment for migrants and their families legally residing in their territory; this policy should cover employment,⁴⁶ social security, trade union and cultural rights, and individual and collective freedoms. Article 12 lists various ways to ensure the application of this principle. It emphasizes the need to involve labour organizations in these efforts.

Recommendation no. 151 is intended to more precisely specify the domains where effective equality should be enjoyed.⁴⁷ A significant element is the emphasis it places on job security (including access to occupational guidance and placement, access to vocational training and employment of their own choice, given the qualifications already acquired, provision of alternative employment, relief work and retraining), equal pay and working conditions for work of equal value, social security measures and welfare facilities and benefits provided in connection with employment, and living conditions, including housing and the benefits of social services and educational and health facilities. It also refers to membership of trade unions, exercise of trade union rights and eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers within enterprises. Among the implementing rules appear informing workers of their rights (in a language they understand, if possible), and providing them with the opportunity to learn the language of the host country.

Various general instruments of the ILO contain provisions concerning migrants. They relate in particular to safety and health at work. Recommendation No. 197 of 2006 draws the attention of States to vulnerable workers or workers employed in high-risk areas, citing migrants as an example. Another, no. 200 of 2010 on HIV and AIDS, specifically mentions

46 Subject to the reservations provided under Article 14.

47 See also Recommendation No. 100.

migrants in its stipulation that testing programs must respect international guidelines on confidentiality, counselling and consent, and that the results must not jeopardize workers' employment or opportunities for advancement. Training, safety instructions and any necessary guidance in the workplace must be provided in a clear manner, accessible to all. Measures to ensure access to HIV prevention, treatment, care and support services for migrant workers should be taken by countries of origin, of transit and of destination; the countries concerned should enter agreements to such effect whenever appropriate.

d - INTEGRATION POLICY AND RESPECT FOR INDIVIDUAL IDENTITY

More than in other areas, it seems quite as important as it is difficult to find a balance between eradicating various forms of discrimination and respecting people's right to be different.

On the one hand, Convention no. 143 requires that a full range of measures be taken to encourage migrant workers and their families to preserve their national and ethnic identity and their links with their country of origin; it specifically mentions the possibility for children to be given some education in their mother tongue. Recommendation No. 100 suggests the granting of facilities for the remittance of funds, the exchange of correspondence, and for the performance by migrant workers of such customary obligations as they may wish to observe. Similarly, the States that have ratified convention No. 97 have thereby undertaken to permit migrants to transfer their earnings and savings to their country of origin, in whole or in part as desired. When migrant workers have worked in their country of employment for a full year and cannot be joined by their families, they must be permitted to travel to visit them with no loss of their rights, wherever they may reside, or receive a visit from them for a duration at least equal to their annual period of paid leave.

Several provisions of Recommendation No. 100 concern the right of these workers, and where necessary any of their family members as well, to repatriation at the expense of the recruiter or employer in the event, inter alia, of death, inability to work or expiration of the employment contract. However, the instrument immediately adds that individuals should be free to waive this right to repatriation or to defer the same for a specified period.

On the other hand, Convention no. 143 and Recommendations no. 86, 100 and 151 aim to facilitate the integration of foreigners who have been legally employed in their host countries. They include provisions addressing the reunification of families; States must permit spouses as well as dependent children and parents to come live with the migrant worker. Measures must also be taken to ensure that they can obtain appropriate housing. More generally, States should seek the stabilization of the workers and their families in or near employment centres. When this does not contradict their policy, they should also give migrant workers who have spent five years in their territory all opportunities of acquiring citizenship in the country of immigration.

They must also take into consideration the special needs of these workers until their adjustment to society in their country of employment is complete. Policy for such purposes should be based, inter alia, on a review of prevailing conditions, not only in the host country, but also in the country of origin. Among the elements mentioned are measures to protect workers' health (with intelligible special instructions and training for such purposes), assistance from social services, aid to migrants and their families to benefit from the opportunities offered by the host country for recreation and wellbeing (including

special measures during the initial period of settlement), as well as concerns regarding their material, intellectual and moral well-being (such as savings and efforts to protect workers against usury).

3 - SOCIAL SECURITY FOR MIGRANT WORKERS

The ILO standards on social security for migrant workers are intended to ensure that a change of residence will not lead to the loss of rights already acquired or being acquired. They seek to ensure equality of treatment with local national workers.

