White Paper 23

the future of labour law

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Introduction
Internationalization or fragmentation of labour law?

More than any other branch of law, labour law is encapsulated inside national borders. First, national labour law is closely intertwined with national social history, social organization, and the strength of trade unions and other collective labour organizations. These particular conditions lead to great differences among national laws.

There is obviously a great difference between the industrialized countries such as those in Europe and North America, Australia, Japan etc., where the power of the players (*inter alia*, political parties, unions, management, and NGOs) have crafted workplace protections to various degrees reflected in national legislation, and less developed countries, where workers' protection is different and usually less organized.

But even among countries in the same group, labour laws are strikingly different. In the United States and Canada, for example, there is limited national legislative protection for all workers, but broader protection for the minority of workers whose organizational power has enabled the negotiation of private contractual benefits. However, while Canada drew its inspiration from the United States, particularly in building the law of collective relations, it has emancipated itself from it. In comparison, general labour protection is more common in the EU as a whole (in spite of important differences between EU countries).

In this context, the internationalization or even harmonization of labour law seems to be an unattainable goal. Despite some very important efforts to put forth international standards, mostly coming from the ILO, there is, in the present state of affairs, no common set of internationally enforceable rules. Obviously, there is little desire among the States to reach or even try to reach a comprehensive international labour law regime. Even in the most integrated regional organization, the EU, unification or harmonization of labour law is partial, fragmented, and more than often dependent on a more general economic integration goal.

But there is also a second reason why the internationalization of labour law is extremely difficult: its territorial nature. Generally, labour relations are governed by the laws and regulations (including collective agreements) of the state where the work is performed. In the past, the spatial scope of the application of labour laws was often determined on the basis of a unilateral, territorial approach: domestic labour laws were to govern

all work performed within domestic territory. Today, with the emergence of multilateral conflict rules also in the realm of labour, similar results are achieved on the basis of the fact that most instruments of Private International Law use the place of performance as the main connecting factor to determine the law applicable to labour relations. Thus, in general, the employment relationship is subject to the *lex loci laboris*. Nevertheless, the unilateral origin of the rule is still very vivid in labour law, and leads very often to the application of the local laws as *lois de police* (international mandatory rules) or to the intervention of the public policy exception. And as far as collective labour relations are concerned, there are very few multilateral choice of law rules. The usual coordination organized by private international law rules functions with difficulty in labour relations.

This territoriality principle unleashes regulatory competition among states, and exploitation of labour law differences. As national regulators enjoy virtually unrestricted discretion in setting the rules and standards for work performed within their national territory, they are in a position to create a regulatory environment that is particularly favorable to foreign employers and investors and thus attract jobs from foreign states. In recent times, the organization of business activities beyond borders though global supply chains, mostly in order to take advantage of lower labour costs in less developed countries, has led to extreme forms of workforce exploitation. The 24 April 2013 collapse of the Rana Plaza building in Dhaka (Bangladesh), which killed at least 1,132 people and injured more than 2,500, shed light on the urgent need to regulate global supply chains: the building had housed five garment factories producing clothes for US and European brands. Other similar disasters, among the worst industrial accidents on record, awoke the world not only to the poor labour conditions faced by workers in the ready-made garment sector in Bangladesh, but, more generally to severe social damages caused by globalization. As a result, international labor law was forced to react, in new ways.

However, the current situation remains one in which resistance to international unification, and the territoriality of labour law, leads to the fragmentation of labour law in the international arena (state of the art). This fragmentation must not hinder the efforts to achieve some uniformity in labour law, including through different and innovative techniques, which might go beyond the pure application of black letter law. The very evolution of labour itself leads to many difficulties (the challenges) and opens new questions (the questions).

1.

state of the art: fragmentation and de-fragmentation attempts

We divide our description of the current situation of international labour law into three parts: the first concerns the field of application of international labour law; the second focuses on instruments of regulation; and the third one on conflict of laws.

1. Fragmentation in the field of application of international labour law

Labour market has changed rapidly in the last decades. New forms of work have appeared and short-(very short)-term contract have generalized, a phenomenon further accentuated by platform work. Fragmentation (or fissuration[1]) of the labour market is widely observed, in "the global North".

This evolution of work relations also affects migrant workers, who are, in general, insufficiently considered and protected by labour law.

In addition, and that is nothing new, but rather a long-standing phenomenon, formal employment relationships covered by labour law are only a limited fragment of work relations. Informal work is an enduring problem, in particular, although not only, in "the global South".

Note 1 D. Veil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

Faced with these issues concerning the scope of labour law, international law is currently evolving, or, at least, solutions on possible evolutions are on the table.

On the formal/informal work divide

A classical opposition divides labour between formal and informal work, the former only being regulated, subject to legal norms and judicial scrutiny.

This distinction has been a useful one to criticize or, more accurately, point out the limits of, international harmonization of labour law. Labour standards elaborated by the ILO are only relevant for the formal sector. However, in most developing countries in Africa, Latin America and South East Asia, the informal sector is much bigger than the formal one, and it is increasing rather than decreasing[2]. This perhaps is the greatest challenge for the ILO. It would be futile to try to simply formalize the informal sector in these countries. The informal sector will remain without a link to traditional employment relationships, and the ILO is well aware of this dilemma.

But, moreover, those engaged with labour law and policy are now questioning the usefulness of the formal/informal distinction. Instead of a strict line separating formal and informal sectors, one can consider that there is, in a number of cases, a continuum: formal and informal work often coexist, at the same workplace, in the same sector. This notion allows for the possibility of a slow evolution from one to the other, rather than a strict border between formal and informal work. It led to the idea that protection of workers, through labour law and social security law, evolves along steps, by which protection is progressively increased. Thus, a particular worker can be subject to a certain set of rules (*e.g*: collective bargaining) but not to another (*e.g.:* minimum wages). This idea of multiple steps might be more accurate to describe the situation of many workers around the world.

Although exceptional, some countries have even gone further. In some jurisdictions, the classical dichotomy between employment and self-employment no longer exists, since new categories of persons rendering services have emerged: this is true, for example, for the 'worker' (as opposed to the 'employee') in the UK or the 'arbeitnehmerähnliche Person' in Germany.

Note 2 See: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf. 60% of the global labour market is in the informal economy. See the ILO definition of informal economy in Recommendation No. 204 : https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf.

Contemporary examples also show that the distinction is of little help to characterize some employment relations, as will be seen in the "Platform work" context. In many situations today, some 'regulated' work is still precarious and subordinated while not quite informal, and the use of legal tools like self-employment can allow for the absence of application of labour law, albeit in a regulated sector.

On inclusion of all types of work in the framework of international labour law

The idea of a more inclusive conception of labour law norms, to reach beyond employees and cover "all workers" has already anchored in national labour and employment law, and also in some domains of international law, especially ILO conventions.

As a matter of fact, ILO Conventions do not always and exclusively refer to subordinate workers. In general ILO standards refers to "workers" which mean all workers, including employees. Some conventions explicitly include self-employed workers in their scope, or expressly admit their inclusion by national laws. Others, by the nature of their subject matter, are necessarily covering self-employed. For instance, the recent Convention 190 (2019) on violence and harassment in the workplace expressly protects workers regardless of their contractual status (Article 2). Similarly, the fundamental convention 87 (1948) on trade union freedom is applicable to all workers "without distinction" (art. 2 b).

