

CONVERGENCES AND DIVERGENCES IN INTERNATIONAL LEGAL NORMS ON MIGRANT LABOR

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INTRODUCTION: IMPLICATIONS OF PLURAL LEGALITIES

Multiple international legal regimes¹—in human rights law, refugee law, labor law, trade law and criminal law—address, to some degree, the rights and privileges that should be accorded to aliens working within the territories of states parties. Even within these particular subject areas, let alone between them, however, “little has been done” in the way of synthesis.²

This “substance without architecture”³ in international migration law may result in part from institutional costs of harmonization, the obstacles of path-dependency, or the simple lack of political will. In addition, there may be valid reasons for the lack of a coherent regime, if the “sites and topics of

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1. Sally Merry has defined legal pluralism as a “a situation in which two or more legal systems coexist in the same social field.” Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 870 (1988). This essay considers the “plural legalities” at the international level, understood as the product of multiple overlapping treaties, each of which is actually or potentially (depending on ratification status) formally binding on the state. As such, the focus of this essay departs from that of other treatments of legal pluralism which look to the interplay between binding state law and competing non-binding norms from, for example, codes of corporate conduct or other corporate practices that may constitute “labor law without the state,” Harry W. Arthurs, *Labour Law Without the State*, 46 U. TORONTO L.J. 1(1996). For an example of such analysis, see Adelle Blackett, *Global Governance, Legal Pluralism & the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001). For a discussion of legal pluralism as a framework for the analysis of international law, see, e.g., William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2003); Paul Schiff Berman, *Global Legal Pluralism*, 80 SO. CAL. L. REV. 1155 (2007).

2. See DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* 36 (2008) (discussing international human rights law); see also RAINER BAUBÖCK, *MIGRATION AND CITIZENSHIP: LEGAL STATUS, RIGHTS AND POLITICAL PARTICIPATION* 37 (2006) (“Assessing how international human rights norms shape domestic immigrant policies. . . is more difficult and has been a relatively neglected area of research”).

3. T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance Without Architecture*, in *INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES* 467 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

governance [are] simply too diffuse to permit" one.⁴ However, the vulnerable social position of migrant workers also raises the danger that their interests are most likely to fall through the cracks of such a patchworked legal order.

Comprehending the effects of multiple legal regimes arising at domestic, regional, and international levels is of course a difficult business, and the challenge of doing so reacts differently with different jurisprudential sensibilities: whereas some see the gradual accretion of global constitutionalism⁵ or at least a welcome form of regulatory competition,⁶ others warn of the destructive effects of fragmentation.⁷

Mindful of such debates, this essay investigates the international regulatory terrain affecting migration. In seeking to contribute to that effort, this essay takes up some of the underlying preoccupations of legal pluralism, which help to shed light on some of the larger questions at stake beyond the particulars. There are, to begin with, the *doctrinal* questions related to positive law. Central to the doctrinal analysis is the question of whether, or more precisely, where, rules from multiple regimes converge or diverge.⁸ While some excellent scholarship has surveyed international

4. *Id.* at 479.

5. The vision of international constitutionalism arising out of the gradual accretion of norms and institutions on the basis of cumulative political deliberation emerges from JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1990). For a discussion of Habermasian constitutionalism, see Thomas Giegerich, *The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?*, 10 GERMAN L.J. 31 (2009). For other discussions of European constitutionalism, see ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004); JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999). For the constitutionalist line within international economic law, see ERNST-ULRICH PETERSMANN, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW* (1991); for a discussion of the literature, see Jeffrey L. Dunoff, *Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas*, 1 J. INT'L L. & INT'L REL. 191, 192 (2005).

6. Joel P. Trachtman, *Regulatory Competition and Regulatory Jurisdiction*, 3 J. INT'L ECON. L. 331 (2000).

7. For an indication of the debate, see INT'L LAW COMM'N, UNITED NATIONS, *FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW* 12 (2006) (UN Doc. A/CN.4/L.682, 13 Apr. 2006), available at http://untreaty.un.org/ilc/documentation/english/a_cn4_1682.pdf ("Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a predominantly technical problem that has emerged naturally with the increase of international legal activity and may be controlled by the use of technical streamlining and coordination."). Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1004 (2004); Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law: Postmodern Anxieties?*, 15 LEIDEN J. INT'L L. 553 (2002).

