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17. Social security protection of migrants from outside Europe

*Gijsbert Vonk**

I. INTRODUCTION

Migration has never been a European affair only but has always extended all over the world. This is reflected in the state of international social security law. Not only is there a global web of bilateral social security relations between all possible countries in the world, there are also international conventions dealing with the worldwide protection of social security rights. Actually, the first global convention which calls upon countries to enter into bilateral social security agreements and which includes general standards on the protection of migrants' rights dates back to 1925.¹

But despite this, the protection of migrants who move between the regions in the world is far from perfect. Western countries which are not very willing to facilitate transnational alignments of migrants increasingly restrict their social security schemes to their own territories in a phenomenon that I have referred to elsewhere as 'national retrenchment'.² This trend may make it more difficult to export benefits abroad and to take into account periods of insurance completed in other countries. Furthermore, key immigration countries in the EU often remain outside the network of bilateral treaties of the Member States. For example, there are no UK social security agreements with countries from the Indian subcontinent. And as for the global ILO co-ordination standards, the number of ratifications is stunningly low. The latest state-of-the-art convention, the Maintenance of Social Security Rights Convention of 1982 (No 157) only received four ratification: Kyrgyzstan, the Philippines, Spain and Sweden. Consequently, many migrants moving in and out the EU are still left without any protection.

* This chapter is an improved and updated version of an earlier publication entitled G Vonk, 'Social Security rights of Migrants: Links between the Hemispheres' in R Blanpain et al (ed), *Social Security and Migrant workers Selected Studies of Cross-Border Social Security Mechanisms*, Bulletin of Comparative Labour Relations (Wolters Kluwer 2014) 47-68. For the latest contemporary treatise of EU social security law for persons coming from outside Europe, see Danny Pieters and Paul Schoukens (eds), *The Social Security Co-ordination Between the EU and Non-EU Countries* (Intersentia 2009). I am indebted to Rob Cornelissen who made valuable comments to the first draft of this chapter.

¹ Equality of Treatment (Accident Compensation) Convention 1925 (no 19). For an overview of ILO instruments on the protection of social security rights of migrants, see International Labour Office, *Social Security for Migrant Workers* (ILO 1972).

² See Gijsbert Vonk and Sarah van Walsum, 'Access Denied: Towards a New Approach to Social Protection for Formally Excluded Migrants', in Gijsbert Vonk (ed), *Cross-Border Welfare State, Immigration, Social Security and Integration* (Intersentia 2012) 3-59, 25-27.

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The purpose of this chapter is to discuss how EU law can help to bridge the gap in migrant workers' social security protection by facilitating the protection of rights of persons moving in and out the EU. One of the things I will look into is a phenomenon that I refer to as *co-ordination creep*, i.e. the dynamics within existing bodies of EU co-ordination law to extend the scope of application beyond the national boundaries of the co-ordination zone, thus becoming relevant for migrants who move in and out of this zone. In Section II, I will explore these dynamics from the point of view of positive EU co-ordination law. The central question is how EU social security law impacts upon the legal position of people moving between the EU and other regions of the world. I will then move forward to Section III by discussing a number of strategic options for protecting migrant workers moving between the EU and other regions in the world, which go beyond the mere spill-over effects of existing EU co-ordination law. These options vary from adopting unilateral protective standards to signing up to the major global instruments on the protection of migrant workers. In between these options, some attention is paid to the possibility of linking up regional co-ordination standards, establishing an EU-Ibero-American pact.

II. EU CO-ORDINATION CREEP

For the purposes of this section I will use a limited, technical concept of EU social security law. It covers Article 48 TFEU and two regulations which are based upon this article, i.e. no. 883/2004 (formerly 1408/71) and no. 987/2009 (formerly 574/72), as well as social security obligations entered into by the EU with third states. Also I include other provisions which may be invoked in order to claim social security benefits in situations of in- or extra-Community mobility, most notably the prohibition of discrimination on grounds of nationality (cf. *inter alia* Article 18, Article 45 TFEU, Article 7(2) Regulation 492/2011 (formerly 1612/68) and Article 24 Directive 38/2004/EC) and the provisions on European citizenship (especially Article 20 and Article 21 TFEU). The non-discrimination rule and the notion of European citizenship have an extra value for EU social security law in addition to Regulation 883/2004. The Court of Justice frequently solves social security cases on the grounds of these principles in cases where migrants are assumed not to be adequately protected by Regulation 883/2004.

In this section attention is paid to three subjects:

- the extra-territorial scope of application of EU social security law (to what extent does EU social security law apply to persons and events situated outside the territory of the EU Member States?);
- the extra-national scope of application of EU social security law (to what extent does EU law apply to non-EU nationals?);
- the EU-status of bi- and multilateral social security agreements and EU agreements with third countries.

These are three major subjects of EU law which have given rise to an abundance of case law and doctrine. The objective is to give a very brief description of the state of

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the law, with reference to the TFEU, case law of the Court of Justice and legal writing. For each of the subjects the general starting points are followed by a more detailed discussion of specific questions which are directly relevant for people moving between the hemispheres. The questions that have thus been selected are the following:

With regard to the extra-territorial scope of application of EU social security law:

- To what extent is EU social security law applicable where a person works outside one of the EU Member States?
- Should a person be resident in one of the EU Member States in order to successfully invoke Regulation 883/2004?

With regard to the extra-national scope of application of EU social security law:

- Under what conditions can third-country nationals invoke the principle of non-discrimination on grounds of nationality and Regulation 883/2004?
- What is the relevance of the so-called ‘migration criterion’ for the application of the foregoing question?

With regard to the status of national and EU social security agreements with third states:

- How does EU law affect the application of bi- and multilateral agreements concluded by the Member States with third states?
- What is the legal effect of the social security paragraphs’ co-operation and association agreements concluded between the EU and third countries?

The answer to these questions is summarised in a paragraph by means of ‘preliminary conclusions’.

II.i The Extra-territorial Scope of Application of EU Social Security Law

II.i.a Legal framework

Article 52 of the EU Treaty defines the geographical application of the Treaty and, by doing so, also the application of secondary EU legislation. According to Article 299, European Union law is applicable in the territory of the Member States of the EU. Furthermore, Article 355 TFEU gives Member States an opportunity to regulate the status of their overseas territories in Annex II of the Treaty.