‘2019 Violence and Harassment Convention

1. This Convention protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer.

2. This Convention applies to all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas.

Article 2

The development of fundamental rights in the labour sector further confirms this idea of overcoming the “great dichotomy”. At first, the strategy adopted by the ILO with the Declaration on Fundamental Principles and Rights at Work (1998), aimed at identifying a set of core labour standards applicable on a global scale: it implies universalization of the basic Conventions relating not only to the extension of obligations compliance with these rules by all States, regardless of the ratification of the Conventions, but also in relation to any form of work, regardless of the type of contract and related legal definition. The universalistic vision of the ILO therefore leads to relativize the distinction between subordinate work and self-employment. This idea reached its full maturity with the Report on the future of work presented by a Global Commission on the occasion of the centenary of the ILO (2019). With this programmatic document, the solutions aimed at expanding the subjective field of social protection through a “Universal Labor Guarantee”, covering all contractual forms of employment.

These ideas were repeated in the ILO Centenary Declaration for the Future of Work (21 June 2019), which states that all workers, irrespective of their contractual status, should enjoy adequate protection in accordance with the Agenda for work. This implies: i) respect for their fundamental rights; ii) an adequate legal or contractual minimum wage; iii) the maximum limits of working hours; iv) occupational health and safety.

‘2019 ILO Centenary Declaration

The Conference calls upon all Members, taking into account national circumstances, to work individually and collectively, on the basis of tripartism and social dialogue, and with the support of the ILO, to further develop its human-centered approach to the future of work by (...) strengthening the institutions of work to ensure adequate protection of all workers, and reaffirming the continued relevance of the employment relationship as a means of providing certainty and legal protection to workers, while recognizing the extent of informality and the need to ensure effective action to achieve transition to formality. All workers should enjoy adequate protection in accordance with the Decent Work Agenda.

Art. III B

A selective extension of protections beyond subordination is also supported by the 2019 OECD Employment Outlook, which recognizes the imbalance of bargaining power between the parties and the existence of monopolistic labour markets as the main factors of vulnerability of self-employed. This leads to two proposals. In the area characterized by a "genuine ambiguity" in the characterization of employment relationships, a series of legal protections could be extended "beyond standard employees", to guarantee that the workers concerned are granted fair pay, limited working time, occupational safety and health, anti-discrimination, and employment protection. As for genuine self-employed, it is suggested that the improvement of their working conditions can be implemented through social dialogue and collective bargaining, training programs and social protection schemes, etc.

This trend is however not universal. Particularly, EU labour law applies only to formal labour contracts or work relations. The exclusion of informal and independent workers is indeed a major limit in the global efficiency of EU labour law harmonization. As far as independent workers are concerned, however, legal steps are being taken at EU level in order to include them into the scope of legal protection (see below, on platform workers).

The same issue is sometimes discussed in the context of bilateral or multilateral trade agreements, which may or may not exclude independent and informal workers from their scope of application.

As a whole, it seems that neither the formal / informal, nor the employees / independent workers divide are as relevant as they used to be. Moreover, these distinctions do not fit well with some very contemporary labour issues, including the quick development of platform work.

On platform work

Intensive research is currently going on, together with transformations of national labour and employment laws, on the ways through which platform workers can be protected.

At the international level, the ILO has contributed extensively to the analysis of the phenomenon, and suggested ways forward. At the European Union level, a directive on the protection of platform workers was proposed by the European Commission in December 2021.

This directive seeks to improve the working conditions and social rights of people working through platforms, and, more specifically, wishes "to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights"[3].

One important issue is collective bargaining of platform workers, when they are not employees but self-employed. Collective bargaining is indeed needed to counterbalance the weakness of the bargaining power of platform workers. But it faces a series of obstacles. In particular, when anti-trust legislation exists, as is the case in the EU, agreements between self-employed workers and the organisations that employ them is prohibited. Against this legal limit, the European Commission has proposed guidelines excluding the application of anti-trust law, in the EU, for "solo self-employed workers", and insisting that the right to strike should cover all workers "without distinction". Australia has already introduced an exemption for eligible small businesses and self-employed class workers wishing to bargain collectively. This legal immunity, although innovative, offers mixed results[4]

In any case, the fast development of platform work shows, once again, that international labour law needs to move beyond the formal / informal, employment / self-employment divide, in order to capture the reality of contemporary work relations.

2. Instruments of regulation: Fragmentation in international regulation

The ILO was born in an inter-state and very European context, even though its tripartite organization is indeed one of its major features. Today, this context has radically changed: not only is the public/private law divide blurring, but also private actors, including NGOs and corporations, are progressively taking new

Note 3 European Commission, "Proposal for a Directive on improving working conditions in platform work", COM (2021) 762 final of 9 December 2021.

Note 4 Shae McCrystal, Tess Hardy, 'Filling the Void? A Critical Analysis of Competition Regulation of Collective Bargaining Amongst Non-employees', (2021), 37, International Journal of Comparative Labour Law and Industrial Relations, Issue 4, pp. 355-384.

and very important roles. Moreover, fundamental rights of workers have become a central reference in international labour law, as are, maybe more surprisingly, international trade agreements.

The private/public law divide: institutions and actors

For a few decades now, new players taking part in the regulation of global value chains have emerged. These are primarily transnational enterprises and international trade union organisations (especially international or regional trade union federations) which have taken spontaneous initiatives of self-regulation from which the Transnational Company Agreements (TCAs) are derived.

A TCA is "an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives."[5]

More recent is the joint involvement of national (including foreign) NGOs and national (including foreign) Trade Unions in the monitoring of the implementation of national and international laws on corporate social responsibility, duty of care or protection of the workers fundamental rights.

Therefore, a very new relationship is being forged between NGOs and Trade Unions, on the one hand, and between NGOs and Trade Unions in the North and the South, on the other. These alliances based on complementarities of expertise and modes of action augurs for a reconfiguration of social actors at the global level. What is still often seen as an anomaly — the lack of representation of actors from the south — is currently evolving, as can be shown, for example, by the ongoing legal proceedings on the *devoir de vigilance* in France.

These NGOs and Unions have taken and are taking an active part in denouncing human rights violations at work, both at regulatory and at firm level. They actively contribute to the preparation of new standards at national and international level, as is shown by the ongoing discussion of the Draft UN

Note 5 European Commission, "The role of transnational company agreements in the context of increasing international integration", SEC (2008) 2155. A comprehensive Data base of the agreements can be found at: https://ec.europa.eu/social/main.jsp?catId=978&langId=en

binding treaty on Corporate social responsibility. At the firm level, they participate to the elaboration of self-regulatory instruments, in particular TCAs. In turn, these TCAs, especially in the textile sector, give rise to new interactions between national unions from the North and the South, which are formalized in the framework of new TCAs in terms of representation of Southern actors in global bodies. The Inditex / IndustriAll agreement, for example created a Global Union Committee in 2019 made of representatives from all the production sites of the Company[6].