These issues are handled in the general instruments. Convention 102 of 1952 establishes the principle of equality of treatment with periodical payments for benefits (or fractions of benefits) financed exclusively or primarily by public funds, and for contributory schemes established for employees (States may require a bilateral or multilateral reciprocity agreement).⁴⁸ The 2006 Convention on Maritime Labour requires States, to the extent possible, to cooperate by entering bilateral or multilateral agreements or other arrangements to ensure to all seafarers regardless of their place of residence the social security rights they have acquired or are in the process of acquiring (whether as part of contributory schemes or otherwise). Each State must provide seafarers sailing under its flag, whether or not they are its citizens, with the social security protections afforded by the Convention, and must periodically consider the possibility of adding new branches of social security.

Conventions no. 118 of 1962 on equality of treatment for nationals and non-nationals in social security matters and no. 157 of 1982, as well as Recommendation No. 167 of 1983 on the maintenance of rights in this respect specifically apply to migrants. The two instruments cover the nine traditional branches of social security,⁴⁹ but according to different schemes. A State may accept the obligations of Convention No. 118 for one or more of these branches. Convention No. 157, however, requires countries with legislation covering any particular branch of social security to apply the standards of the Convention in regard to such branch.

They offer States the possibility to make exceptions to their provisions by means of special arrangements concluded between them, provided they do not affect the rights and obligations of other States parties or impose rules that are generally less favourable. Recommendation no. 167 encourages Member States to conclude bilateral or multilateral agreements covering the nine branches of social security and to coordinate the (bilateral or multilateral) instruments by which they are respectively bound. It contains an appendix with model provisions for the conclusion of such instruments and a model agreement for coordinating them.

48 Likewise, Convention no. 121 of 1964 on occupational accidents and diseases and No. 130 of 1969 on Medical Care and Sickness Benefits require Member States to ensure that any non-nationals residing or normally working in their territory enjoy equal treatment with local nationals in terms of benefits.

49 Industrial accidents and occupational diseases, medical care, sick pay, disability benefits, survivor benefits, old age benefits, maternity benefits, family benefits and unemployment benefits.

a. EQUALITY OF TREATMENT

Following on to Convention No. 102 in particular, Convention No. 118 establishes the principle of equality of treatment for foreign nationals, both in terms of coverage and the right to benefits, for each of the nine branches of social security accepted by a state. However, it makes that principle contingent upon a condition of reciprocity: it applies only to the nationals of another State that has ratified Convention No. 118. In turn, as a retaliatory measure, a State may deny equality of treatment in respect of a given branch of social security to the nationals of another State that does have legislation covering that branch, yet does not provide for equality of treatment in regard to said branch for nationals of said other State. Convention no. 157 also implicitly imposes a condition of reciprocity: Article 1 defines as a “Member” any ILO member State bound by the Convention, and Articles 6 and 9 in particular binds the obligations of any ratifying State exclusively to those of other “Members.” Both instruments stipulate that such rights must be provided to refugees and stateless persons, with no conditions of reciprocity.

Equality of treatment must be assured, in principle, without any conditions of residence. This does not imply that benefits must be granted to foreign nationals with no conditions regarding their place of residence, but that this requirement should not be imposed only on foreigners.

b - MAINTENANCE OF RIGHTS ACQUIRED OR IN THE PROCESS OF ACQUISITION

The distinctions shown here among the instruments concerned and the benefits proposed show the complexity of the issue of the maintenance of rights acquired and in the process of acquisition.

In regard to *long-term benefits* (disability, old age, survivors, or occupational accident and disease benefits), Convention No. 118 stipulates a direct obligation to maintain rights acquired: this obligation is not dependent on agreements among the States concerned. If it is party to Convention No. 118, the State must provide for the provision of benefits in a specific branch abroad both to its own citizens and to those of any other State that has accepted the obligations of the Convention with regard to the same branch, regardless of the beneficiary's place of residence. Convention No. 157 establishes a similar obligation, but in respect of all branches with regard to which the States concerned have legislation in force (since in contrast to Convention No. 118, said States cannot exclude certain branches).

In regard to *short-term benefits*, States must endeavour to participate in a system for the maintenance of acquired rights. This obligation applies within the limits of the scope of application of each of these instruments: under Convention No. 118, it applies to the nationals of any other State where the Convention is also in force, and with regard to the branches of social security accepted by those States; Convention no. 157 applies more broadly to all branches of social security with regard to which the States concerned have legislation in force. In any event, the obligation stipulated is that States will “endeavour to” comply; it is an obligation of means: if negotiations are conducted in good faith, their failure cannot be construed as a breach.

When migrant workers move to a different country, they risk the loss of the periods of consistent employment, contribution, or residence required for their *acquisition of entitlement* to benefits (qualifying period condition) or *figuring into calculations of the*

amount of their benefits. They may thus become obligated to complete a new qualifying period. Thus they may receive only a small pension in spite of a long professional career. Conventions No. 118 and 157 therefore require States to endeavour to participate in schemes for the maintenance of rights in the process of acquisition under conditions similar to those described for the maintenance of rights acquired.