Together with their dates of accession, the Member States of the EU are Austria (1995), Belgium (founding member: 1958), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (founding member: 1958), Germany (founding member: 1958), Greece (1981), Hungary (2004), Ireland (1973), Italy (founding member: 1958), Latvia (2004), Lithuania (2004), Luxembourg (founding member: 1958), Malta (2004), the Netherlands (founding member: 1958), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995) and the United Kingdom (1973).

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For the purpose of this chapter it is assumed that EU social security law is also applicable to three remaining countries of the European Free Trade Association (EFTA), Iceland, Liechtenstein and Norway. The reason for doing so is that since the conclusion of the treaty on the European Economic Area in 1993,³ these countries have been linked to the main EU instrument, Regulation 883/2004.

For Switzerland a separate situation applies. After the Swiss people voted against the participation of Switzerland in the European Economic Area in the 1992 referendum, it was decided that social security relations should be established on a bilateral basis. Thus there is a separate agreement on the freedom of movement of persons, which also links up Switzerland to the EU co-ordination regulations.⁴

The continental shelf is part of EU territory, at least the EU has functional jurisdiction on this part of the North Sea. This means that the EU co-ordination regulations on social security apply to activities that are carried out on the continental shelf. Thus, on 7 January 2012 the Court of Justice held that a Dutch radiographer, Mr Salamink, working on a the Dutch part of the continental shelf, was subject to Dutch social security legislation on the basis of the conflict rules included in the then co-ordination Regulation 1408/71.⁵

Extra-territorial application of the non-discrimination rule The fact that the territorial application is confined to the territory of the Member States (and their overseas territories as defined in Article 355, Annex II TFEU),⁶ does not preclude European Union rules from having effects outside the territory of the Union. The Court of Justice has consistently held that provisions of Community law may apply to professional activities performed outside Community territory as long as the employment relationship retains a sufficiently close link with the Community.

The oldest court ruling (1974) concerned Mr Koch, a Dutch national and a professional cyclist behind motorcycles (so-called ‘pacemakers’), who participated in a championship in Spain, at that time not yet a member of the EU.⁷ He invoked the principle of non-discrimination of the EC Treaty on the grounds of nationality, because the rules of the Union Cycliste Internationale stipulated that the pacemaker must be of the same nationality as the cyclist. Mr Koch wanted Mr Walrave, not a Dutch national, to be his pacemaker. The European Court of Justice opened the door to the application of the Community law outside the territory of the Member States:

5. The rule on non-discrimination applies to all legal relationships which can be located within the territory of the community by reason either of the place where they are entered into or of the place where they take effect.

³ [1993] OJ L347/2.

⁴ [2002] OJ L114.

⁵ Case C-347/10 *Salamink*, nyr.

⁶ The status of overseas territories is complex. See Dimity Kochenov (ed), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories sui generis* (Wolters Kluwer 2011).

⁷ Case C-36/74 *Walrave/Koch* [1974] ECR 01405.

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The Court left it to the national court to establish if there were indeed sufficient grounds to link the economic relation to EU territory.

In subsequent case law dealing with Regulation 1612/68 the Court of Justice has frequently elaborated on the starting point of *Walrave/Koch*. An important step forwards was made in the *Lopez-da Veiga* case.⁸ Mr Lopez-da Veiga was a Portuguese seaman who had worked for years on ships flying the Dutch flag. During periods of leave he spent his time in the Netherlands. He was denied a Dutch residence permit because the Dutch authorities did not consider his stay on board Dutch ships as a stay in the Netherlands. However, the European Court of Justice decided that Mr Lopez-da Veiga had a sufficiently close connection with the territory of the Netherlands for the application of Community law (in this case Regulation 1612/68):

17. ... the applicant works on board a vessel registered in the Netherlands in the employ of a shipping company incorporated under the law of the Netherlands and established in that State; he was hired in the Netherlands and the employment relationship between him and his employer is subject to Netherlands law; he is insured under the social security system of the Netherlands and pays income tax in the Netherlands.

The most far-reaching Court ruling dates from 1995.⁹ Ms Boukhalfa was a Belgian national. Since 1 April 1982, she had been employed on the local staff of the German Embassy in Algiers. She was hired in Algiers. Prior to entering into her contract, Ms Boukhalfa was already established in Algeria, where she also had her permanent residence. German labour law differentiates between German and non-German diplomatic staff (e.g. different wage levels). Ms Boukhalfa wanted to be equally paid on the basis of the EU non-discrimination principles as laid down in Regulation 1612/68. Germany, on the other hand, argued that Community law was not applicable to the present case because its scope of application is limited, under the EC Treaty, to the territory of the Member States of the EU and Ms Boukhalfa's situation was not that of a national of a Member State employed in another Member State but she had always worked in a non-Member country. Nevertheless the Court ruled that the employment relationship of Ms Boukhalfa had a sufficiently close link with the EU for EU law to be applied to that relationship.

16. In the present case, it is clear from the documents before the Court that the plaintiff's situation is subject to rules of German law in several respects. First, her contract of employment was entered into in accordance with the law of the Member State which employs her and it is only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law. Secondly, that contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Bonn and, ultimately, Berlin. Thirdly, the plaintiff in the main proceedings is affiliated for pension purposes to the German State social security system and is subject, though to a limited extent, to German income tax.

17. In situations such as that of the plaintiff in the main proceedings, Community law and thus the prohibition of discrimination based on nationality contained in the abovementioned

⁸ Case C- 9/88 *Lopez-da Veiga* [1989] ECR 02989.

⁹ Case C-214/94 *Boukhalfa* [1996] ECR I-02253.

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Community provisions are applicable to all aspects of the employment relationship which are governed by the law of a Member State.

These rulings show that the Court has released the definition of the territorial scope of application of the non-discrimination rule from the narrow confines of its strict geographical meaning. Instead, there should be a sufficiently close connection between the employment relation and the legal order of the EU.

Extra-territorial application of Regulation 883/2004 Regulation 883/2004 does not contain a general provision about its territorial scope of application. Because of that the territorial application is subject to the same restrictions and extensions as the EU Treaty. Indeed, there are several indications that the Regulation was originally meant to be applied within the territory of the Member States only.

Thus, Article 7 Regulation 883/2004 ensures the payment of benefits abroad, but only if the beneficiary lives in the territory of another Member State. Furthermore, Articles 11 to 16 dealing with the determination of applicable legislation explicitly refer to persons living or working in the Member State of the European Union. But some other provisions do not contain such explicit references to territorial scope of application. Thus, for example, the non-discrimination rule on grounds of nationality included in Article 3 Regulation 883/2004 no longer refers to persons residing in a Member State of the EU, while the text of this article in the forerunning Regulation 1408/71 still did.