Today, the landscape of actors of international labour law is fragmented between International organisations, States and a multiplicity of private actors (firms, NGOs, Trade Unions), which do not all have the same legitimacy in terms of institutional representation, particularly at ILO level.

This evolution has, of course, a great impact on international labour law norms.

The private / public law divide: norms

Traditionally, labour law leaves room for private norms, particularly via collective agreements. This specificity is reflected by the fact that Trade Unions and employers have a particular role to play in the ILO. Nevertheless, classic international labour norms still are embedded in traditional public acts: national laws or international conventions.

The contemporary multiplication of private actors in the field of international labour law and labour relations completely changed this situation and led to an important set of new norms.

In some cases, the duty to protect workers' rights abroad is not imposed through public regulation, but is rather a voluntary choice made by the companies themselves. Some companies unilaterally adopt codes of conduct committing themselves to the observance of minimum labour rights, while others conclude bipartite agreements with global union federations or other transnational workers' representatives to the same end. This trend toward adoption of private norms can be articulated with public norms, particularly in the Corporate Social Responsibility (CSR) domain. Should UN or EU text be adopted in this domain, private and public rules will have to cohabit in order to develop

Note 6 https://www.industriall-union.org/industriall-and-inditex-create-a-global-union-committee

these obligations toward a better integration of CSR requirements in private companies.

In other situations, one can notice a transition from unilateral CSR instruments to framework agreements negotiated with the international trade union federations of the sector. A true worldwide negotiation between employers and employees can lead to formal agreements, or TCAs covering a company or group of companies in multiple states[7]. These agreements are now widely developed in international firms. They include legal commitments to respect fundamental workers' rights, although those commitments are mostly encapsulated in soft law norms.

Note 7 European Commission, "The role of transnational company agreements in the context of increasing international integration", SEC (2008) 2155. A comprehensive Data base of the agreements can be found at: https://ec.europa.eu/social/main.jsp?catId=978&langId=en

> "2019 Inditex Transnational Company Agreement
>
> The main purpose of the Agreement remains ensuring respect of Human Rights within the labour and social environment, by promoting respect for international labour standards throughout Inditex's supply chain. This Agreement recognizes the crucial role that freedom of association and collective bargaining play in developing mature industrial relations. Accordingly, it is appropriate to establish a framework to reaffirm the engagement with Trade Unions organisations, which represent the workers in the textile, footwear and garment supply chain.
>
> | *Preamble*

Sometimes, transnational regulation needs to leave room for collective bargaining between both State and non-State actors. The maritime sectors shows that international norms can be achieved by private negotiation[8], in addition to the very important maritime convention adopted under the auspices of the ILO (MLC, 2006). In this context, greater attention should be given to private actors and specific economic sectors.

Lastly, international collective bargaining can integrate public and private institutions. The Rana Plaza arrangement and the Rana Plaza accord[9], albeit very specific, show that new forms of collective agreements can be achieved by cooperation of both public and private actors, including NGOs.

All those codes of conducts, private or semi-private agreements are today of paramount importance in international labour law and are at the very heart of any CSR action. These are mostly soft law instruments, of a non-binding nature, and therefore, are very often challenged as being ineffective and the source of even more fragmentation of international labour law regulation. However, these texts have favored the spread of the culture of social dialogue and the promotion of ILO conventions on fundamental rights in multinational companies.

Note 8 https://www.itfseafarers.org/sites/default/files/node/resources/files/ITF%20IMEC%20International%20IBF%20CBA%202019-2022%20.pdf

Note 9 http://ranaplaza-arrangement.org and http://bangladeshaccord.org.

Fundamental rights

In labour law, fundamental rights play a very important, but somehow ambiguous, role. Their importance cannot, of course, be underestimated. They are consecrated in many international or regional law instruments (*inter alia*, the UN Covenant on Economic, Social and Cultural rights, ILO 1998 Declaration, European Social Charter, and the Charter of Fundamental Rights of the European Union). As such, they constitute a central database of rights used to protect workers.

However, we also cannot ignore the potential dangers of relying too much on the idea of fundamental rights to define labour norms. The traditional discussion over the effectiveness of fundamental rights can be transposed in the context of workers' rights. But some questions are more specific.

The very identification of those rights can be difficult. The ILO 1998 Declaration is centered on a limited number of rights:

freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. In 2022, the ILO added a fifth principle: the right to occupational safety and health.

In contrast, other texts identify many more rights as fundamental. In addition, the exact place of those fundamental rights in the hierarchy of norms is uncertain.

Moreover, in many countries, labour law offers much more protection than what can be derived from fundamental rights. Therefore, the framework of fundamental rights is sometimes seen as regressive path for labour law.

Against this backdrop, and in order to take into account fragmentation in work relations (e.g., the formal/informal and employee/self-employed divides), some would mobilize the idea of "concentric circles" of protection can: along this line, a gradation can be imagined, from the minimum protection guaranteed by fundamental rights of the ILO Declaration, which should be available to any form of work anywhere in the world, to the much more precise and developed protection given to statutory workers in a specific country, with many variations in between. However, while this theory is interesting, it does not reflect the reality of work relations regimes. More realistically, the overall picture of workers' rights, around the world, is highly disorganized and fragmented.

Trade and social norms

Transnational and international regulation of labour law can be done in conjunction with other international institutions, in particular financial and commercial institutions. A very rich, and eventually unfruitful, discussion took place about the so-called "social clause" in the WTO rules, by which trade advantages could be subject to the respect of fundamental social rights. This idea slowly spread, however, and is now widely accepted in bilateral and sometimes multilateral trade agreements. Many international trade agreements including social clauses have emerged and expanded. Those trade agreements usually use a mix of hard and soft regulation (including, sometimes, technical assistance and international cooperation) and open sometimes for specific legal actions, namely through *ad hoc* dispute resolution mechanisms.

One important example can be drawn from the NAFTA / USMCA agreements between Canada, Mexico and the United States.

NAFTA was adopted with a parallel agreement, the North American Agreement on Labor Cooperation. This agreement has favored a substantial increase in the level of knowledge of the reciprocal labour law systems by trade unions, governments, NGOs and public opinion, fertilized the development of collaborations between trade unions and NGOs, and finally produced significant reforms in the law of the contracting parties, particularly in Mexico. The recent USMCA treaty (2018), which replaced NAFTA, has made more significant steps forward, namely by including the possibility of directly denouncing companies that violate labour standards, to which commercial sanctions may be applied. Thus, complaints against specific companies are now possible, in addition to claims against States.

‘ 2020 USMCA Treaty: Statement of Shared Commitments

1. The Parties affirm their obligations as members of the ILO, including those stated in the ILO Declaration on Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization (2008).

2. The Parties recognize the important role of workers’ and employers’ organizations in protecting internationally recognized labor rights.