The system must include the aggregation of periods of insurance, employment or residence, and equivalent periods for the acquisition, maintenance, or recovery of rights, and for the calculation of benefits. It should address possible burden sharing for disability, old-age and survivor benefits, as well as for occupational disease pensions. The amount of benefits, such as sickness or unemployment benefits, on the other hand, is not calculated on the basis of the duration of a reference period; such periods are taken into consideration only as a prerequisite for the granting of a benefit or full benefits.

C - APPLICABLE LEGISLATION

The ILO standards do not normally include an identification of the applicable law and competent jurisdiction. Convention No. 157 makes an exception to this in regard to social security for migrant workers. It seeks to avoid conflicts of law and the undesirable consequences that may result for the parties involved due to a lack of protections or as a result of an undue accumulation of contributions and benefits. It establishes some basic rules, from which States may exempt themselves by agreement. Article 5 stipulates that employed and self-employed workers are subject to the legislation of their workplace, even if they reside in the territory of another Member State, or the company that employs them is headquartered or domiciled in another Member's territory. As for economically inactive persons, they are bound, in principle, by the laws of their State of residence.

According to the guidelines supplemental to the 2006 Convention on maritime labour, States must cooperate by mutual agreement to determine the law applicable when seafarers are subject to more than one body of legislation on social security; they must account for elements such as the types of protections provided by each country, the levels thereof, and the seafarers' own preferences.

d - ADMINISTRATIVE ASSISTANCE AND ASSISTANCE TO PERSONS

Conventions no. 118 and 157 appeal to Members to provide the mutual administrative assistance required to implement this coordination of social security systems. The second furthermore calls upon Members to promote the development of social services intended to assist the persons concerned in their relations with authorities, institutions and jurisdictions, and also to facilitate their acquisition of entitlement to benefits, their possible exercise of rights of appeal, and the improvement of their personal and family welfare.⁵⁰

⁵⁰ Article 13 provides that claimants may submit their application to the institution of their place of residence, which will then forward it to the competent body referred to in the claim.

4 - A FEW EXAMPLES DRAWN FROM PRACTICE

It is well known how much distance may lie between theory and practice, or the law and its general application. The book *Ganz unten (Lowest of the Low)* by Günter Wallraff demonstrated the pertinence of this observation, in light of the abuses committed by some to exploit their co-contractors' precarious status.⁵¹

Foreigners are particularly vulnerable to prejudices and to differences of treatment on the labour market on grounds of race, colour, or national origin; these are often combined with others such as sex or religion. Cases of double or even triple discrimination (such as against an elderly African woman) are common,⁵² as are cases of xenophobia, paradoxically even amongst migrants themselves towards others of different origin (such as Gypsies). Some bodies of legislation impose restrictions on the creation of unions based on nationality, residence, or citizenship. Foreign nationals, even those whose situation is regular, may be subject to unfair practices, confiscation of passports, non-payment of wages, deprivation of freedom, or physical and sexual mistreatment, turning their employment into forced labour. Their children may not have equal access to education, which increases the risk of their being made to work.⁵³

Their wages are often lower than those paid to local nationals. A Spanish study has shown that injuries due to occupational accidents are greater among foreign workers than among Spaniards: emigrants face a 34% greater risk of a fatal accident and 13% greater risk of injury. The reasons for this are numerous: they are employed in the most dangerous areas, and do the riskiest jobs (long days, work in successive shifts); many are illegal immigrants with little opportunity to demand improvements, and access to measures for prevention is limited.⁵⁴ The Spanish Social Security does not require accident reports for domestic employment, which is one of the branches with the most foreign workers.

ILO procedures permit monitoring of the provisions I have examined in more cases than it might seem. Curiously, the Organization's mediation work often goes unnoticed. It is true that its secretariat practices "quiet diplomacy," working discreetly to manage the sensitivities of States that are ready to improve, but eager to "save face." It is only if this fails that publicity is used to exert pressure to end the violations.

51 Cologne, K&W, 1985 and London, Methuen London, 1988 for the English edition. Also see volume 31(4), 2015 of the *International Journal of Comparative Labour Law and Industrial Relations* devoted to «migrant workers' vulnerabilities»; F. Villanueva et al., «Les travailleurs étrangers temporaires au Québec: le paradis, un peu loin...», *Revue de droit comparé du travail et de la sécurité sociale*, vol. 1, 2015, pp. 58-69.