II.i.b Specific questions

In the previous section, it was pointed out that the territorial scope of application of Regulation 883/2004 is determined by Article 52 of the EU Treaty. It was also pointed out that Community law sometimes goes beyond the borders of the EU if there remains a sufficiently strong economic tie with the EU. In this section, I will discuss two specific questions regarding the extra-territorial effect of Community law which are connected with Regulation 883/2004.

Can Regulation 883/2004 be applied to employment relations outside the EU? Title II of the Regulation (Articles 11–16) contains a set of rules that determine the legislation applicable to a migrant worker. The rules apply in situations in which workers are in one way or another engaged in cross-border activities. The objective of these rules is to avoid cases where persons are not covered by the social security legislation of any Member State ('negative conflict'), or when they are simultaneously covered by the legislation of two or more Member States ('positive conflict'). To realise this objective, Article 11(1) stipulates that a person can be subject to the legislation of one Member State only (the competent Member State).

But what legislation should apply in a concrete situation? To answer this question, the provisions of Title II contain rules that designate the applicable legislation, the so-called 'rules of conflict'. The general starting point for these rules is the principle that a person is subject to the legislation of the Member State where he works, even if he resides in another Member State (*lex loci laboris*). This starting point is embodied in Article 11(3)(a) for employees:

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... a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

For other groups of persons, such as workers who are engaged in transport, seamen or persons who work simultaneously in two countries, specific rules of conflict on the applicable legislation have been adopted.

The explicit reference to the Member State in which a person is employed as competent Member State suggests a further obstacle for the application of Title II to employment relations outside the territory of the EU. However, the Court of Justice has extrapolated the above-mentioned case law to the application of Title II: if there is a sufficient relationship with the legal order of (one of the Member States of) the EU, the applicable legislation can be established by the rules of conflict of the Regulation.

The Court decided this in the *Aldewereld* case.¹⁰ Mr Aldewereld was a Dutch national who was resident in the Netherlands when he took a job with an undertaking established in Germany, which posted him immediately to Thailand, where he worked during 1986. During 1986 Mr Aldewereld was liable in Germany to pay social security contributions in respect of sickness, unemployment, old age and accidents according to German domestic social security legislation. Over the same year, Mr Aldewereld was –on the basis of residency – also insured under the Netherlands legislation in respect of old age and survivor’s pension. The question arose as to whether this ‘positive conflict’ was covered by Article 13(2)(a) Regulation 1408/71, in spite of the fact that Mr Aldewereld performed his activities in Thailand. The Court of Justice answered this question positively:

14. It follows from the case-law of the Court ... that the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community. In a case such as this, a link of that kind can be found in the fact that the Community worker was employed by an undertaking from another Member State and, for that reason, was insured under the social security scheme of that State.

This was not yet the end of the story, since there is no specific rule of conflict tailored to this situation. Here too, referring to the objective of Title II, the Court of Justice links the applicable legislation to the Member State in which the economic point of gravity can be located, *in casu* Germany where the employer is registered:

24. In a case such as that in the main proceedings, the legislation of the Member State of the worker’s residence cannot be applied, since there is no factor connecting that legislation with the employment relationship, unlike the legislation of the State where the employer is established, which must therefore be applied.

At this point the conclusion should be that the case law regarding the extra-territorial effect of Regulation 1612/68, which was discussed above, also applies to Title II of Regulation 883/2004. This has subsequently been reaffirmed by the Court of Justice in the *Bakker* case, which dealt with a Dutch national living in Spain and working on

¹⁰ Case C-60/93 *Aldewereld* [1994] ECR I-02991.

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board dredgers flying the Netherlands flag for an undertaking established in Rotterdam.¹¹ According to the Court of Justice, working under the Dutch flag constituted a sufficient link with the territory of the European Union, even though most of the activities were carried out in the territorial seas of China and of the United Arab Emirates.

Should a person be resident in one of the EU Member States in order to successfully invoke Regulation 883/2004? The previous paragraph was concerned with the question as to whether Title II of Regulation 883/2004 can have extra-territorial effect in cases where persons work outside the territory of the EU. The present question goes a step further, and deals with the situation of persons living outside the territory of the EU. Can Regulation 883/2004 be invoked by persons who are resident in a third state? This is a controversial question, which up until now has not yet been finally resolved in the case law of the Court of Justice.¹² The case adopts a pragmatic approach on the basis of which it depends on the specific provision in question whether one lives on EU territory.

Indicative for this pragmatic approach is the case of *Chuck v Sociale Verzekeringsbank* of 3 April 2008.¹³ Mr Chuck was a British national who had worked and was resident in the Netherlands from 1972 to 1975 and then for a brief period from 1976 to 1977. In the nine months between those two periods he worked in Denmark, where he paid social security contributions. Since 1978 he had been resident in the United States. On reaching the age of 65, he submitted a claim for an old-age pension to the SVB. The SVB granted Mr Chuck an old-age pension, but for the calculation of the amount of the pension the SVB did not take account of the periods of insurance completed in Denmark, on the ground that Mr Chuck no longer resided in a Member State and, according to the SVB, could not claim the benefit of Article 48 of Regulation No 1408/71. This article obliges the SVB to take into account small periods of insurance completed in other Member States.

In the case that followed, the SVB suggested that it was unthinkable that Regulation 1408/71 would be applicable to all residents outside the EU. It would result in a global export obligation. However, the Court of Justice declined to answer the question of whether the Regulation applies to non-EU residents in a general manner. The Court simply stated that Article 48 Regulation 1408/71 does not depend on the place of residence of the worker when he claims an old-age pension. Hence, it cannot be interpreted as meaning that the mere fact that a person has moved his place of residence to a non-Member State will call into question his right to have his old-age pension calculated in accordance with the rules set out in that article. However, according to the Court of Justice this does not automatically mean that on the basis of the Regulation social security benefits should be made exportable all over the world. In this respect the Court observed:

¹¹ Case C-106/11, *M.J. Bakker*, nyr.

¹² The residence clause in Article 2 Regulation 883/2004 only refers to refugees and stateless persons, as was the case in Article 2 of forerunner Regulation 1408/71. This interpretation is confirmed by recital 13 of Regulation 1231/2010.

¹³ Case C-331/06 *Chuck* [2008] ECR I-01957.