3. The Parties also recognize the goal of trading only in goods produced in compliance with this Chapter.

| *art. 23-2*

The new generation of bilateral Free Trade Agreements (FTAs) confirms the willingness of states to tackle the question of the link between social rights and international trade. A number of FTAs (US-Vietnam, EU-Korea, to name a few) integrate the rules on fair labour practices into the corpus of the treaties, using more binding and precise legal formulas than in the past. The clauses often expressly refer to the ILO 1998 Declaration, and fundamental conventions, elected as the domestic benchmark of national regulation, equating the violation of social rules with the violation of fair-trade practices, with the use of the same procedural and sanctioning devices.

The virtuous connection between social policies and regulation of international trade now finds numerous empirical evidences. Emblematic cases demonstrate the positive impact of the trade and social law linkage, in the promotion of labour standards in economic sectors covered by agreements, with a consequent increase in competitiveness based on the improvement of working conditions and on the increase in productivity, capable, in turn, of compensating for the higher social costs, with further benefits in macroeconomic terms and political stability.

3. Fragmentation of International Private Law

Extraterritorial application of national norms

Generally, labour relations are governed by the laws and regulations (including collective agreements) of the state where the work is performed. In the past, the spatial scope of application of labour laws was often determined on the basis of a unilateral, territorial approach: domestic labour laws were to govern all work performed within domestic territory. Today, with the emergence of multilateral conflict rules also in the realm of labour, similar results are achieved on the basis of the fact that most instruments of Private International Law use the place of performance as the main connecting factor to determine the law applicable to labour relations. Thus, in general, the employment relationship is subject to the *lex loci laboris*. This rule, which seems to be widely accepted, could be adopted through an international instrument, which has been advocated in Labour law by some scholars for many years.

This description applies *a fortiori* to collective labour relations, which are averse to the choice of law mechanism. Every State

organizes freely collective relations in his territory (collective bargaining, collective representation, collective action), and there is seldom any coordination with foreign laws. One exception could be the European Works Council directive (2009/38) which provided for an international body allowing for workers representation across borders. Transnational company agreements can also be a useful tool to organize some form of cross-border representation and surpass the strong territoriality of collective labour relations. But those two examples are clearly exceptions to the general principles: collective labour law does not mix with conflict of law rules.

The territoriality principle described above fosters regulatory competition among States, or even inside States, between federal provinces. As national regulators enjoy virtually unrestricted discretion in setting the rules and standards for work performed within their national territory, they are in a position to create a regulatory environment that is particularly favorable to foreign employers and investors and thus attract jobs from foreign states.

Recently, a trend towards extra-territorial application of certain employment standards has developed. Some States (mostly in the global North) have passed legislation incentivizing or even legally requiring domestic companies to protect workers' rights also when conducting business abroad. In particular, these companies are expected to ensure that their subsidiaries and suppliers operating in foreign host states comply with certain minimum employment standards. This trend is part of a more general reflection on the necessity of protecting fundamental rights in international groups and even chains of value, in other terms Corporate Social Responsibility. Some European countries (*e.g. Modern Slavery Act* 2015 in the UK ; *Loi sur le devoir de vigilance* of 2017 in France, *Lieferkettensorgfaltspflichtengesetz* of 2021 in Germany), the European Union (Directive 2014/95 on Non-Financial Reporting, Regulation 2017/821 on Conflict Minerals, 2022 Proposal on Corporate Sustainability Due Diligence), Australia (*Modern Slavery Act* 2018, *Model Work Health and Safety Act*, adopted in various Australian States) or the US (*US Tarif Act* of 1930, modified in 2016) have enacted laws concerning directly or indirectly the respect of fundamental workers' rights, independent of the applicable law to the specific labour relation between worker and employer.

In Europe, there is a trend toward forcing multinational companies to implement fundamental rights throughout the value chain, sanctioned by either penal sanctions or civil liability.

In Australia, supply chain regulation has been introduced to deal with outsourcing via an interconnected series of commer-

cial arrangements, in the Textile, Clothing and Footwear industry and also the Truck drivers and Cash-in-transit industries, in some Australian States. Under this regulation, an outworker can make a claim against any party in the contracting chain (aside from the retailer), including principal contractors and a person directly engaging the outworker, despite there being no direct employment relationship or common law employment contract between the outworker and the person giving out the work.

In the US, since 2016 any good or any input to a good can be denied entry at the US border if made with forced labor or prison labor.

This legislative trend towards extra-territorial application of employment rules may have the effect of restraining regulatory competition, as foreign host states no longer have complete control over employment standards within their domestic territory.

Dispute resolution

Access to justice is a fundamental right guaranteed by many international texts which obviously apply to workers as well as any plaintiff. Workers, therefore, should be granted access to justice, at reasonable cost, with access to legal representation.

In many States, workers have access to a specific set of courts.

However, workers in the international arena suffer more specifically from many procedural and practical obstacles that hinder access to justice for victims of human rights violations committed by corporations.

The first one is, of course, the avoidance of liability by companies, due to the way in which legal responsibility is divided among the members of a corporate group under national law. As has been seen, the tendency to extraterritorial application of national laws aims precisely to challenge that avoidance.

More generally, workers can be faced with the impossibility of accessing the courts of the State of origin, when the applicants face a denial of justice in the host State of the location of the supply chain, in particular when there is a lack of provision for recourse to collective actions.

Lastly, it is not uncommon to witness the exclusion of some groups, such as migrants, from an adequate level of legal protection of their rights.

In this context, particular rules of jurisdiction are useful. The European example of Brussels 1 regulation (Reg. 1215/2012) is frequently praised and could be a model for other international

texts. However, it is only applicable in traditional disputes involving a State judge and with a specific connecting factor leading to a European court (domicile of the defendant or place of performance of the work, mostly). Under such traditional rules, it is therefore very difficult to find jurisdiction in the State of the forum against foreign companies or foreign subsidiaries, even in situations of massive violations of workers' rights, and even when the goods produced by them are mostly crafted for the market of this or these States. The Rana Plaza case is a particularly sad example of this situation.

The fragmentation of dispute resolution mechanisms is therefore as pronounced as fragmentation in the field of choice of law, and access to justice can be hindered in many cases due to this strict territorial approach.

However, specific access to national justice can be imagined when fundamental rights are involved. The famous example of the American Alien Tort Statute of 1789 has had a great influence worldwide on thinking about this matter. However, the disappointing results of the application of this law have led advocates to consider other possibilities: universal civil jurisdiction and/or *forum necessitatis*. Those are or would be, indeed, a very important way forward, as would be a much more comprehensive rule on co-defendant jurisdiction.

As far as alternative dispute resolution (ADR) and arbitration are concerned, there seems to be a strong rejection of the use of traditional arbitration in the Labour context. In this regard, the example of the United States seems to be a hindrance for many. Traditional arbitration does not reflect the diversity of society, due to the very few actors involved, and it can be a strong obstacle to worker protection (*e.g*: the Uber dispute, by which the introduction of an arbitration clause in the contracts with the drivers endangered the class action initiated by many of these drivers).