52 Daugareilh, I., «Les discriminations multiples. une opportunité pour repenser le droit à la non discrimination», *Revue Hommes et Migrations*, No. 1292, July-August 2011 p.34-47; L. Moguérou, T.Eremenko, X. Thierry, R. Prigent, Les familles monoparentales immigrées: des familles doublement pénalisées?», *Revue de droit comparé du travail et de la sécurité sociale*, vol. 2, 2015, pp. 68-82.

53 International Labor Conference (101st session, 2012), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1B), Geneva, ILO, 2012, § 967.

54 *El País*, 14 June 2008, Salud, pg. 4.

The ILO has thus sent missions to Israel, Palestine and the Golan Heights in order to gather information about the employment conditions of workers in the occupied territories, in the wake of numerous allegations, regarding discrimination in particular. These visits have provided assistance to the populations concerned, but the continued tension and violence has partly rendered it vain.

Another example: in the second half of the 1980s, Libya expelled some 30,000 Tunisian workers and 15,000 Egyptian workers. The reasons were both technical (a drop in the price of oil was significantly reducing the country's revenues) and political (Egypt and Tunisia were considered too closely linked to the United States). Neither of these Arab governments had diplomatic relations with Libya. Tunisia lodged a complaint of violations of ILO Conventions No. 95 of 1949 on Protection of Wages, No. 111 of 1958 on Discrimination (Employment and Occupation), and No. 118 of 1962 on Equal Treatment (Social Security), ratified by both countries. As for Egypt, which had also ratified these conventions but which had particularly sour relations with its western neighbour, the confederation of unions filed a protest.

The proceedings were suspended to allow senior officials of the Organization to make a site visit and set up a conciliation commission, charged with resolving issues of unpaid wages, transfer of social security rights acquired or in the process of acquisition, and compensation for lost personal property. Libyan institutions, including social security, agreed to pay the equivalent Tunisian organizations the amounts owed to the Tunisian workers on the basis of the documents produced in support of their allegations. The complaint was withdrawn, and diplomatic relations were re-established in 1987.⁵⁵ On the Egyptian side, the situation was more complex. Discussions were held between the trade union organizations of both countries. Finally, the principle of equivalent compensation was accepted, which put an end to the procedure.

Even in these cases involving a State considered by many to be difficult and highly technical standards, international mechanisms have played an important role in granting due benefits. The ratification of the instruments was a key element in initiating proceedings. It remains that even in the absence of ratification, ILO standards can serve as an internationally recognized foundation for the settlement of disputes between two States, situations that may tend to proliferate as labour migration increases.

5 - EU: FREEDOM OF MOVEMENT, EQUALITY OF TREATMENT

European law may be of value in inspiring the improvement of international provisions on migrants, even though the current state of global society may make it difficult to imagine the establishment of the universal free movement of labour any time in the near future (freedom of movement is, we should point out, one of the main reasons for the UK's exit from the EU and Switzerland's reluctance to join it). If EU mechanisms for this purpose present only limited value beyond this regional grouping, European legislation and practice may in other respects serve as a source of reflection, especially for the resolution of conflicts of law and jurisdictions.

⁵⁵ ILO Administrative Council, *document GB.240/14/25*, May-June 1988.

The creation of a free market and community of interests among the European brought about a convergence in national legal systems, which nonetheless remain quite different. The dynamics of the EU and the adoption of regulations and directives tending to establish parallels between these legal systems have not unified them; far from it. The resolution of conflicts of law and jurisdictions has become all the more urgent as closer links have been developed among the States concerned. It has involved various dimensions of the national legal systems, including substantive law and private international law (or social security law). The instruments adopted therefore have a specific purpose; to adapt to the supranational mobility of labour and to modify national legal systems commensurately. Subject to specific provisions, they apply to all persons domiciled in a State of the EU, whatever their nationality.

Before deciding on the merits of a case concerning labour law that contains a foreign element, national courts must determine the competent jurisdiction and applicable law, and then consider whether the claim falls within the scope of application of the law selected, particularly in a territorial sense.⁵⁶ I will successively discuss jurisdictional competence, applicable labour law, and social security rights, acquired and in the process of acquisition, governed by a number of regulations. Traditional private international law (as well as social security law) retains its relevance beyond the scope of application of these instruments. However, Regulation no. 662/2009 of 13 July 2009 establishes a procedure for the negotiation and conclusion of agreements between Member States and third-party countries on particular questions regarding the law applicable to contractual and non-contractual obligations.

a - JURISDICTION

Regulation no. 1215/2012 deals with jurisdiction and the recognition and enforcement of rulings in civil and commercial cases. It covers individual labour contracts, but its scope does not include social security. Its purpose is to protect the weaker party by jurisdictional rules favourable to their interests.⁵⁷ Employers can only bring their case before the courts of the worker's State of residence. Workers, on the other hand, have several options available to them: they may approach the courts in their employers' State of domicile, or of the location of a branch office or any other establishment, those in the location in which (or from which) the workers normally do their work, in the last place they normally worked, or failing all these, in the location of the establishment that hired them. The law of each country determines whether a person has established domicile there. In case of posted work performed in the context of the provision of services, Directive no. 96/71 of 16 December 1996 stipulates that the courts in the location where the posted work is performed shall have jurisdiction.