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The Court, following the example of the Advocate General, would point out that, while Article 10 of Regulation No 1408/71 introduces a binding right to have a pension paid in any Member State, neither that regulation nor any provision of Community law requires Member States to pay pensions in non-Member States. It follows that the detailed arrangements for paying such an old-age pension remain subject to the provisions of the national law of the Member State of the institution responsible for paying the pension.

The latter restriction formulated by the Court of Justice did not harm Mr Chuck as this pension was fully exportable under the Dutch–US social security agreement.

II.i.c Preliminary conclusions as to the extra-territorial scope of application

EU social security law is primarily confined to the territory of the EU Member States. Nonetheless there a limited number of exceptions to the strict territorial application. Extra-territorial application is possible when the employment relationship of a person is closely linked to the legal order of the Member States. Such a situation may occur when a person is temporarily employed in a third country by an employer who is established in the Union. This person will remain protected by the TFEU provision on the freedom of movement of workers and is equally covered by the single state rule underlying Title II of Regulation 883/2004. With regard to persons living outside the Union, the situation with regard to EC social security law is ambiguous. The only thing that can be said with certainty is that persons living outside the EU can invoke the protection of the principle of non-discrimination on grounds of nationality and rules on the aggregation of insurance periods in order to claim social security rights under the legislation of Member States under which they are or have been insured. However, the export rule as established in Article 7 Regulation 883/2004 does not apply to the territory outside the EU.

II.ii Extra-national Scope of Application of EU Social Security Law

II.ii.a Legal framework

The personal scope of application of EU social security law traditionally extends to workers in an employed and self-employed capacity, as well as to the members of their families. The present Regulation 883/2004 is simply applicable to all persons who are or have been subject to the social security legislation of the Member States.¹⁴ For the TFEU the notion of European citizenship applies, overarching various subdivisions between employed workers, the self-employed, students, pensioners, etc. Every person holding the nationality of one of the Member States is granted citizenship. And even though Article 21 TFEU merely stipulates that citizens of the Union shall enjoy the rights conferred by the EC Treaty, the Court of Justice has found in this article a major source of inspiration to extend the scope of freedom of movement rights to those who were previously without protection, most notably persons who are economically not

¹⁴ Article 2 Regulation 883/2004.

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active. This has also had a major impact on the possibility to claim all sorts of social benefits in an intra-Community context.¹⁵

For the purposes of this chapter, the main question to be considered is whether persons not holding the nationality of an EU Member State are protected by EU social security law: to what extent are third-country nationals protected by the relevant EU rules?

In order to answer this question properly, it must be pointed out that neither the TFEU regime governing the freedom of movement of persons nor the TFEU provisions on European citizenship apply to third-country nationals.¹⁶ The EU has no competence to extend any protection to third-country nationals, except on the basis of Title IV, Chapter 2 dealing with a common immigration policy for the Union (border checks, asylum and immigration), Articles 77–80 TFEU).¹⁷ On the basis of Title IV a growing body of directives have come into being which have an impact on access to social security (*lato sensu*) for third-country nationals residing in Member States of the EU. A characteristic of most of these directives is that they mostly protect well-defined, limited groups of persons such as researchers (Directive 2005/71/EC), asylum seekers (Directive 2003/9/EC to be replaced by Directive 2013/33 EU), victims of human trafficking (Directive 2011/36/EC), migrants who are engaged in return proceedings to their home countries (Directive 2008/15/EC), etc. Only two directives stand out as having a more general scope of application.

These are permanent long-term residents (Directive 2003/109/EC) and so-called blue card holders applying to highly qualified third-country workers (Directive 2009/50/EC). Both directives contain provisions which are relevant for social security (see below).

- (a) third-country nationals enjoying protection under directives based on the common immigration policy of the Union, most notably long-term residents and blue card holders;
- (b) members of the families of EU nationals who make use of their right to freedom of movement within the Union (traditionally covered by the co-ordination regulations and by the prohibition of discrimination on grounds of nationality);
- (c) persons who satisfy the conditions of Regulation 1231/2010, extending the scope of application of Regulation 883/2004 to third-country nationals.

In the next section I will consider under what conditions these categories of third-country nationals can invoke the relevant legislation. Furthermore I will specifically pay attention to the question of the extent to which the third-country national should satisfy

¹⁵ See C Barnard, 'EU Citizenship and the Principle of Solidarity', in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005); K Hailbronner, 'Union Citizenship and Access to Social Benefits' [2005] *CMLRev* 1245–1267.

¹⁶ See the definition of Article 20 TFEU. With regard to Article 45 TFEU (freedom of movement of workers) the restriction to nationals of the Member States has been formulated in secondary legislation, but not in the treaty provision itself. The Court excepted the restriction in Case C-48/75 *Royer* [1976] ECR 00497.

¹⁷ Denmark and Ireland have negotiated an opt-out for this measures taken on the basis of Title IV, Chapter 2 TFEU.

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the so-called ‘migration criterion’, i.e. the condition that a person must have moved between two or more Member States of the European Community.

II.ii.b Specific questions

Under what conditions can third-country nationals invoke EU social security law?

With regard to the possibility to invoke equality of treatment *for persons with permanent residence*, Directive 2003/109/EC primarily requires that the third-country national acquires ‘long-term residence status’. This depends inter alia on the duration of residence in the host state (five years), stable resources and adequate health insurance. Interestingly, the right to equality of treatment in the area of social security, social assistance and social protection is granted by the directive¹⁸ independently of the right to move to another Member State. In other words third-country nationals with permanent residence status can invoke equality of treatment in order to obtain social advantages in their host state, even if they have not migrated within the European Union. The ‘migration criterion’ (see below) is not applicable. On the other hand, there is an important restriction: long-term residence status terminates when a third-country national remains outside the Member State for more than 12 months. As a result, Directive 2003/109/EC is of no avail to third-country nationals who have returned to their home countries and who claim social security rights under the legislation of their former EU-states of residence. The Blue Card Directive 2009/50/EC introduces a regime for entry and residence of *highly qualified third-country workers*. Not only will these workers be given access to the labour market, but they are also entitled to equal labour and social security conditions (Article 14). However, the unemployed blue card holder only enjoys this protection for limited duration (Article 13), while equality of treatment in ‘procedures for obtaining housing’ may be restricted (Article 14(2)).