However, a specific form of labour arbitration could be imagined. The Canadian example of the "arbitre de griefs" seems very specific, quasi-public and far from traditional arbitration. It provides nevertheless an example of a collective dispute resolution mechanism which could be extended to other examples. Moreover, the Permanent Court of Arbitration (PCA), based in The Hague, seems to be an underused resource for resolving labour disputes. Created in 1899 primarily to resolve boundary disputes between countries, it could be a partner with ILO to resolve labour disputes. PCA has dispute-resolution expertise and international stature. Recently, the Permanent Court of Arbitration has been administering two arbitrations arising

under the Rana Plaza accord[10]. In the "business and human rights context", the Uni Global Union and IndustriAll are today advocating for the incorporation into framework collective agreements of a labour arbitration clause based on the Hague rules[11].

Some international agreements also provide for original actions. The European Social Charter (1961 and 1996) opens for actions before a specific panel, the European Committee on Social Rights, which can be directly seized by Unions. The ECSR elaborates a case law that could prove of paramount importance in Europe in the field of fundamental social rights. The United States-Mexico-Canada Agreement (USMCA, 2018) also creates various legal actions, which can lead to trials against a specific firm for violation of the provisions on labour protection of the Treaty. This is reminiscent of the complaints procedure, which is part of the ILO's system for monitoring compliance with OIT norms, allowing the professional organisations of employers or workers to submit a complaint to the ILO Administrative Council against any Member State which has failed to satisfactorily implement an agreement to which it has acceded, or the complaints procedure before the ILO Committee on Freedom of Association which allows workers' or employers' organisations to act against a Member State, even if it has not ratified the relevant conventions. These committees of experts play an important role in the interpretation and implementation of international labour law

In the context of Corporate social responsibility, specific mediation procedures can be set forth. The most important example is the OECD guidelines for multinational enterprises, which organizes, through so-called "points of contact" a mediation procedure which is now rapidly growing[12].

Lastly, some of the legislative instruments recently passed at national level aimed at regulating the working conditions in transnational supply chains also require multinational enterprises to set up and maintain grievance mechanisms for workers (see e.g. the German *Lieferkettensorgfaltspflichtengesetz*).

Note 10 https://pca-cpa.org/en/cases/152/

Note 11 https://www.industriall-union.org/special-report-how-can-we-build-an-international-labour-court

Note 12 http://www.oecd.org/fr/investissement/mne/2011102-fr.pdf (dernière visite le 1er juin 2017).

These examples show that there is a trend toward the creation of specific dispute resolution mechanisms implying multinational enterprises. More ADR might be developed, particularly in the context where access to justice is difficult or inefficient. Mediation and conciliation, particularly when they are set by the actors themselves, are considered as possible methods to be developed as they seem to be an efficient means to solve disputes.

2.

challenges

The challenges that international labour law is currently facing are numerous, and, most often, linked with one another. They range from regulating globalization (1), and, in particular, global supply chains, to adapting labour law to objectives of "sustainable development" (3), through coping with digital transformation (2), including labour migrations (4) in the domain covered by labour law, and inventing a new regulatory model (5).

1. Regulating globalization

Protecting workers involved in global supply chains

Supply chains represent a fundamental problem for labour law. There was a long era where services were provided and goods were produced in a single jurisdiction. This has not been the case since the 1980s. A single firm with a subsidiary has transformed into a lead firm that outsources its core business, whose contractors may have multiple clients, leading to the increasing complexity of supply chains, as illustrated, namely, in the garment industry.

Regulating "global value chains" to achieve decent work throughout the chains has been a central objective of international labour law in recent times. Recent developments, especially at national and EU levels (see above) indicate that regulation is progressing. But many issues remain, namely, those related to the implementation of new types of liability (due diligence) and sanctions (e.g., financial market sanctions, consumer bans, and civil and/or criminal liability).

Concerning liability of brands throughout the chains of contracts, there is an urgent need to find ways to concretize general principles. The questions to be solved concern not only the conception of the duties of corporations (due diligence or a stricter conception of liability), but also the matters covered (health and safety, working conditions, and social security, to name a few). For the moment, regulation of global supply chains has emerged in different jurisdictions, without harmonization. Such harmonization could be necessary, in particular to facilitate implementation, and to ensure efficiency in meeting the new duties (reporting, namely) in attracting "green" capital finance.

Protecting workers in international transport

In specific sectors, such as transports (air, maritime, or road), globalization has a longer history and takes particular forms. This has led to specific institutions and norms, in particular the Maritime Labour Convention of 2006. However, labour exploitation has not been eradicated, especially in maritime transport, as illustrated in the Covid crisis, when seafarers and fishers were unable to join their vessels and return home for long periods. Many uncertainties remain on applicable rules, concerning namely social protection of workers. This is very well illustrated within the EU, where, in spite of regulation, working conditions and social security affiliation of pilots and other members of the crews of low-cost airline companies continue to be litigious, and enforcement of rules concerning road transport, on matters of working time and remunerations, in particular, remain problematic.

Limiting temporary posting of workers in the framework of trade in services

Another major challenge, particularly for the EU, but, more generally, related to trade in services, concerns posting of workers beyond borders. Although assigning workers to provide services in another country can be considered necessary for the development of international (European) provision of services, developments within the EU show that posting of workers has become a business as such, resting on differences in labour cost. If the existence of a new industry is not in itself problematic, it has led to extreme forms of workers' exploitation in certain sectors (agriculture, meat, and construction, in particular). The role of platforms as intermediaries, facilitating assignment of labour beyond borders, can foster this type of work assignment, and entail very poor working conditions. This raises

the question of further regulating, globally or in some sectors, or even possibly prohibiting international posting. Although prohibition of temporary work or independent work has been achieved in certain countries, to counter exploitation (in the meat sector, in Germany, for instance), a regional or universal shift in this direction seems much more complicated.

Enforcing social clauses in trade agreements

The virtuous connection between social policies and regulation of international trade that is described above does not solve all questions. Interpretation of the social clauses, and enforcement of social clauses, namely through trade sanctions, remains difficult. The report[13] of the panel set up to deal with the EU claim that Korea violated the social clause contained in the EU-Korea trade agreement is an interesting example of both the progress towards implementation of these clauses, and the difficulties in reaching a common understanding of the commitments of each party and ensuring that necessary adjustments are made in reasonable time.

Note 13 https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf

In addition, the regulatory interweaving between the economic and social dimensions mainly concerns specific bilateral negotiations (even at a macro level, as in the case of mega-treaties). Disseminating the social and environmental clauses also in multilateral international trade treaties, to ensure compliance with the fundamental conventions of the ILO and the environmental standards enshrined in international protocols, is an important challenge. In this perspective, a reform of the WTO would have to be implemented, incorporating non-trade instances in the governance of world trade. On the basis of the treaties and international standards in force in the member states of the WTO, social concerns could therefore be integrated into the decisions of the panels and the appellate body. But this scenario is highly controversial, and would not be easily put in place.

Relaunching social conditionality in international trade

Positive social conditionality can be a path toward globalization of social rights, both on the political level and for operational instrumentation. This would require relaunching with greater incisiveness the Generalized System of Preferences (GSP), for the EU, namely, as suggested by the European Parliament, with

particular reference to special incentive schemes. The proposed revision of the GSP can be seen as a way to combine economic and social growth. However, requiring "sustainable development", including respect of core labour standards, is rejected by standard bearers of the free market as an obstacle to the competitiveness of developing countries. Although very classical, this debate hinders transformation.