⁵⁶ In this connection see L. Merrett, "The extra-Territorial Reach of Employment Legislation," *Industrial Law Journal*, vol. 39 (4), December 2010, pp. 355-381.

⁵⁷ Recitals 18 and 14 of Regulation no. 1215/2012 on employment contracts.

Agreements attributing jurisdiction can only derogate from the general rules by clauses that are added after a dispute has arisen, or that allow employees to bring their case before different courts.

The regulation does not require that the defendant be a European citizen; it applies whenever the latter is domiciled within the EU. The privilege of jurisdiction, which allows citizens to defend themselves in their own country and bring proceedings against a counterparty there, ceases to exist when the defendant is domiciled within the European Union. It is granted, however, to non-nationals domiciled within the country, bringing cases against defendants domiciled outside the EU.

b. APPLICABLE LABOUR LAW

Regulation no. 593/2008 of 17 June 2008, referred to as “Rome I”, determines the law applicable to contractual obligations. In regard to the individual employment contract, there is the principle of *favor laboratoris*, which protects the weaker party to the contract “by rules of conflict more favourable to their interests”; its interpretation must be guided by this principle (23rd recital of the regulation). Also, despite the tangled wording of Article 8, the body of law most commonly applicable is that which applies in the place where the work is normally performed. Parties may only choose another body of law - this may include, if appropriate, non-state or international bodies of law (13th recital) - if it does not deprive the employee of the protection of the mandatory provisions of the legislation that would otherwise be applicable. It is known that the majority of employment provisions are of such a nature.

If it is not possible to determine the applicable law based on the prior rules, more detailed rules will provide a solution, specifically indicating the applicability of the legislation of the country where the employee habitually performs his or her work, of the country where the business that hired the employee is established, or more generally of the country with which the contract is most closely connected. Different laws may apply to different parts of the labour contract; several articles provide for this expressly.

The judge can always apply the overriding mandatory provisions in force in local national law. Such rules do not derogate from the principle of the applicability of the legal system in place where work is performed, whenever the case is brought - as happens quite frequently - before a judge in that same location.⁵⁸ Along parallel lines, the regulation also allows the court to disregard the law normally applicable if “such application is manifestly incompatible with public policy in the place of jurisdiction.”

58 The CJEU, however, in its ruling of November 23, 1999 in the case of *Arblade and Leloup*, has ruled that even where national rules fall into the category of overriding mandatory public safety law they must still respect treaty provisions.

Directive no. 96/71⁵⁹ of 16 December 1996 focuses on the national rules applicable to posted workers in a Member State, in the context of the provision of services. Contrary to the rules of Rome I, and often to the provisions governing such matters in federal States, the directive only provides that the legal system of the place of work shall apply when its rules constitute a core of mandatory dispositions providing minimum protections: minimum wage, working hours, rest and holidays, safety and health, protections for pregnant women, youth and children, non-discrimination, and conditions for hiring out workers. Such rules involve questions regarding the preeminence of overriding mandatory provisions⁶⁰ and law and order. This directive does not seek to improve employment conditions, but simply to determine the applicable law; its intention is not to prevent but to stimulate competition among businesses, by permitting competition between employees in different countries. Both its content and its interpretation by the CJEU⁶¹ have caused a controversy that remains unresolved.

C. THE APPLICABLE BODY OF SOCIAL SECURITY LAW

National social security systems are based on the principle of territoriality: on the one hand, except in exceptional cases, benefits are contingent upon a precondition of legal residence, and, where appropriate, to a period of work or contributions within the national territory; on the other hand, they insure only against the risk of events occurring within that geographical area. The European coordination mechanisms⁶² uphold the existing social security schemes. They do not tend to harmonize national bodies of legislation, other than in regard to the spatial and temporal dimensions of their choice of law rules. On the other hand, they do permit European citizens migrating within the Union to retain their Social Security benefits: the services are provided by *removing the residency requirement*; events occurring outside the country, including periods of work and contributions, are taken into account for the acquisition of entitlement to benefits.

59 According to Article 8 §2 of Regulation No. 593/2008, the country where work is usually performed is not deemed to change when the employee performs work temporarily in another country.