8. The work in a related field, citizenship, has made more progress in achieving comprehensive analysis of convergence and divergence in law and policy. For a general discussion of research on citizenship law and policy and the question of convergence, see *MIGRATION AND CITIZENSHIP: LEGAL STATUS, RIGHTS AND POLITICAL PARTICIPATION* 44 (Rainer Bauböck ed., 2006). For examples of a framework informed by pluralism, see *CITIZENSHIP TODAY: GLOBAL PERSPECTIVE AND PRACTICE* (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

migration law,⁹ few treatments have attempted to sharpen the analysis through inquiry into convergence and divergence around specific norms and principles. Section I of this essay seeks to chart out an initial such analysis, conducting a concise comparison of particular rules affecting migrant workers from different realms of international law. Section I concludes with both a graphic representation of doctrinal convergences and divergences, and a further discussion the doctrinal relationships among treaties as elucidated through consideration of hypothetical legal disputes.¹⁰

The article considers the convergence/divergence question not only on the level of positive law and doctrine but also at the level of *normative* analysis. Attention to laws as norms gives proper place to the axiom recognized across numerous domains—from constitutionalists¹¹ to critical theorists¹² to social scientists¹³—that the ideas that laws attempt to embody or enforce harbor their own power, as aspirations towards our higher selves¹⁴ or as evidence of our limitations and fears. International lawyers know this perhaps best of all, as the salience of international legal rules as norms can precede or exceed their effectiveness as rules of positive law.

Labor of course particularly lends itself to this convergence/divergence analysis. Though international labor law, and most centrally the International Labor Organization, have occupied an historically primary role in establishing legal standards on the treatment of workers, over the postwar era and in particular in the late twentieth century's era of globalization,¹⁵ multiple regimes in other domains of international law have established rules and practices that significantly affect labor. The proliferation of international rules affecting labor has also created political and philosophical tensions: though an international trade perspective might view labor in purely economic terms, such a view is sharply limited by competing conceptions in the international legal order that emphasize the humanity and dignity of workers and that object to the commodification of labor.¹⁶

9. See, e.g., MIGRATION AND INTERNATIONAL LEGAL NORMS (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); JOEL P. TRACHTMAN, THE INTERNATIONAL LAW OF ECONOMIC MIGRATION: TOWARD THE FOURTH FREEDOM (2009); DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 36 (2008).

10. See *infra* Section II.F.

11. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

12. See, e.g., MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., 2002).

13. See, e.g., DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).

14. For treatments of the tension between natural conceptions of morality and justice and positivist rationality, see ALASDAIR MACINTYRE, AFTER VIRTUE (1981); JOSEPH RAZ, THE AUTHORITY OF LAW (1979).

15. See, e.g., BOB HEPPLER, LABOR LAWS AND GLOBAL TRADE 33 (2005).

16. E.g., INT'L LAB. ORG., DECLARATION OF PHILADELPHIA (1944) ("labor is not a commodity").

This essay will argue that even where disparate treaties *converge doctrinally*, they may *diverge normatively* and that normative divergence may be significant in its own right. Section II considers the normative implications of divergent rule systems. In particular, Section II raises the question of whether the rise of international criminal law, combating forms of illegal migration such as migrant smuggling and trafficking in persons, may support a normative divergence in international migration law between the primacy of the rights of individuals, on the one hand, and the primacy of states, on the other. This normative tension in turn marks a rift still greater than those between trade and labor, or labor and human rights: it represents the polarities of liberal legalism as a jurisprudential framework ultimately transcending sovereignty, or one that protects and legitimates sovereignty.

This kind of normative analysis is, of course, highly stylized. Legal regimes do not stand for only one set of norms, but rather reflect contested and complicated histories. International labor law, for example, harbors tensions between the “economic and the social,” that is to say, an emphasis on particular industrial and workplace contexts versus broader aspirations toward justice.¹⁷ Moreover, even where particular principles predominate, this should not be taken to discount the importance of political economy, self-interested bargaining, and historical contingency in allowing those norms to prevail or in influencing the particular ways in which norms continue to develop and change over time.

Finally, a consideration of norms explicitly articulated by the treaties or laws in question does not begin to describe their full effect, and formal principles often create substantive effects sharply at odds with their own terms. The treaty regimes analyzed in this article should be studied not only in terms of their internal complexities but also in their external “real-world” impact. Such an analysis is beyond the scope of this essay. Nevertheless, by mapping the array of international legal regimes across human rights, trade, labor, and crime that affect migration, and in describing some of their prevalent doctrinal and normative characteristics, it is hoped that the article might contribute to emerging scholarship on this topic.