2. Coping with the digital transformation of work

Moving away from lex loci laboris

Transnational telework after the pandemic, the emergence of new forms of online outsourcing of tasks to distant destinations, notably through digital crowd sourcing platforms, bring to the forefront the debate on the rules for determining the law applicable to employment relationships. Digitalization of the labour market– and especially the 'de-territorialization' of labour resulting from digitalization – raises new challenges for private international law rules.

Some of the challenges can be addressed by supranational regulation (e.g. EU rules on social security coordination), but, in many instances, application of national law is necessary. For digital nomads or cross-border services performed by people at a distance through digital means, determining a connecting factor with national law is highly problematic. What is more advantageous for workers: the usual place of work, the place of destination of the service provided or the place where the value is generated?

The criterion of the *lex loci laboris*, which is predominant at international level and also in the European Union, is used by companies for their "law shopping" policies. The quasi-general application of this rule encourages massive relocation of employment linked to the digital provision of services to countries where the level of protection is lower. It may even encourage states to implement strategies aimed at obtaining abusive competitive advantages by reducing the protection they offer to their workers. For this reason, over the past decades, criticisms have been made that this rule needs to be reformulated or adapted to the reality and challenges posed by transnational telework and remote service provision.

Regulating platform work at the international level

The need for common rules to protect platform workers seems all the more necessary as platforms have given birth to a new form on internationalization of work relations: people working on the same internet platform in different places in the world, with possibly very different working conditions.

In the domain of platform work too, the ILO has embraced the universalist perspective of decent work: a perspective that is independent of the type of employment contract, and focuses on the need for social protection of all workers. It results from ILO and the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) that the fundamental principles and rights at work are applicable to platform workers in the same way as all other workers and regardless of their employment status.

In addition to the principles and fundamental rights (that can be traced back to the ILO conventions on trade union freedom, collective bargaining rights, non-discrimination, the elimination of forced labour and child labour), a number of rights should be recognized to platform workers (whether they are subordinates or self-employed), including the right to health and safety, social security, active labour policies, protection against dismissal, clear and understandable conditions of employment, professional mobility, rights of access to justice in the event of disputes. Some rights to be granted to platform workers are more specific: access to data and confidentiality, or the right to disconnect, for instance. In this perspective, it would be important for the ILO, and is indeed an ongoing debate, to define the content of a new Convention, or at least of a Recommendation concerning work through digital platforms (in this context, the proposed EU directive on platform work can serve as a reference).

However, rather than new rights for workers, it may seem more important, and efficient, to create new duties for operators. For instance, a duty for platform to promote anti-discriminatory discourse or anti-hate speech. This scenario would represent a shifting away from traditional international labour law approach.

3. Strengthening the social dimension of sustainable development and just transitions

According to the ILO[14], there are two defining challenges of the twenty-first century: achieving environmental sustainability and turning the vision of decent work for all into a reality. Not only are both challenges urgent, the ILO contends, but they are also intimately linked and will have to be addressed together. On the one hand, environmental degradation and climate change will increasingly require enterprises and labour markets to react and adjust. On the other hand, the goal of environmentally sustainable economies will not be attained without the active contribution of the world of work. Thus, the future of work is tightly connected with the notion of "sustainable development", which requires international law intervention or rather regulation of international activities.

Protecting social rights through environmental (climate) law

For now, environmental issues, and climate change, in particular, have taken over the social ones. Hooking the social to overarching transformations of law deriving from the need to protect the environment and combat climate change has become a central question. Recent evolutions, especially at EU level, indicate that social rights can benefit from being associated with Human rights and environmental objectives: hard law instruments (on sustainable reporting or due diligence) are on the verge of transforming CSR into legislation, creating new obligation for corporations, across borders. This is indeed beneficial for social rights and it could be an opportunity for trade unionism to reinvent itself (new members, new topics, new forms of action...). Linking social rights with environmental objectives thus appears as a way forward, for international labour law. However, such an approach must not lead to a dissolution of the specific features of social law.

Note 14 International Labour Conference, Sustainable development, decent work and green jobs, 102nd Session, 2013.

Taking into account the specificities of social rights and labour institutions

Climate agreements, just as the EU Commission proposals, fail to truly take into account specificities of social rights. They do not provide for the participation of organised labour, even though trade unions should have a say in issues regarding "just transitions". Unions were not asked for their opinion at COP summits on climate change. The UN Framework Agreement (Paris Accord), does not include a mechanism for union participation. The preamble refers to "just transition," which is a union concept, but it is not elaborated nor binding. Similarly, under domestic law, workers' representatives generally have no right either to negotiate and participate in climate change policies. There are no proper infrastructures in place. Even when nothing formally prevents a union from negotiating at the enterprise, sectoral, or national level (e.g., with the state oil company in Colombia), the company will not if it is not compelled to.

Instead, other private actors, NGOs for instance, can take over, which is a problem when they have no legitimacy, experience, or knowledge on social issues. For instance, in the current process of designing standards for sustainability reporting, in the EU, the role of EFRAG (European Financial Reporting Advisory Group) seems to be prominent, whereas other actors, including trade unions, have no guarantee concerning a formal and determining role.

Solving possible conflicts between new (environmental) rights and workers' rights

In addition to the institutional framework, questions arise concerning rights themselves. A new generation is emerging, which are more collective than individual, concerning data protection, or the use of big data, the right to clean air, to water, to a clean environment, for instance. This is a challenge for labour law, not so much because of the collective (rather than individual) dimension of these new rights, but because they do not concern workers, or the workplace, specifically. This could also be said, and it is an even greater challenge, about the rights of Nature or natural entities: human beings, workers in particular, are no longer the core concern of the law, nor the beneficiaries of rights. And the exploitation of the resources of the earth, on which labour law was based, does not fit in well in a new perspective, in which the rights of the earth may compete with the rights of labour. It is therefore necessary, and undoubtedly urgent, to reflect on a virtuous alliance between labour law and the rights of nature.

4. Embedding migration issues into labour law

The vulnerability of migrant workers, in the countries of destination, namely, has been widely emphasized and reported. Although international law (ILO conventions 97 and 143; UN convention on the Protection of the Rights of all Migrant Workers and Members of their Families of 1990, namely) has taken into account the specific situation of migrant workers, immigration law and international labour law remain largely separated, and intersections between international labour law and immigration law remain unexplored.

Closing the gap concerning social security of migrant workers

Among the issues resulting from this division, one concerns social security. Bilateral agreements on social security do not always address important issues concerning social security rights of migrant workers. From a social security perspective, the current normative responses by international law emphasize the obligations imposed on countries of destination, and the importance of bilateral and multilateral social security agreements as key instruments to improve the regulatory protection of migrant workers in social protection terms. The reality though is that countries of destination often use nationality, residence and other restrictions to avoid responsibility and even liability. Furthermore, as also acknowledged in a 2016 contribution of the European Economic and Social Committee, bilateralism has its material and formal limits, implying that alternatives need to be sought. In addition, the ILO normative framework provides limited guidance on the inclusion of social security provisions in bilateral labour agreements. It is only very recently, in an important, but non-binding (soft law) UN instrument, that a more comprehensive social security role for bilateral labour agreements is foreseen. The United Network on Migration Guidance on Bilateral Labour Migration Agreements (February 2022)[15] contains relatively detailed provisions that should, as a guide, be included in such agreements.