60 Recital no. 34 of the Rome I Regulations thus states that the rules on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country of posting, as provided by the directive.

61 Rulings in the cases of *Rüffert* (3 April 2008), and *Commission v. Luxembourg* (June 19, 2008).

62 Regulation no. 883/2004 of 29 April 2004 coordinates social security systems on the basis of Article 48 of the TFEU. It has been amended in particular by Regulations no.988/2009 of 16 September 2009, and no. 465/2012 of 22 May 2012; Regulation no. 987/2009 of 16 September 2009 established its implementing rules. This legislation covers both employed and self-employed workers. Regulation no. 1231/2010 of 24 November 2010 extends its provisions to third-country nationals who are not already covered by these regulations due solely to their nationality. Directive no. 98/49 of 29 June 1998 safeguards the supplementary pension rights of employed and self-employed persons migrating within the Community. The protections cover supplementary pensions, both voluntary and mandatory. Directive no. 2011/24 of 9 March 2011 clarifies the application of bodies of law in regard to the cross-border provision of healthcare to patients who decide to seek treatment in a Member State other than the State where they are enrolled in social security.

The “*neither gap nor overlap*” rule constitutes the backbone of European coordination among social security schemes. The mechanism in place seeks to ensure the preservation of rights without disadvantage or advantage to social security participants due to their exercise of their right to free movement under the Treaty.

It is immaterial whether or not their stay in a country other than their own is related to performing work (employed or self-employed) or seeking work.⁶³ Coordination does not come into play in all cases: a participant must be covered by a national social security scheme and must have acquired an entitlement to benefits.⁶⁴

Citizens of the European Union, the members of their families, and their survivors, as well as any other persons legally residing in the EU, enjoy the same benefits and are subject to the same obligations under the legislation of any Member State as the local citizens thereof. The same applies to nationals of third countries that have established agreements to such effect with the EU, as well as to refugees and stateless persons residing in a Member State, and to their family members and survivors. All Member States must assimilate facts and events occurring in another Member State to those occurring on its territory (such as imprisonment causing suspension or revocation of the right to benefits).⁶⁵

The Content of Choice of Law Rules

The persons concerned fall under the legislation of their place of economic activity. Economically inactive persons are subject to the laws of their State of residence. Persons receiving cash benefits as a result of economic activity, paid or unpaid, are considered to be engaged in such activity. This rule does not apply to services normally provided for life: disability pensions, old age or survivor benefits, pensions for occupational accidents or diseases, sickness benefits paid in cash covering unlimited care - in such case the body of law of the country of residence applies.

Specific provisions apply to persons engaged in economic activity in more than one Member State. In case of temporary posted work, employees remain subject to the original body of law if they are performing a specific job on behalf of a company that has posted them, if the duration of such work does not exceed twenty-four months, and if the individual concerned has not been sent to replace another posted person. It is also necessary that the sending company must normally operate within the territory of the State where it is established, and that it regularly conducts significant business activities therein; if its activity in the country is limited to recruitment, so as to take advantage of more liberal legislation and place workers in another State, this would manifestly constitute evasion.⁶⁶ Self-employed workers also remain subject to the legal system of their countries of origin if the expected duration of their economic activity in another EU Member State does not exceed twenty-four months.

⁶³ Article 19 of Regulation no.883/2004.

⁶⁴ See in this regard the ruling in the case of *Borger* (10 March 2011).

⁶⁵ Ruling in the case of *Kenny* (28 June 1978).

⁶⁶ See the rulings in the cases of *Fitzwilliam* (10 February 2000), and *Plum* (9 November 2000).

Two or more Member States may, by agreement, stipulate exceptions to the rules discussed above in the interest of certain persons or categories of persons.

Action against Liable Third Parties

When a social security participant receives benefits based on the legislation of one Member State for damages occurring in another, the regulations provide the institution providing such benefits with two possibilities of recourse against the third party liable to compensation for damages: either a direct claim against the third party, if the institution responsible for payment has one; or, if the legislation applied by the institution responsible for payment permits it, to pursue an action in subrogation for the victim's claim against the liable third party; the victim's rights, into which the institution would thus be subrogated, are, in turn, determined by the applicable law in the place where the loss occurred.

Coordination Techniques

When national legislation subordinates a claim to benefits or other advantages to the completion of periods of insurance (contributions), employment or economic activity, or of residence, the competent social security institution, where necessary, must assimilate the periods completed in another member State and in accordance with its legislation. Each system may thus define the periods completed under its jurisdiction.