I. DOCTRINAL CONVERGENCES AND DIVERGENCES

The central principle in liberal legalism’s self-understanding is formal equality, and it is reflected in international law’s enshrinement of the doctrine of nondiscrimination. In international human rights law,

17. See, e.g., Adelle Blackett & Colleen Sheppard, *Collective Bargaining and Equality: Making Connections*, 142 INT’L LAB. REV. 419 (2003).

individuals are entitled to nondiscrimination by virtue of their irreducible equality as human beings; in international economic law, nondiscrimination arises from a commitment to the benefits of trade. In international labor law, individuals are entitled as workers to nondiscrimination in their enjoyment of protections that enable the pursuit of “material well-being . . . in conditions of freedom and dignity, of economic security and equal opportunity.”¹⁸ The precise contours of the right to nondiscrimination arise in these key areas: the right of territorial entry;¹⁹ the general right to nondiscrimination;²⁰ the right to work and conditions of work;²¹ freedoms of expression, association and assembly;²² and criminal due process.²³

There are both convergences and divergences around the central principle of nondiscrimination, and particular aspects of it relevant to migrant workers’ experiences, in the leading multilateral treaties.²⁴ The remainder of this section proceeds in two stages: subsections A–E provide a fairly close and relatively technical doctrinal exposition and analysis. This kind of detailed comparison across human rights, trade, labor, and crime regimes does not yet exist in the literature. Subsection F then synthesizes and summarizes around doctrinal convergences and divergences concluding with a detailed examination of potential doctrinal conflicts.

- *Human rights:* In the area of human rights, the two 1964 Covenants, the International Covenant on Civil and Political Rights (ICCPR, or the “Civil and Political Covenant”)²⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR, or “Economic Covenant”) set forth standards on the principle of nondiscrimination generally, and also on particular aspects of worker rights.

Beyond these two general covenants, several specialized human rights treaties also. The 1965 International Convention on Elimination of Racial Discrimination (CERD or the “Racial

18. ILO, *supra* note 18.

19. *See infra* Section I.A.

20. *See infra* Section I.B.

21. *See infra* Section I.C.

22. *See infra* Section I.D.

23. *See infra* Section I.E.

24. International law is greatly complicated by the existence of regional and bilateral treaties, which are only occasionally addressed in this essay. In addition, the multilateral treaties themselves are subject to highly varying levels of ratification and assortments of reservations. Finally, of course, international norms are implemented differently within particular national legal systems. Thus, this exercise can do no more than offer an initial and instructive example of this analytical framework, hopefully demonstrating its utility. A fuller examination of the applicable transnational norms within any particular system is beyond the scope of this essay.

25. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter *Civil and Political Covenant*].

Discrimination Convention")²⁶ has weighed in on particular types of discrimination that can affect migrants. The 1951 Convention Relating to the Status of Refugees (the "Refugee Convention")²⁷ set an important benchmark for the treatment of migrants fleeing political persecution. Most recently, the 1990 Convention on the Rights of Migrant Workers and Their Families (ICRMW or "Migrant Workers' Convention") addresses the plight of migrant workers specifically.²⁸

- *Labor*: Predating human rights treaties are the treaties of the International Labor Organization, which include the Convention on the Freedom of Association and Protection of the Right to Organize,²⁹ the Convention on the Right to Organize and Collective Bargaining,³⁰ the Convention on Discrimination,³¹ and the other "core" treaties recognized in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.³² The ILO has also adopted two specialized treaties on migrant workers, the 1949 Migration for Employment Convention,³³ and the 1975 Migrant Workers (Supplementary Provisions) Convention.³⁴
- *Trade*: The World Trade Organization (WTO), which is the 1995 successor to the General Agreement on Tariffs and Trade (GATT), includes the General Agreement on Trade in Services (GATS).³⁵ GATS addresses labor as it relates to the provision of services by foreign nationals. Since the provision of services need not entail the movement of an actual person

26. General Recommendation XIV, Definition of Discrimination (22 Mar. 1993) U.N. Doc. A/48/18 (Mar. 22, 1993) [hereinafter *Racial Discrimination Convention*].

27. Convention Relating to the Status of Refugees art. 24(1), 189 U.N.T.S. 137 (July 28, 1951) [hereinafter *Refugee Convention*].

28. International Covenant on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter *Migrant Workers' Convention*].

29. Freedom of Association and Protection of the Right to Organize Convention, July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950).

30. Right to Organize and Collective Bargaining Convention, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

31. Discrimination (Employment and Occupation) Convention, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960).

32. ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233 (1998).

33. Migration for Employment Convention (Revised), July 1, 1949, 120 U.N.T.S. 70 (entered into force Jan. 22, 1952) [hereinafter *ILO Migration for Employment Convention*].

34. Migrant Workers (Supplementary Provisions) Convention, June 24, 1965, 1120 U.N.T.S. 324 (entered into force Dec. 9, 1978) [hereinafter *ILO Supplementary Provisions Convention*].

35. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167, 1187 (1994) [hereinafter *GATS*].

across a national border, not all categories, or “Modes,” of GATS rules are relevant: within the GATS framework the most relevant is the framework addressing the Temporary Movement of Natural Persons (“Mode 4”).³⁶

- *Crime*: In 2000, a new complex of multilateral agreements was negotiated at Palermo under the auspices of the Vienna-based UN Office on Drugs and Crime Control: the Convention Against Transnational Organized Crime (the “Crime Convention”)³⁷ and two Protocols, the “Migrant Smuggling Protocol”³⁸ and the “Trafficking in Persons Protocol.”³⁹

Though the treaties listed above have varied structures and substantive orientations, they each potentially address the experience of the migrant worker, and can be examined on the basis of whether and how they permit differential treatment on the basis of citizenship status (i.e., non-citizen but documented) or documentary status (i.e., non-citizen and undocumented).