Members of the family of a European citizen¹⁹ have always enjoyed protection under the non-discrimination rule irrespective of their nationality. Directive 2004/38/EC now defines ‘family member’ as:

- a. the spouse;
- b. the partner with whom the Union citizen has contracted a registered partnership ... ;
- c. the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point b;
- d. the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point b.²⁰

These members of the family enjoy the same equality of treatment on grounds of nationality as the European citizens from which they derive their states.²¹ However, it is a condition that the member of the family resides in the territory of the Member State. Hence, third-country family members who have returned to their home countries are without protection. Furthermore, it is required that the European citizen who is related

¹⁸ By Article 11(1)(d) Directive 2003/109/EC.

¹⁹ Be it in an employed, self employed or any other capacity.

²⁰ Article 2(2) Directive 2004/38/EC; this article replaced Article 10 of Regulation 1612/68.

²¹ Article 24 Directive 2004/38/EC.

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to the member of the family can himself be qualified as a person who exercised the right to freedom of movement between two or more Member States. Unlike Regulation 2003/109, which is discussed above, the 'migration criterion' is fully applicable. Thus, for example, in the case of *Poirrez*²² the Court of Justice did not allow a disabled child from the Ivory Coast who was adopted by a French national access to the principle of non-discrimination as a 'member of the family', in order to claim a French allowance for handicapped persons. The reason was that the French father had always lived in France. Unlike Directive 2003/109, Directive 2004/38/EC is exclusively written for the freedom of movement of citizens within Europe.

Last, but not least *third-country nationals* are now fully covered by Regulation 883/2004.²³ This extension is essentially realised by one article of a separate Regulation (no. 1231/2010) based upon the present Chapter 2 Title IV of the TFEU, dealing with immigration policy:

Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 shall apply to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.²⁴

There are three aspects to be taken into account. Firstly, the territorial scope of application. Denmark is not in the arrangement, nor are the EEA countries: Norway, Iceland and Liechtenstein.²⁵ The result is that third-country nationals cannot claim any advantages from Regulation 883/2004 arising from their migration between a Member State and any of these four countries. Secondly, the requirement of *legal* residence. There is no common definition of this term in Community law. Eventually it is the qualification under national immigration law which determines whether a person is to be considered legal or not legal. It is to be expected that the Member States fall back on the requirement that the third-country national is in possession of a valid residence permit. Thirdly, there is the 'migration criterion', uniquely codified in Article 1 Regulation 1231/2004 in the requirement that the situation should not be 'confined in all respects within a single Member State'. The meaning of this requirement is the subject of the next question.

²² Case C-206/91 *Poirrez* [1992] ECR I-06685. Years later on 30 September 2003 *Poirrez*'s claim was finally recognised by the European Court of Human Rights under the European Convention on Human Rights.

²³ Before this extension third-country nationals could already invoke most provisions of the co-ordination Regulation as family members and survivors of mobile EU citizens. The scope of these rights was considerably extended when it became apparent in Case C-308/93 *Cabanis-Issarte* [1996] ECRI-02097 that the family members may invoke all provisions of Regulation 1408/71 except for the ones specifically designed for employed persons (such as the rules on unemployment benefits).

²⁴ Article 1 Regulation 1231/2010.

²⁵ Switzerland has now accepted the Regulation within its separate agreement with the EU.

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What is the relevance of the so-called 'migration criterion' in applying EU social security law to third-country nationals? The purpose of the Regulation is to protect persons from the loss of social security rights following upon the movement between two or more EU Member States. From this it follows that purely internal matters, with no *intra-Community connection* are outside the scope of protection of Regulation 883/2004 and the treaty regime governing the freedom of movement of persons. Thus, in 2008 the Court of Justice still refused to apply EU law in a controversy between the devolved French- and Dutch-speaking governments in Belgium about the right to Flemish care insurance for Walloon citizens in cases which are solely within the internal sphere of Belgium.²⁶

When there is only a link between one Member State and a third state, the situation is equally disregarded by the EU regime on the freedom of movement. This became apparent in the cases of *Khalil and others*.²⁷ These cases involved a number of Palestinian stateless persons or refugees whose claim for German child benefits had been rejected by the German authorities on grounds of their insufficient status under German immigration law. They claimed that the refusal of benefits was contrary to the non-discrimination rule of Article 3 Regulation 1408/71. The Court did not accept this claim because there was no intra-Community connection. The Court admitted the situation would be different if these persons had moved to France and subsequently back to Germany. Had this been the case, Regulation 1408/71 would have been applicable.

It should be pointed out that Regulation 883/2004 does not impose strict standards for a person to satisfy the migration criterion. It suffices that in some way or other, by moving his place of work or residence, a person should be in contact with the social security legislation of more than one Member State. In the case of family benefits the intra-Community connection can also arise when one of the parents does not live in the same country as the children.²⁸

II.ii.c Preliminary conclusions as to the extra-national scope of application

It can be concluded that third-country nationals are covered by EU social security law in the same way as EU citizens, subject to the criteria of:

- intra-Community movement ('migration criterion'), and
- legality of residence.

This means that third-country nationals are protected against a loss of social security rights following from their movement between the EU Member States.

Outside Regulation 883/2004, third-country nationals are only protected by the non-discrimination rule. They are entitled to this protection either as permanent status holders within the meaning of Directive 2003/309/EC, as blue card holders or as family members of EU citizens. For permanent status and blue card holders the migration

²⁶ Case C-212/06, *Walloon government v Flemish government* [2008] ECR I-01683.

²⁷ Cases C-95/99 to 98/99 *Khalil cs* [2001] ECR I-07413.

²⁸ Case 115/77 *Laumann* [1978] ECR 00805.

criterion does not apply. This status terminates once the person has left the EU Member State for longer than 12 months.

II.iii The Status of National and of EU Social Security Agreements with Third Countries

II.iii.a Legal framework

National social security agreements Regulation 883/2004 does not contain any rules on the status of national social security agreements, other than Article 8, stipulating that the regulation replaces agreements which apply between the Member States themselves. With regard to agreements with third states, the situation is rather governed by the TFEU. The general rule here is adopted in Article 351 TFEU, according to which EU law may not stand in the way of any rights and obligations which arise from agreements that the Member States have concluded with third states. However, this does not mean to say that while applying agreements with third states the Member States are no longer bound by EU law in relation to each other. This issue played a role in the *Gottardo* case,²⁹ which dealt with a French lady who made a claim under the Italian-Swiss social security convention, which is only applicable to nationals of the contracting parties.