Finally, as a result of the often weak social security available to migrant workers in countries of destination, countries of origin have increasingly been extending different forms of welfare

Note 15 https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/resources_files/blma_guidance_final.pdf

support to their own migrant workers abroad. The welfare support tends to include the extension of social security provisions available in the country of origin also to the migrant workers of the country abroad. Despite this increasingly widespread approach adopted by countries of origin, there is no international normative framework available, which would provide a standardized framework for country-of-origin social protection measures: the ILO's view is that this remains the (primary) responsibility of countries of destination. An additional normative framework is needed to help guide countries of origin and to ensure a standardized model of available social security support in the event of non-adherence to international standards in this regard by countries of destination.

Addressing the issues resulting from incoherent and (possibly) conflicting norms

In this domain of labour migrations, as in others, one of the current problems consists in dispersion, and sometimes even competition, between standards developed by different instances (private or public). For instance, ILO Conventions on migrant workers ignore irregular migrants, which is a major problem. On the contrary, the UN Convention includes provisions on irregular migration. One important challenge is to reflect on institutional alliances, or mismatches.

5. Working towards a new type of regulatory model

Re-empowering public powers

Evolution of regulation toward transnational regulation implies that more attention should be given to the interaction of international, regional and national public rules with private rules. The trend toward private actors, corporations, in particular, gaining more power and evading social regulation (at all levels) represents a major challenge, that has been coined as a risk of "corporatization". To avoid it, public authorities need to find institutional and regulatory ways to counterbalance corporate power, in order to protect the common good.

A combination of hard law and soft law instruments is necessary. Public regulatory instruments are indeed necessary, since the existence of a "global" right depends on regulatory actions by nation states. The challenge is for nation states to regain

their share of sovereignty in economic and social matters, calling the political and trade union forces to confront global issues. Governments have to make themselves globally responsible for the awareness of the ultra-state dimension of the problems related to the future of work in the global era. Involvement of national governments in social matters at global level seems necessary, in order to re-establish the democratic legitimacy of the universal principles on which labour law is based.

Strengthening private checks and balances

Private power (of corporations) can be limited by mechanisms implying other private actors, Trade Unions and NGOs, in particular. Already, a shift away from private unilateral regulation, through soft law instruments (codes of social responsibility), to a model of more enforceable transnational collective agreements, has been observed. In the future, another model of relationships between corporations and labour could emerge, beyond the classical transnational company agreement, within one single company or group, more balanced, and possibly more efficient to regulate global supply chains. This could be, for instance, a model of quad-partite negotiations at international level involving (1) the brands combining into employer associations, (2) local manufacturers, (3) local union representing workers, (4) international union. These parties could work out the structure of negotiations and the working conditions themselves. One step forward, for international labour law, would consist in generalization (or at least a frequent use) of this model.

Inventing new regulatory tools

New instruments can be seen as the result of a process of "creative destruction": as the effectiveness and protection of national and international labour law diminish, new instruments emerge to try to compensate for this. These instruments can be seen as the "embryo of a new transnational labour law", in order, namely, to regulate global value chains.

They can be characterized by three main features:

(1) the multiplicity of levels of regulation and the hybridization of sources, giving rise to a "polycentric governance model";

(2) extraterritoriality or transnationality;

(3) transversality (protection offered by a single law), leading to a new legal framework.

Transversality refers to protection offered by a subject other than the employer, such as the parent company or principal, given its position of control in the global production process and its capacity to influence.

This is a new model of regulation of work in the global economy, composed of elements that allow it to give rise to a regulatory effect that cannot be achieved by each of its components separately. Challenges, to reach this new model, include:

- Global production chains becoming a space or sphere of regulation (the global production chain as a legal category);
- Human rights at work being considered as a protected good, the area of protection being at the intersection of international labor law, human rights and environmental law (way beyond the rights covered by the 1998 ILO Declaration);
- Due diligence being conceived as a meta-principle governing corporate actions in production chains.

In order for this emerging model of regulation to be consolidated, policy interventions are needed. In particular, it seems necessary to strengthen the individual and collective participation of workers so that their interests are taken into account in the design of the instruments and that they can reach all sectors of the production chains. In addition, on the substance, economic sustainability must become a necessary component of corporate human rights due diligence policies.

Facilitating dispute resolution for workers

Dispute resolution through courts is not easily accessible for workers, in international contexts. Other existing mechanisms must be strengthened, in line with the trend toward the creation of specific dispute resolution mechanisms implying multinational enterprises. More mediation and conciliation, particularly when they are set by the actors themselves, and not corporations alone, would need to develop to provide for more efficient means to solve labour disputes.

Another interesting idea consists in building litigation impact funds, in order for provide resources, namely, for strategic litigation.

3.

questions

This section, significantly shorter, will address two types of questions: (1) those raised in the section on challenges, and (2) those of a more general and cross-cuttings nature relating to global political trends.

1. Resolving some challenges?

Linkage between international Trade and Labour

Obviously, one of the major issues in international labour law for the future is the relationship between trade and labour. The questions raised seems to be twofold, which are two sides of the same coin:

Should there be restrictions on free trade and free movement, in order to ensure protection of workers; should there be limits to protection of workers to foster free trade and free movement?

The first set of questions, raises the issue of limiting trade in cases of the violation of fundamental rights, for example, imposing an import ban based on the fact that the goods were produced through forced labour. Would it be possible to go further, either by expanding the number of fundamental rights or by strengthening the means to ensure implementation of national labour laws? The same question applies to freedom of circulation of workers: should posting of workers (or other forms of assignment of labour) beyond borders be regulated (possibly prohibited in certain sectors)? How could such an evolution be reconciled with free trade in services?

The second set of questions, raises the symmetrical issue of limitation of workers' rights due to the necessities of free trade and/or free movement. European Union is a striking example of this everlasting debate between market efficiency and social protection. Obviously, the priority given to freedom of movement can lead to a significant decline in workers' rights.

More generally, the global relations between trade and labour probably needs rethinking under the light of the new requirements of sustainability and social responsibility. How can chapters on sustainability in trade agreements be effectively implemented? What should be the role of unions, NGOs, dispute resolution mechanisms, sanctions etc.? How could social clauses in bilateral trade agreements disseminate to international trade law?

Respective roles of stakeholders of international labour law

The *ILO* is of course the major actor in International Labour Law. It has however been very widely criticized, for many international conventions are either not ratified or not respected. How can the ILO be strengthened? Should the role of international labour law (especially ILO conventions) evolve to be more in touch with the reality of the contemporary world of work? What can be done concerning the risk of progressive obsolescence, weak ratification, poor ability to be directly applied, limited scope (focus on salaried relationships) of ILO convention? How can the ILO address *de facto* marginalization of non-salaried employment? Can ILO norms contribute to solve some of the most pressing contemporary issues, such as, for instance, the status and working conditions of platform workers and, more generally, the status of informal workers?