A. *Nondiscrimination in the Right of Territorial Entry*

Most labor rights relate to the experiences of workers who are actively employed in the state party in question, but there is the preliminary question of entering the territory. It is an enduring feature of modernity, and a generally—though not universally—accepted paradox,⁴⁰ that in a liberal-legal world that champions the principle of nondiscrimination as foundational, the state nevertheless may make distinctions among persons seeking to enter its territory.⁴¹ International law *generally* reflects this normative commitment to sovereignty, so that there is no “right to immigrate.”⁴² From a traditional perspective, the notion of a *right* to enter

36. GATS defines “Mode 4” as “the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” *GATS*, *supra* note 37, art I, ¶ 2(d).

37. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex I, 55 U.N. Doc. A/45/49/Annex I (Nov. 15, 2000) [hereinafter *Crime Convention*].

38. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/45/49/Annex III (Nov. 15, 2000) [hereinafter *Migrant-Smuggling Convention*].

39. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, Annex II, U.N. Doc. A/45/49/Annex II (Nov. 15, 2000) [hereinafter *Trafficking Protocol*].

40. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007).

41. See *infra* Section II for further discussion of the normative.

42. Seyla Benhabib & Judith Resnik, *Introduction: Citizenship and Migration Theory Engendered*, in *MIGRATIONS AND MOBILITIES I* (Seyla Benhabib & Judith Resnik eds., 2009) (citing the Universal Declaration of Human Rights an example of foundational principles of contemporary international law, and noting that it does not specify a right to immigrate); TRACHTMAN, *supra* note 10,

the territory of a sovereign state appears nonsensical, so deeply entrenched is the principle of territoriality as a feature of sovereignty. However, this basic recognition of sovereignty is not absolute. Exceptions in international law assert differing degrees of variance from the principle of sovereign territorial control.

The "strongest" exception to sovereign territorial control stems from international refugee law. Asylum seekers and refugees often enter the workforce and in some cases can contribute significantly to the migrant labor supply.⁴³ For this reason, the central treaty to the international framework of refugee law, the Refugee Convention, provides refugees with both political and economic rights relevant to work.⁴⁴ Because it addresses individuals who presumably find themselves in conditions of extreme duress, the Refugee Convention also effectively protects the right of territorial entry for asylum seekers, by requiring states to admit them at least on a temporary basis while refugee status determination takes place.⁴⁵

Beyond this most assertive exception, in several cases international law recognizes the state's fundamental authority to screen immigrants, but constrains those procedures according to the principle of nondiscrimination. For example, although the Racial Discrimination Convention explicitly exempts from sanction the "distinction between citizens and non-citizens,"⁴⁶ the UN body responsible for interpreting the Convention has specifically invalidated racial discrimination in immigration criteria.⁴⁷ The

at 172 ("Generally, of course, there is no obligation in customary international law or in human rights law to treat foreign persons as well as nationals in connection with *admission*") (emphasis in original).

43. For one case study of the overlap between asylum seeker and migrant worker populations, see Chantal Thomas, *Migrant Domestic Workers in Egypt*, 58 AM. J. COMP. L. 987 (2010).

44. See *infra* I.C.

45. *Refugee Convention*, *supra* note 29, at art 31 ("Contracting States shall not impose penalties ... on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in a territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." Interpretations by the Executive Committee of the UNHCR have further clarified that states have an obligation to admit asylum seekers at least on a temporary basis in order to adhere to the principle of *non-refoulement*. See U.N. HIGH COMMISSIONER FOR REFUGEES, EXCOM CONCLUSION NO. 6 ON NON-REFOULEMENT (1977) (reaffirming "the fundamental importance of the observance of the principle of *non-refoulement* both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees"); U.N. HIGH COMMISSIONER FOR REFUGEES, EXCOM CONCLUSION NO. 8 ON DETERMINATION OF REFUGEE STATUS (1977) (laying out guidelines that would allow states to comply with the principle of non-refoulement, including the obligation to allow an asylum-seeker to remain in the territory at least temporarily while her refugee status is determined); U.N. HIGH COMMISSIONER FOR REFUGEES, EXCOM CONCLUSION NO. 22 ON THE CESSATION OF STATUS (1981) (reaffirming that even in cases of "large-scale influx, asylum seekers should be admitted to the State in which they first seek refugee... at least on a temporary basis").

46. *Racial Discrimination Convention*, *supra* note 28, at art 1(2)). States Parties retain control over determining citizenship, as long as there is no discrimination against any particular nationality. *Id.* at art 1(3).