Mrs Gottardo had worked successively in Italy, Switzerland and France. She was in receipt of Swiss and French old-age pensions, which were granted to her without any need for aggregation of periods of insurance. Mrs Gottardo wished to obtain an Italian old-age pension pursuant to Italian social security legislation. However, even if the Italian authorities took into account the periods of insurance completed in France, in accordance with Article 45 of Regulation 1408/71, aggregation of the Italian and French periods did not enable her to achieve the minimum period of contributions required under Italian legislation for entitlement to an Italian pension. Mrs Gottardo would only be entitled to an Italian old-age pension if account were also taken of the periods of insurance completed in Switzerland pursuant to the aggregation principle referred to in Article 9(1) of the Italian-Swiss convention.

The Court ruled that it was contrary to the principle of non-discrimination on grounds of nationality to deny Mrs Gottardo access to the convention.

It follows from the case-law that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC [now Article 351 TFEU, GV], to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect.

... when a Member State concludes a bilateral international convention on social security with a non-member country ... , the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

²⁹ Case C-55/00 *Gottardo* [2002] ECR I-00413.

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According to the Court this ruling was possible in view of the fact that in this case the unilateral extension of the convention by the Italians in no way impaired the interests of the Swiss Confederation. The conclusion is that social security conventions with third states must be applied in the same way for EU citizens, as long as this does not lead to any extra obligations for the social security institutions of the third state.

EU social security agreements with third states Entering into social security relations for the purposes of protecting migrant workers is not an exclusive national competence. It is a mixed competence. Indeed, the EU has a long tradition of adopting so-called social paragraphs in ‘association’, ‘stabilisation’, ‘co-operation’ and ‘partnership’ agreements with third states all over the world. It is here that we can truly speak of EU links between the hemispheres, at least potentially, because, as we will see, in practice the implications are limited.

The social security paragraphs of many EU agreements also contain provisions on the social security protection for migrant workers. These paragraphs normally provide a basis for the introduction of social security instruments that are based upon techniques comparable to those adopted in Regulation 883/2004. However, only in relation to Turkey has such an instrument been developed,³⁰ although even here efforts to apply this instrument by adopting further implementation measures have been aborted. The result is that for third-country citizens these paragraphs remain without any tangible legal (direct) effect, until the treaty partners have adopted further measures. Apart from the legal effect attributed by the Court of Justice to the social security paragraphs within the EU legal order itself (see below), these paragraphs remain sleeping beauties, waiting to be brought to life with a kiss by further measures of the contracting parties.

II.iii.b Specific questions

How does EU law affect national social security agreements An interesting consequence of the *Gottardo* ruling, which was discussed earlier, is that bi- and multilateral social security agreements that have been concluded with third states should now apply to all persons who are subject to Regulation 883/2004. Furthermore, as a result of the extension of Regulation 883/2004, also non-EU nationals may benefit from this situation. In my eyes this is the most far-reaching consequence of *co-ordination creep* so far. The *Gottardo* effect is not merely that it extends the personal scope of application of agreements, which is possibly restricted to nationals of the contracting states only, to all persons covered by Regulation 883/2004. It also has an effect on the application of so-called open agreements, which apply simply to all persons who are or have been subject to the legislation of the contracting parties, irrespective of nationality. The modern approach is that countries adopt such open agreements. Take, for example, the 2007 Ibero-American Multilateral Agreement on Social Security, which entered into force in 2011 between Spain and Portugal and a number of ratifying South American states (Argentina, Brazil, Bolivia, Chile, Ecuador, El Salvador, Paraguay, Uruguay and Venezuela). This is a modern multilateral instrument crafted very much along the lines of Regulation 883/2004. It has the same open, personal scope of application, so

³⁰ Decision 3/80 of the Association Council EEC-Turkey.

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seemingly applying the *Gottardo* principle is not a prerequisite for applying the Multilateral Agreement to – let us say – a French citizen who has worked in Spain and in South America. The effect of *Gottardo*, however, goes further: suppose the French citizen has completed periods of insurance in France, Spain and Argentina. The Spanish authorities are now under an obligation to totalise the insurance periods in all three countries for the purpose of calculating Spanish pension for our Frenchman living in the EU. In other words, through the intervention of the *Gottardo* principle a single EU-Iberian-American co-ordination area has been created. Of course there are still important *lacunae*. For example, the EU export rule does not apply between Europe and the South American agreement members. Also the *Gottardo* principle may not invoke new obligations for South American countries. These extra steps are waiting for an intercontinental co-ordination effort between the EU and the signatories of the multilateral agreements. This is something I will dwell upon further in Section III.

What is the legal effect of agreements concluded between the EU and third countries? The social security paragraphs of the EU agreements with third states are merely framework articles establishing a ground for developing further social security ties between the contracting parties. As in none of the cases such ties have actually been developed, a separate body of EU co-ordination law vis-à-vis third states has simply not yet come into being. The good news is nevertheless that the Court of Justice has held that the prohibition on grounds of nationality included in social security paragraphs of EU agreements has direct effect in the EU legal order. This means, for example, that a Moroccan national living in France can invoke the Euro-Mediterranean agreement with Morocco in order to claim equal treatment under French social security legislation.³¹ The claim does not depend upon the Moroccan national having any ties with another EU Member State: the requirement of intra-Community migration does not apply. Remarkably, ever since direct effect was proclaimed by the Court to the prohibition of discrimination on grounds of nationality, new EU agreements concluded with central and eastern European states no longer include such prohibition. Instead this new generation of EU agreements only refers to other co-ordination principles such as the export benefits and the totalisation of insurance periods. The latest news, however, is that the Court seems to be of the opinion that also the export clause can be invoked directly by citizens without further implementation measures having been introduced. This became apparent in a case involving a number of Turkish citizens who claimed they were entitled to export Dutch supplementary allowances to their invalidity benefits on the basis of the export clause of Article 6 of Decision 3/80 of the Association Council EEC-Turkey. That claim was accepted by the Court,³² which held that Article 6 had direct effect in the EU legal order.

³¹ Case C-18/90 *Kziber* [1991] ECR I-00199. For a similar conclusion in relation to decision 3/80 of the Association Council EEC-Turkey Case 262/96 *Sürül* [1999] ECR I-02685.

³² Case C-485/07 *Akdas c.s.* [2011] ECR I-04499.