Is the way forward to be found in the possibility to promote interaction of ILO conventions with other sources and regulatory instruments being developed in the field of human rights protection and on the promotion of commercial activities more in line with the respect of these rights at the global level (Cf. the draft international treaty on human rights and international trade, or the laws or draft norms on the due diligence, the IFAs,

etc.). Can co-regulation and inter-normativity make international standards more effective?

Could the ILO be strengthened through "social conditionality" of aid (to companies and states), a system which would condition aid on respect for human rights and labor standards?

Those questions, among others, are today at the very center of any comprehensive reflection on the future of international labour law.

States and other public entities are being challenged by the growing importance of private actors. What kind of powers can States use, to promote social rights at the international level? How can States contribute to "de-corporatization" of law?

How could public procurements, in particular, be more efficient in reaching this objective? How could promotion of legislation on public procurements, in accordance with the provisions of the Government Procurement Agreement and the UNCITRAL Model Law on Procurement, as well as the Labour Clauses (Public Contracts) ILO Convention 94 (which provides for the adoption of social clauses in public procurement contracts in order to avoid that social standards represent an element of competition to the bottom) be achieved? Likewise, how could the same mechanisms be promoted by the international organizations operating in the area of public contracts, such as the World Bank, the international financial institutions, the International Finance Corporation, the regional development banks, the European Union and other regional organizations (COMESA, WAEMU, APEC, Mercosur), NGOs...? In other words, would (instead of should) the inclusion of the respect of the social standards of the ILO in the assessment of the country risks be useful, in order to avoid that public money - such as the financing of business internationalization projects- is actually used to finance social dumping?

States and public actors, through their regulation capacities, still have a decisive function, in order to integrate international law, soft law norms and private norms in national legislation. In that respect, the relation between international soft law and national law should probably be further investigated.

As far as international organisations other than the ILO are concerned, the question is to determine whether they could participate in the elaboration of international labour law. In particular, can a reform of the WTO be envisaged that would lead to including non-trade instances in the governance of world trade, so that social concerns could be integrated into the decisions of the panels and the appellate body? More generally, what could be the role of international financial institu-

tions in promoting and implementing international labour standards, especially freedom of association and collective bargaining? Here too, could social conditionality of financial support to States include respect for labour rights, considering the multiple problems of such conditionality (not only, but namely, in terms of respect for democracy)?

How useful could be the introduction of "essential" conditionality clauses aimed at respecting social rights in international treaties on investment, development aid, economic cooperation, as well as promoting a greater role of conditionality clauses in the activity of the IMF, World Bank and regional development banks? What would be the conditionality criteria and subsequent problems of using them?

Private actors, have taken a seminal role in the development of international labour law. This, in turn, raises many questions in order to determine how the importance of those actors could serve global social justice.

Private actors are both a source of international social norms and actors in their implementation. As a source, the question is how can purely private norms be articulated with national legal systems (which are still the primary source of labour law)? Private international law norms should probably be redesigned, in order both to challenge the traditional *locus labori* connecting factor and to encompass private norms.

As far as implementation is concerned, how can an "Independent Monitoring of Private Transnational Regulation of Labour Standards" be achieved, without ignoring the risks of regression inherent in such a solution? Should private enforcement of labour law increase, including by developing private labour inspection?

In that context, should the role of national and international Trade Unions be renewed? National trade unions have many difficulties to tackle those international issues and a renewed analysis of their role would be of great importance, to ensure workers access to justice and efficient protection of their rights.

2. Some cross-cutting issues

Global trends and transformations, beyond labour issues, have an enormous impact on international labour law. To identify just a few, we will mention a legal one and a geopolitical one.

On the legal side: the end of international labour law autonomy?

International labour law, in its current limited scope, will probably not, in a foreseeable future, develop as much as other branches of international law. It is unfortunate and does certainly not correspond to the 1944 Philadelphia Declaration, which aimed at placing international social justice at the center of international cooperation.

However, the incredible development of international trade law and, more recently, the ever-greater importance taken by climate change issues and corporate social responsibility has, as has been previously mentioned, significant labour law impact. Workers' protection can (and certainly should) be taken into consideration in all branches of international law, whatever branch is concerned.

Therefore, an important question for the future is to determine whether international labour law will still be limited to explicit labour law international norms, typically the ILO conventions, or will encompass many obligations stemming from many other branches of law, some of them only loosely related to labour law in a stricter sense.

This question, obviously, opens a fundamental debate over the very nature of International labour law. Should it be a separate branch of law or should it be just part of a more comprehensive "social law" that would include but would not be limited to labour law? For example, is the concept of "due diligence" in the verge of becoming a central concept of international labour law is also a more general concept of international law, and international commercial law, in particular. Will labour law merge into a new branch of international law that could be tagged as "Sustainable Development Law"?

This debate is already suggested in French language, by the distinction between "Responsabilité *sociale* des entreprises" and "Responsabilité *sociétale* des entreprises". Sometimes, the second version is preferred, precisely to highlight the fact that "sociétale" has a broader meaning than "social", which is usually, at least in French legal literature, limited to labour and social security law.

It could be argued, therefore, that there is a need to redefine the very nature of international labour law, and integrate it in a more comprehensive branch of law. Of course, one can fear that the specificities of labour law might be lost in the process, and it is rather unclear if such an evolution would be a gain or a loss when it comes to global justice.

Geopolitical trends: toward "deglobalisation"?

The war in Ukraine and the many tensions between Russia and other countries led to a great disruption in international trade, particularly, but not only, in the energy sector. At the same time, greater tensions between China and the US led to grave commercial litigation and limitation to exports. This evolution must also be read in conjunction with growing nationalism and parochialism, particularly in the global north, which goes against international trade and international cooperation.

Simultaneously, this year saw the entry into force of the last and now biggest of the regional free trade zones of the world: the Asian Regional Comprehensive Economic Partnership (RCEP) on the 1st January 2022.

These tensions might be the start of a movement already named by some "deglobalisation", by which international trade would be much more restricted, and more limited to closely integrated geographical zones.

It is of course impossible to predict what the future will be like. However, these trends, should they accentuate in the future, might have an important impact on the development of international labour law. The impact on trade could lead to greater reluctance to introduce workers' protection in international trade, or even in any form of international law, be it public or private.

Such developments could result in an ever-greater divergence of the labour and social laws of the various States of the world.

This remain to be confirmed, but would probably imply some backlash in workers' protection in the international arena and more than ever, it seems necessary to remember the terms of the Declaration of Philadelphia:

"lasting peace can be established only if it is based on social justice".

annex 01

persons interviewed

- Christopher Albertyn (Albertyn Arbitration, Canada)
- Edoardo Ales (University of Parthenope, Italy)
- Catherine Barnard (University of Cambridge, UK)
- Adelle Blackett (McGill University, Canada)
- Cesar Carballo Mena (Universidad Católica Andrés Bello, Venezuela)
- Laura Carballo Piñeiro (University of Vigo, Spain)
- Patrick Chaumette (Université de Nantes, France)
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