47. See *id.* ¶ 2. See also David Weissbrodt, *The Protection of Non-Citizens in International Human Rights Law*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES

Human Rights Committee, which monitors the Civil and Political Covenant, recognizes the right of States' parties to decide "in principle" who enters their borders,⁴⁸ has also recognized that the right of States to authorize territorial entry should be constrained by concerns of nondiscrimination.⁴⁹

Whereas the human rights regimes more concerned with traditional civil and political equality have extended themselves to the issue of discrimination in immigration, those aspects of international law concerned with individual economic and social rights have demonstrated more deference. In some cases, such as the Economic Covenant, the position maintained is one of diplomatic silence.⁵⁰ In the case of the labor rights conventions, both the UN Migrant Workers' Convention, and the ILO migrant labor conventions, reaffirm the state's prerogative over immigration⁵¹ and exhort states to better enforce it so as to combat illegal immigration.⁵²

221, 225 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007); see Committee on the Elimination of Racial Discrimination, CERD/C/64/Misc.11/rev.3, Feb. 23–Mar. 12, 2004 ("xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism . . . differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim").

48. The Civil and Political Covenant "does not recognize the right of aliens to *enter* or to *reside* in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory." *Civil and Political Covenant*, *supra* note 27. See Comment, Office of the High Commissioner of Human Rights, General Comment on the Position of Aliens Under the Covenant, Apr. 11, 1986, available at <http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b> [hereinafter *Position of Aliens*].

A definitive discussion of the status of non-citizens under UN and regional human rights treaties is found in WEISSBRODT, *supra* note 3. Professor Weissbrodt was also the Special Rapporteur for the UN on the rights of non-citizens.

49. *Position of Aliens*, *supra* note 50. The Human Rights Committee only generally stated concerns of "non-discrimination, prohibition of inhuman treatment and respect for family life," but has declined to specify further.

Note that what is discussed in the text is only the right of territorial entry, not other issues related to territoriality such as acquisition of citizenship or residence authorization. For a detailed discussion of these issues, including the cases in which human rights bodies have allowed some forms of ethnic or linguistic discrimination, see WEISSBRODT, *supra* note 3.

50. WEISSBRODT, *supra* note 3, at 190 ("Unlike the Civil and Political Covenant, the Economic Covenant's monitoring body has not yet issued a comment clearly stating that the non-discrimination provision protects migrants.")

51. *Migrant Workers' Convention*, *supra* note 30, at art 35 ("Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation").

52. *Id.* at art. 68 ("States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation."); *ILO Supplementary Provisions Convention*, *supra* note 36, at art. 3 (requiring states to "suppress clandestine movements of migrants for employment"). Indeed the ILO Convention goes so far as to call for greater enforcement of border control (*id.* at Art 2, requiring each signatory to "determine whether there are illegally employed migrant workers on its territory"; *Id.* at art. 3, requiring signatories to adopt measures to "suppress clandestine movements of migrants for employment and illegal employment of migrants"; *Id.* at art. 6 ("Provision shall be made under national laws or

The basis for this divergence between civil and political rights, and economic and social rights, stems from differences in surrounding context and rationale. In the case of the latter, considerations of political will and the need to avoid the treaty's rejection by antisocialist states may have informed the greater deference. In addition to this essentially negative reason, however, lies both the positive concern for the well-being of all workers, and the desire to avoid the erosion of some workers' bargaining power through the presence of others more easily exploitable.⁵³

Coming to international trade, the World Trade Organization does generally reserve to members the right to "regulate the entry" of workers who would otherwise be covered under the General Agreement on Trade in Services, in the GATS Annex on the Movement of Natural Persons.⁵⁴ For workers who are employed in temporary contracts under sectors that Members have included in their specific commitments, Members can regulate entry only provided that such regulation does not "nullify or impair the benefits" accorded by that commitment.⁵⁵ That is, if particular sectors have been included under GATS's other commitments, workers "shall be allowed to provide" those services and any entry regulations would not be permitted to bar them from doing so.⁵⁶ This obligation still generally preserves the territorial sovereignty of Members: it just means that they

regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions"))).

53. Awareness of the negative effect of differences in labor standards on the preservation of labor standards—in other words, the danger of a "race to the bottom" driven by competition—has appeared with regularity in the history and text of the ILO. See, e.g., NICOLAS VALTICOS, *INTERNATIONAL LABOUR LAW* 20 (1979) ("One of the oldest ideas advanced in favor of international conventions in the field of labour was that of international competition... international agreements in the field of labour would avoid international competition from taking place to the disadvantage of workers, by a kind of inhuman 'dumping.'"). The importance of uniform minimum standards below which labor markets cannot go is reflected in the 1919 ILO constitution ("the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries" and in the 1944 ILO Declaration of Philadelphia ("poverty anywhere constitutes a danger to prosperity everywhere."). The ILO's position on competition modified over the years toward an endorsement of "constructive competition." See BOB HEPPLER, *LABOR LAWS AND GLOBAL TRADE* 33 (2005) (explaining that the "argument for international standards as a means of regularizing competition" was more prominent in the ILO's founding than in subsequent eras). Nevertheless, even in this more moderate context international standards are deemed important in "preventing destructive competition." *Id.* (emphasis added). Although the Migration for Employment Convention addresses workers of disparate nationalities in a single market, as opposed to workers across disparate nations, a similar logic would seem to apply.

54. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex on Movement of Natural Persons Supplying Services Under the Agreement, 1869 U.N.T.S. 183, 33 I.L.M. 1167, 1187 (1994) [hereinafter *MONP Annex*], ¶ 4.

55. See *id.*; see also TRACHTMAN, *supra* note 10, at 247.

56. Joel Trachtman interprets the MONP Annex to establish a higher standard than only "does not nullify or impair"; he would also add a "necessity test" i.e. that the entry regulation would need to be necessary which has been interpreted to mean the least possible trade restrictive. TRACHTMAN, *supra* note 10, at 244 (considering past WTO jurisprudence).

cannot give commitments under the schedules but then take them away with onerous entry requirements.

The GATS does recognize the WTO's general requirement of nondiscrimination among Members (the "most-favored nation principle"). However, it also specifies that Members can, at the least, impose differential visa requirements for nationals of different Members.⁵⁷ Whereas treaty bodies have interpreted international civil and political rights to bar discrimination in immigration criteria, the trade law of the GATS would appear to establish a weaker non-discrimination constraint, albeit one that at least theoretically could apply to any non-visa immigration requirements that differentiate on the basis of nationality.

In addition to these explicit constraints on the sovereign prerogative of territorial control, international law has created an implicit, but ultimately more powerful, constraint in some cases by decoupling the right to authorize entry with the rights enjoyed by workers once in a state's territory. In some cases, the fact of unlawful entry or residence does not necessarily deprive migrant workers of certain rights under international law, as is discussed in the next sections.

B. *The General Right to Nondiscrimination*

Once migrants have entered the territory, there are several specific categories of enumerated rights that are relevant to their experiences as workers: there are the civil and political rights related to trade union organizing; economic and social rights related to minimum standards and conditions of work; and criminal process rights. These are discussed below in turn, and treaties vary in their substantive expressions in each of these categories. Apart from these more specific rights, however, there is the general question of the scope of nondiscrimination as a general, catchall principle applying to migrant workers.

In the area of human rights, both the Civil and Political Covenant, and the Economic Covenant, recognize the general right of all human beings to nondiscrimination without distinction based on national origin, birth or "other status."⁵⁸ The Human Rights Committee has clarified that "other status" in the Civil and Political Covenant includes the distinction between

57. See *MONP Annex*, *supra* note 56, at n.1 ("the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under" GATS obligations). In addition, Members appear to retain total control over measures specifying residence and permanent employment requirements, as well as over workers who are seeking employment rather than already employed. *Id.* ¶ 3.

58. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), at art. 2(2) [hereinafter *Economic Covenant*]; *Civil and Political Covenant*, *supra* note 27, at arts. 2(1) & 26.

citizens and aliens,⁵⁹ with only a narrow exception for the right to vote.⁶⁰ Moreover, this equality extends to undocumented immigrants as well, according to the Committee, with only one exception of the right to freedom of movement.⁶¹ As with the right of entry described above, the Economic Covenant is much more circumspect: the UN Committee on Economic, Social and Cultural Rights has declined to comment on the application of the Economic Covenant rights to non-nationals more generally. Moreover, the treaty explicitly grants developing countries the right to exclude non-nationals.⁶²

In the case of the Migrant Workers' Convention, the question of nondiscrimination between citizens and aliens does not arise because, by definition of its scope, the Convention applies only to aliens. The question then is whether there may be discrimination among classes of aliens. The same term that exists in the Covenants, "other status," is used to define the Convention's scope of application of the Migrant Workers' Convention, but with the important qualification "except as otherwise provided hereafter,"⁶³ and the "hereafter" in question clearly demarcates rights into those that apply to all workers regardless of documentary status,⁶⁴ and those that

59. General Comment 15 on the Position of Aliens under the Covenant (Apr. 11, 1986), ¶ 1, reproduced in UN Doc. HRI/GEN/1/Rev.1. The Comment states that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens [but] . . . the Committee's experience in examining reports shows that in a number of countries . . . rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant." ("Reports from States have often failed to take into account that each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction' (art.2(1)). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."). *Id.*

60. David Weissbrodt, *The Protection of Non-Citizens in International Human Rights Law*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 224 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007). Although this principle is sweepingly stated, several commentators have observed that more could be done to enunciate its content. See *id.* at 233; T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance without Architecture*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 469 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