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II.iii.c Preliminary conclusions as to the status of national and EU social security agreements

Through the operation of EU law, in particular the ruling in *Gottardo*, national agreements with third countries must be applied to all persons covered by Regulation 883/2004. The result is that EU Member States must take into account third-country periods of insurance, while establishing title to benefits for EU migrants. This may result in large co-ordination zones, in particular when EU Member States have entered into multilateral agreements with third states, such as the Iberian-American Multilateral Social Security Agreements. These co-ordination zones are, however, not fully reciprocal as the *Gottardo* ruling cannot impose obligations on third states.

As for EU social security alignments, there are many but so far these have not yet led to any EU third-country social security instruments. In the meantime the Court of Justice allows third-country nationals to directly invoke the non-discrimination clauses included in the social security paragraphs and, seemingly, the export clauses as well.

III. EXTENDING SOCIAL SECURITY PROTECTION TO PERSONS MOVING IN AND OUT OF THE EU

While it is true that EU co-ordination law stretches out beyond its own borders, thus becoming relevant for migrants who work or reside outside the EU, the fact remains that a real co-ordination regime between the EU and other regions in the world has not come into being. EU agreements with third countries do create a framework for such regimes but so far no concrete measures have been introduced. Obviously, this affects most of all migrants from countries with which no bilateral social agreements have been concluded, as is the case for a large majority of developing countries. In this last section I will discuss a number of strategic options to fill this gap.

III.i Unilateral Efforts

III.i.a From an EU perspective

A drawback pertaining to the system of EU bilateral social security relations is that a co-ordination effort with third states is not very likely when social security systems have not yet come into being in those states. This would lead *a fortiori* to a very asymmetrical sort of co-ordination. Perhaps this is the reason why establishing co-ordination ties with the poorest countries in the world is not envisaged. It would explain why the EU partnership agreement with the African, Caribbean and Pacific Group of States, signed in Cotonou on 23 June 2000 (and amended in 2005)³³ is silent about the whole issue of social security for migrant workers. In the meantime, for the poorest migrants who find their way to Europe and who return to their home countries, there is just no international social security protection at all. This is an undesirable situation. As early as 1997 the ILO listed expelling migrants without regard to the social security rights arising out of past employment or residence as one of the ten most

³³ http://ec.europa.eu/europeaid/where/acp/overview/documents/cotonou-consolidated-fin-ap-2012_en.pdf.

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exploitative practices in the world today.³⁴ The latter practice is typically one that is allowed to exist in the absence of international co-ordination standards. In my view the European Union should at least impose a number of minimum requirements which apply unilaterally to the treatment of third-country migrants, such as equality of treatment on grounds of nationality, the exportability of benefits and the totalisation of insurance periods for the right to benefit. Such unilateral standards are not as far fetched as they seem. Indeed, they have already been adopted for asylum seekers (Directive 2003/9/EC), for victims of human trafficking (Directive 2004/81) and, most importantly from the point of view of our subject, in the recent Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State. Not only does this directive stipulate equality of treatment for labour immigrants claiming social security rights in the Union, but it also requires benefits to be exported outside the Union under the same conditions as those which apply to nationals of the Member States (Article 12(4)). This is a modest start at least.

III.i.b From a third-country (sending state) perspective

A short comment should also be made about unilateral efforts by sending states. Social security systems sometimes extend their coverage to national citizens living and working abroad, for example by allowing for optional continued insurance. Such facilities gain importance when emigrants live and work in countries with which no social security ties have been established. In this way, for example, the Albanian social insurance system provides the opportunity for emigrants to remain affiliated to the system on a voluntary basis, creating protection for the hundreds of thousands of Albanians working abroad, often in undeclared work and/or without authorisation of the immigration authorities.³⁵

Sometimes extra-territorial responsibility manifests itself in more complex forms. An example of this is the Philippine government's initiative to support workers overseas. Increasing problems associated with working abroad have made migrant protection and representation an important priority for the Philippine government. One of the Philippine institutions providing migrant protection is OWWA, an institutionalised welfare fund that seeks to protect Filipino migrant workers abroad. OWWA is funded by a mandatory membership fee payable by the emigrants and by government grants. It offers support services for participation in pre-departure orientation seminars, public assistance programmes for people in need, on-site services at embassies and consulates, and an OWWA identification system.³⁶ Apparently inspired by the success of the Philippine fund, Sri Lanka has also come up with an initiative to help its workers

³⁴ Tripartite meeting of experts on future ILO activities in the field of migration, *Protecting the Most Vulnerable of Today's Migrants* (ILO 1997) 2.

³⁵ Potential, because so far the voluntary scheme has not been overly successful in attracting in participants. In 2009 the number had risen to 23,900 persons. See ISSA, 'Managing of Voluntary Insurance, The Case of the Social Insurance Institute in Albania', in *Good Practices in Social Security* (Geneva 2010).

³⁶ N Ruiz, *Managing Migration: Lessons from the Philippines*, Migration and Development Brief no 6, (World Bank 2008).

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abroad. The Sri Lanka Overseas Workers Welfare fund covers payments to migrants and their families in the event of death, disability or a need to cover travel expenses.³⁷

These examples show how countries of origin can take increased responsibility for their migrants' social security in the absence of receiving country commitments.³⁸ In my view this responsibility must be actively encouraged by the international community as part of a strategy for the alternative social security protection for vulnerable migrants.

III.ii. Bi- and Multilateral Co-ordination Efforts

III.ii.a Bilateral efforts

Another way to improve social security protection of migrants moving between the various regions of the world is to proceed with pressing for co-ordination measures within the framework of EU third-country agreements. Indeed, this seems to be the approach advocated by the European Commission in a policy document on the external dimension of social security co-ordination. The Commission has proposed closer social security co-ordination with four countries: Albania, Montenegro, San Marino and Turkey. Proposed social security measures are based on obligations contained in existing EU Association Agreements with these four countries (in the case of San Marino it is based on a Customs and Cooperation Agreement) where there is a commitment to implement a set of limited social security co-ordination rules with EU Member States.³⁹ However, speedy results cannot be expected from this. There is the division of competences between the EU and its Member States to be taken into account. Traditionally, entering into bilateral social security obligations is considered to be a national competence and the EU Member States are not so likely to pass on this competence to the supranational EU bodies, especially not to the much-feared and powerful Court of Justice. As long as the EU Member States stick to their national competences, the development of a body of bilateral EU co-ordination law is not very likely. Incidentally, also third states may have a preference to negotiate agreements with the individual Member States, rather than with the powerful EU block as a whole. This is reportedly the case for Morocco, which has never been a strong supporter of EU efforts to come to any co-ordination instrument under the Euro- Mediterranean agreement.⁴⁰ So perhaps the EU should rather concentrate on developing social security relations with third states in areas where the individual Member States are at a disadvantage, such as large countries like China and the USA.