The proportion of old-age, survivor or disability pensions that each country is obliged to pay is prorated based on these periods. Sickness benefits or unemployment benefits, however, fall under one body of legislation, with no distribution of the amounts to be paid in proportion to the periods spent in different countries. In these cases, the amounts payable are not calculated on the basis of the duration of the specified period; such period is only taken into consideration as a precondition for the granting of a benefit, or full benefits.

Such a complex mechanism can only function effectively with support from European institutions and cooperation by national social security agencies. An administrative committee, established by the European Commission and composed of one representative from each Member State, manages and interprets the corresponding rules and implementing provisions. It works to develop cooperation among Member States and their social security institutions. These bodies are required to cooperate in good faith.⁶⁷ The certificates and legal documents issued by the competent bodies of a Member State are considered legitimate until proven otherwise.⁶⁸ There are several dimensions to the cooperation among these national institutions, such as mutual representation, collection of contributions and payment of benefits; the institution with jurisdiction in the place of residence provides benefits in kind for sickness and accidents, and obtains reimbursement; cash allowances are paid, in principle, by the institution responsible for payment, but special arrangements may be made to authorize the institution with jurisdiction in the place of residence to do so.

⁶⁷ See the rulings in the cases of *Rindone*, (12 March 1987), and *Paletta* (3 June 1992).

⁶⁸ Rulings in the cases of *Dafeki* (2 December 1997), and *Fitzwilliam*, (10 February 2000).

CONCLUSION: AN ISSUE THE COMPLEXITY OF WHICH GLOBALIZATION INCREASES

"International Labour Migration Law, or, The Misfortunes of Virtue." Let us now take a moment to explain this provocative title. Migrant labour law, particularly in its international dimensions, suffers from the ambiguities of the policies in place. The objectives pursued by host countries may be contradictory: humanitarian concerns for the poorest persons and a non-committal approach to the fight against illegal immigration on the one hand, concern for protecting domestic labour markets, and concerns related to public policy and the safety of citizens on the other; a desire to both encourage integration and respect differences. Countries of origin also impose policies that are not without their contradictions, caught between a wish to protect their nationals abroad and to find solutions to economic shortages and endemic unemployment. That being said, it is important that we not err on the side of pessimism: the reality is quite nuanced.

International migrant labour law is still highly incompetent to deal with the opening of borders, and technical facilities offered to migration by the globalization process. Even the limited provisions applicable to these people, the wretched of the earth, are not always respected; far from it. Furthermore, the internationalization of trade, capital, and talent does not merely accelerate the transnational mobility of the workforce, it renders it more fluid. Immigration no longer necessarily corresponds to a perennial admission to a given labour market, but to flows across a mobile transnational network through time and space.⁶⁹ Labour policy must take into account these new parameters, as the integration of newcomers, *inter alia*, becomes ever more difficult. The influx of refugees fleeing wars and poverty presents another tragic development.

Even with regard to third country nationals, European law provides certain guarantees, especially in the coordination of social security systems, which may constitute a source of inspiration. However, within that system of law as well the need to permit the mobility of the workforce, in particular their temporary secondment, may pave the way for the evasion of labour laws and therefore contribute to increasing job insecurity.

The fact that some of these objectives remain unspoken while others are loudly advocated, despite the difficulties in achieving them, merely adds to the confusion. To make standards on migrant workers more efficient requires more virtue, and above all more honesty. The ILO has a role to play in working towards greater clarification. The development of any policy on migration demands that a more comprehensive view of the international movement of persons be taken. The recent crisis created by the waves of refugees in Europe could serve as an opportunity for such an overhaul. Its success will require us to take into consideration all the dimensions of the issue, even the most sensitive and uninviting.

69 A. Fleuras, *Immigration Canada. Evolving Realities and Emerging Challenges in a Postnational World*, Vancouver, UBC Press, 2015, preface and p. 2.

a. UNEMPLOYMENT AND IMMIGRATION POLICY

There are other ways to meet workforce requirements besides immigration: in particular, the promotion of employment among people reluctant to seek it, or extending the working life of the population. Switzerland plans to enact such measures in response to the population's misgivings towards the influx of foreigners seeking work, which is admittedly not insubstantial for that small country. Elsewhere economists have even suggested that a tax could be levied on employers who wish to hire immigrant labour.⁷⁰

Whatever the outcome of these controversies may be, common sense calls for a synchronization of policies on immigration, education and employment promotion. A broader perspective would account as well for the aging of the population and the difficulties brought about by that phenomenon in regard to the financing of social security, the school-leaving age, and the retirement age (if one has been established), and the uneven distribution of unemployment per sector of economic activity. In addition, it would also need to integrate the serious problem posed by the influx of refugees and illegal immigrants.