61. General Comment 15 states that "[o]nce an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12(3)." Since this is the only place where lawful status is explicitly mentioned, one can be even more confident in interpreting the lack of explicit mention as intentional. This would support the application of the nondiscrimination principle regardless of lawful status. The familiar canon of legal interpretation, *exclusio unio inclusio alterius* can be applied to conclude that the fact that lawful status is mentioned here but not elsewhere suggests that with respect to the other principles, lawful status is not a basis for distinction. This interpretation is supported by David Weissbrodt, *The Protection of Non-Citizens in International Human Rights Law*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 224 (Ryszard Cholewinski, Richard Perruchoud, & Euan MacDonald eds., 2007) ("The ICCPR contains a narrow exception to . . . equality for non-citizens with respect to . . . the right to vote; and freedom of movement . . . which may be denied to undocumented immigrants").

62. *Economic Covenant*, *supra* note 60, at art 2(3).

63. *Migrant Workers' Convention*, *supra* note 30, at Art 1.

64. *Id.* Part III.

apply to migrant workers who are “documented or in a regular situation.”⁶⁵ Although there is a separate sub-section preceding the lists of substantive rights that exists solely to set forth a general non-discrimination commitment,⁶⁶ that general principle cannot apply to documentary status given the treaty’s allocation of substantive rights explicitly on the basis of documentary status.⁶⁷ The “rights provided for in the present Convention”⁶⁸ do distinguish between documented and undocumented workers, providing to the documented workers rights relating to access to educational, vocational, housing, and health institutions and services, as well as certain labor protections.⁶⁹

The Racial Discrimination Convention asserts a sweeping nondiscrimination provision including “other status” and does, as interpreted by the treaty body, apply to immigration and citizenship criteria linked to race, descent, or national origin.⁷⁰ If there is no discrimination on this sort of identity basis, however, the Convention explicitly backs off of the distinction between citizens and aliens.⁷¹

Again, there is convergence and divergence with apparently an underlying political trade-off in each of these treaties on human rights. The most far-reaching of the treaties is the Civil and Political Covenant. The Racial Discrimination Convention stops short of the line that the Civil and Political Covenant draws, perhaps trading off more explicit commitments on the sensitive issues of race and ethnicity for another mode of “out-group” discrimination against non-citizens more generally. The Economic Covenant, with its yet more controversial orientation toward economically redistributive justice, expresses more deference still to sovereign prerogatives over citizenship and its exclusiveness.

Within international trade law, the norm of nondiscrimination is expressed in two key principles: that of most-favored nation treatment, which requires states parties to treat nationals of all other states parties equally; and that of national treatment, which requires a state party to forego preferential treatment of its own nationals. In its jurisprudence related to trade in goods, the WTO’s interpretation of the nondiscrimination norm has been strikingly expansive, with much more liberal approaches to proving discrimination than, for example, would be the case in U.S.

65. *Id.* Part IV.

66. *Id.* Part II.

67. See *infra* Section II.C. for more detail on which rights are provided to documented and which to undocumented workers.

68. *Migrant Workers’ Convention*, *supra* note 30, at art. 7.

69. *Id.* at art 43.

70. *Racial Discrimination Convention*, *supra* note 28, at art. I(1).

71. *Id.* at art I(2) (“This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and non-citizens.”).

constitutional law. The breadth of these principles perhaps explains why their initial scope was rather limited, to tariffs and other technical “border” measures affecting trade, and expanded only after several decades. Indeed, the GATS, with its application to labor, was enacted only in 1994 with the succession by the World Trade Organization of the original General Agreement on Tariffs and Trade.

Reflecting this particular balancing dynamic, the GATS retains the broad statements of most-favored nation treatment and national treatment. Although, the general most-favored nation treatment principle applies with only a few exemptions to trade in services,⁷² the more politically and economically sensitive national treatment principle (which entails competition between nationals and foreigners) applies only to those sectors falling specifically within states parties’ specific commitments. These commitments can be quite specific indeed, so that states retain virtually complete control over their exposure. Once the specific commitment has been made, the principle of national treatment applies in its broad form within that constraint.

The ILO Migration for Employment Convention and Supplementary Provisions Convention make no generalized call for nondiscrimination, beyond the latter’s reminder of the obligation of states parties to “respect the basic human rights of all migrant workers.”⁷³ Apart from this, the principle of nondiscrimination as stated in these is limited to particular and listed rights related to the workplace,⁷⁴ as opposed to the generalized language that exists in the human rights treaties. Moreover, the ILO rights are once again carefully limited to lawful workers only,⁷⁵ removing the question of extending worker rights to irregular migrants with the key exception of terms and conditions of work “arising out of past employment.”⁷⁶ This exception is important because it indicates the ILO sensibility: on the one hand, more pragmatic and deferential to states’ ability to determine the right to enter; and on the other hand, with a focus on equalizing bargaining power across workers.⁷⁷ This carefully limited right to nondiscrimination may be at odds, however, with the broader language of ILO’s Convention on Discrimination.⁷⁸

72. See JULIA NIELSEN & DARIA TAGLIONI, A QUICK GUIDE TO THE GATS AND MODE 4 (2003).

73. *ILO Supplementary Provisions Convention*, *supra* note 36, at art 1(1).