³⁷ ILO, *Best Practices in Social Insurance for Migrant Workers: The Case of Sri Lanka*. ILO Asian Regional Programme on Governance of Labour Migration, Working Paper 12 (ILO 2008).

³⁸ See W. van Ginneken, *Making social security accessible to migrants*, Paper presented at the World Social Security Forum (ISSA 2008).

³⁹ [2012] COM(153 final).

⁴⁰ See Abdellah Boudahrain, 'The Insecure Social Protection of Migrant Workers from the Maghreb' [2000] *International Social Security Review* 47–74.

III.ii.b Multilateral efforts: Towards an EU-Ibero-American co-ordination pact

Another possibility for extending the co-ordination network is trying to link up EU co-ordination law with similar co-ordination instruments that exist elsewhere in the world.

A unique possibility that has come up is to create a link between EU co-ordination law and the 2007 Ibero-American Multilateral Agreement on Social Security. Creating such a link is a possibility for various reasons. In the first place the Multilateral Agreement is set up almost completely on the lines of the latest EU Regulation 883/2004. This makes it technically feasible to establish a liaison between the two instruments. In the second place, two EU Member States, Spain and Portugal, are already covered by both co-ordination regimes. Thirdly, due to the large number of participants in the Multilateral Agreement it is not very likely that alternative bilateral relations can be created with individual EU Member States and all the South American countries involved. Fourthly, an EU-Ibero-American co-ordination zone would be beneficial to all the parties, as the migration streams run not only from South to North, but, ever since the economic crisis, also from North to South, thus creating a true equilibrium of interests.

In the most minimal form an EU-Ibero-American co-ordination pact could codify the *Gottardo* principle (supra Section II.iii.a.), which already applies for Spain and Portugal vis-à-vis persons who fall under the scope of Regulation 883/2004. If this principle were to be made reciprocal this would mean that Spain and Portugal would also have to take into account periods of insurance completed in other EU Member States while calculating a pension under the Ibero-American Multilateral Agreement. In this option, it is Spain and Portugal that is the bridge that bears the brunt of the EU-American co-ordination effort, which is perhaps a little unfair. A second option would therefore probably be better, namely to assume a general obligation for all the states involved to take into account periods of insurance completed in the entire co-ordination zone, while calculating pensions under either the Ibero-American Agreement or Regulation 883/2004.

For pensions the overarching rule can be quite straightforward: when Regulation 883/2004 applies, the Member States shall take into account American periods of insurance and vice versa, when the Ibero-American applies, the contracting states must take into account EU periods of insurance. This principle should probably be accompanied by a conflict rule should both co-ordination instruments apply simultaneously to one person. Such overlapping of instruments could easily occur where the Ibero-countries are involved, especially taking into account the Court of Justice's ruling in *Gottardo* and in *Chuck* (supra II.iii.a. and II.i.b.). This problem could be solved by giving preference to the most favourable instrument for the person concerned,⁴¹ along the same lines it could be stipulated that the Euro-Ibero-American co-ordination pact shall not affect any rights and obligations arising from existing or future bilateral agreements concluded between any of the states involved. Of course, the co-ordination

⁴¹ A fair tradition in most of the international co-ordination instruments. Cf inter alia Article 6(1) European Convention on Social Security 1972 and Article 17(1) of the Maintenance of Social Security Rights Convention 157 and in a somewhat attenuated way, Article 8(1) Regulation 883/2004.

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pact should then also include provisions on the administrative co-operation between the competent authorities, the exchange of forms, etc. Indeed, if a Euro-Ibero-American pact could be established, it would be the first multilateral intercontinental co-ordination instrument in history. In our view, studying the feasibility of such pact, based on different scenarios, is highly recommended.

III.iii Adhering to Global Standards

There are global standards on the social security protection of migrant workers. The most important and far-reaching instruments to be mentioned here are ILO Convention No 157 on the Maintenance of Social Security Rights and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The ratification record of both conventions is dismal: four countries for ILO Convention No 157 and 45 for the UN Migration Workers Convention, none of which are from the North and from large middle-income countries, except Mexico and Turkey. In view of this blatant lack of interest of the national states, perhaps it is time for international organisations to start to exercise some mild pressure. For example, the European Parliament and the Commission could place EU membership of these conventions on the agenda.

IV. SUMMARY

The way EU co-ordination law impacts on non-EU migrants depends very much on the specific circumstances of the case. It is a consequence of intricate legal constructions hidden in secondary legislation or principles which have been developed by the European Court of Justice. However, this does not mean to say that the impact of EU rules is minimal. Thus, for example, the main EU instrument on the co-ordination of social security rights, Regulation 883/2004, is fully applicable to third-country nationals. EU co-ordination law may also have extra-territorial effect. For example, the principle of non-discrimination on grounds of nationality in EU law can be invoked by persons who are resident outside the EU. The principle may also affect the way Member States should apply bi- and multilateral social security agreements with third countries vis-à-vis persons who fall under the scope of Regulation 883/2004. Finally, we must bear in mind that the EU itself also has obligations with third countries, thus creating new social security obligations for its Member States which can be invoked by third-party nationals in the EU legal order. It is the combined effect of such rules that makes EU law relevant for persons moving between Europe and other regions of the world.

Still, there are a number of *lacunae* to be addressed. I observed that even though EU third-party agreements create a framework for this, a true body of intra-continental co-ordination law has not yet come into being due to a lack of any further co-ordination measures adopted by the contracting parties of such agreements. This means that large groups of migrant workers who move in and out Europe are still left without any protection.

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I suggested three strategic options to address this issue. The first option is to establish unilateral obligations. For the EU the social security guarantees adopted in the single permit Directive 2011/98/EU can be seen as a strong precedent for this approach. The second option is to enter into more bilateral and multilateral liaisons. An exciting prospect in this respect is a Euro-Ibero-American co-ordination pact, created by linking together the operation of Regulation 883/2004 and the Ibero-American Multilateral Social Security Agreement. I discussed a number of implications of such a pact for the totalisation of insurance periods. The feasibility of an EU-Ibero-American pact deserves further study. The third option raised (at least from a theoretical point of view) is that the EU would adhere to global protective standards, such as ILO Convention No 157 on the Maintenance of Social Security Rights and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

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