b. THE VOLUME OF ILLEGAL IMMIGRATION, WHATEVER THE CAUSE, IS ITSELF A DESTABILIZING FACTOR

Driven from their countries by poverty, immigrants frequently form pockets of poverty in their host countries, even more so if their status is irregular. The situation unfortunately gives rise to serious health problems, drug and crime among young people, and among most a debilitating frustration. This requires the efforts of social services to fight against social exclusion and wage a stubborn battle against undeclared work that makes enforcement against go-betweens who enrich themselves on the backs of the poor a priority. Employers and trade unions have an important role to play in fighting these practices.⁷¹

The fear of seeing foreign nationals compete with local nationals, and accepting low paid jobs with poor working conditions, is not the only destabilizing factor at play. Another concerns education and vocational training. The children of immigrants arrive with a different culture, often without a mastery of the local language. The conditions they face in obtaining an education, often living in cramped dwellings with poorly educated parents, form an obstacle to good academic progress. Teachers have to teach class groups lacking in consistency, caught between the children of immigrants and of local nationals; their difficulty finding a balance can lead gifted students to prefer private education, more demanding but not free of charge, a trend that will deprive newcomers of a chance to compete equally with them. This observation confirms the value of transitional and catch-up courses, especially since education remains an important vector for integration into the host society and the labour market.⁷²

70 C. Ozden, «Marché du travail et migration : la grande incompréhension», *Problèmes économiques*, n° 3112, 2015, pp. 25-31.

71 Eurofound, *Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour*, Publications Office of the European Union, Luxembourg 2016.

72 OCDE, UE, *Les indicateurs de l'intégration des immigrés 2015. Trouver ses marques*, Paris: OECD, 2015, Chapter 13.

Conviviality is another important aspect. It implies a respect for differences, both on the part of natives and immigrants, and requires sustained efforts to be undertaken against discrimination based on ethnic origin, religious beliefs and cultures. Among both of these groups, there is a pressing need to do away with dichotomous attitudes, and promote in-depth understanding of customs and fears. Without strong and effective measures, the arrival of people from distant lands in substantial numbers gives rise to increased tensions, a critical spike in xenophobia, and a political shift to the far right.

The State, in all its institutions, is the primary responsible body. But the trade unions have a role to play as well advocating for protections for newcomers' living conditions and employment. Their position is a delicate one, because they too are not free of the contradictions faced by States, since their mandate is to defend the interests of their members, and migrants are likely to compete in the search for employment and good working conditions. Hence their frequent involvement, whether formally or informally, in the development of sectoral regulations on immigration.⁷³ It is here appropriate to point out that it is incumbent upon workers' organizations in sending countries to provide protections as well.

Examples of cooperation between these bodies are rare. One historical case was the initiative taken by trade unions of the former Yugoslavia,⁷⁴ and today, aside from a case already mentioned, in efforts to provide protections for Portuguese workers in the UK or Bulgarian workers in Cyprus.⁷⁵ An agreement was signed in 2014 between British Trade Unions (TUC) and Portuguese (CGTP-IN), in view of providing protections for Portuguese immigrant workers, and, at the same time, preventing wage cuts in the UK. The document covers immigrants from other Portuguese-speaking countries such as Angola and Brazil working in the UK.

Not long before this, Trade Unions in Bulgaria (KNSB/CITUB) and Cyprus (SEC) entered an accord in view of protecting the rights of Bulgarians working in Cyprus. It includes a project allowing them to share best practices and increase knowledge of host country legislation among immigrants, train consultants, and open informational offices in the two countries. A jointly-conducted study exposed the issues encountered: Bulgarians often work in low-paid jobs; contract violations were found involving work time, compensation

73 E. Albin, *op.cit.*, pp. 158-159; S. Engblom, "Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services" in C. Castello, M. Freedland (dir.), *op.cit.* pp. 342-360.

74 ILO, *La situation syndicale et les relations professionnelles en Yougoslavie*, Geneva, ILO, 1985.

75 European Observatory of Working Life, *UK, Portugal: Unions renew cooperation agreement to protect migrant workers*, 25 March and 24 April 2015; EIRONLINE, *Cross-border project aims to protect rights of migrant workers*, 10 June 2014.

for overtime, vacation and public holiday pay; it was found that irregularities in the payment of wages occur more frequently among non-unionized workers (30.5% as against 10.3%), as do extended working hours (49.5% as against 29.6%); and violations of labour and social security law were especially found among small and very small enterprises, where illegal work is quite common.

*"LIVING EXAMPLES HAVE MUCH GREATER POWER;
A PRINCE LEARNS NOT HIS DUTY FROM BOOKS."*⁷⁶

⁷⁶ Pierre Corneille, *Le Cid*, Act 1, Scene 6.

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