74. See *id.*

75. Ryszard Cholewinski, *The Rights of Migrant Workers*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 258 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

76. *ILO Supplementary Provisions Convention*, *supra* note 36, at art 9(1).

77. See *supra* note 57.

78. The ILO Convention on Discrimination defines “discrimination” to include any distinction “on the basis of race, colour, sex, religion, political opinion, national extraction or social origin.” art. 1(a). The Convention also, however, accords to the state the right to determine any further extension of its

C. *Nondiscrimination in the Right to Work and Conditions of Work*

The Refugee Convention requires that refugees enjoy equality with nationals regarding both to the right to work, and to labor legislation and social security provisions.⁷⁹ In terms of the actual conditions of the workplace, it is not surprising that the human rights treaties differ in their level of specificity. The Civil and Political Covenant, which has the broadest purview in terms of nondiscrimination, does not include economic rights such as the right to work and to minimum standards in workplace terms and conditions. The Economic Covenant recognizes the right to work,⁸⁰ and to “just and favourable conditions of work”;⁸¹ developing countries are not required to extend this to non-nationals, however, and in any case the scope of these basic rights has not been specified in cases where they would apply.⁸²

As for the other treaties dealing with labor rights, convergence appears on the principle that, regardless of states’ obligations to non-nationals, once an employment relationship is initiated no discriminatory treatment of migrant workers should be permitted. This principle of equality for actual employment relations regardless of lawfulness is reflected in the Migrant Workers’ Convention.⁸³ The Convention does otherwise distinguish in the substantive economic rights granted to migrant workers on the basis of documentary status, guaranteeing to undocumented workers only the right to emergency medical care⁸⁴ and the transferability of earnings upon termination of employment,⁸⁵ whereas documented workers enjoy an

scope. art. 1(b) (“Such other distinction ... may be determined by the Member”). Nevertheless, particularly subsequent to the enshrinement of nondiscrimination as a “core” labor right in the 1998 Declaration on Fundamental Rights and Principles at Work, the ILO right to nondiscrimination is understood to be of general application. For a discussion of the implications of this broad interpretive scope, see Blackett & Sheppard, *supra* note 19, at 419.

79. See *Refugee Convention*, *supra* note 29, at arts. 17 & 24.

80. *Economic Covenant*, *supra* note 60, at art. 6(1) (“States Parties . . . recognize the right to work”).

81. *Id.* at art. 7.

82. See *id.* at art. 2(3).

83. The Migrant Workers’ Convention grants treatment not less favorable than nationals with respect to remuneration, “conditions of work” (“overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship”), other “terms of employment” (“minimum age of employment”). *Migrant Workers’ Convention*, *supra* note 30, at art. 25. Moreover, states parties “shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.”

84. *Migrant Workers’ Convention*, *supra* note 30, at art. 28.

85. *Id.* at art. 32. Although the Convention does contain a provision on social security for undocumented workers, *id.* at art. 27, it is nonbinding, stating only that social security may be granted as long as provided for by law of state party; if state party does not allow, then Convention requests state party to “examine the possibility of” reimbursement.

ongoing right to transfer earnings and savings⁸⁶ and treatment no less favorable than nationals in terms of taxation,⁸⁷ and unemployment benefits.⁸⁸ Thus, even though states essentially maintain total control over determining the terms on which migrant workers may enter, what kinds of employment they may seek, and for how long,⁸⁹ because the equality principle attaches upon employment, the Migrant Workers' Convention can be said to guarantee "basic economic, social and cultural rights to both regular and irregular migrant workers."⁹⁰

The ILO also reflects the norm that, though in principle states parties retain the right to distinguish between documented and undocumented migrant workers, with only the former receiving guarantees of equal treatment *a priori*,⁹¹ all workers are entitled to equal treatment regarding past employment. Indeed, in this respect, the ILO exceeds the Migrant Workers' Convention by including social security in this exception.⁹²

The ILO places another notable constraint on the state's authorization of workers, by providing an automatic regularization for workers after a period of not more than two years.⁹³ The ILO's final gesture in the direction of equality is to exhort, but not require, states parties "to pursue a national policy designed to promote and to guarantee . . . equality of opportunity and treatment in respect of employment and occupation, of

86. *Id.* at art. 47.

87. *Id.* at art. 48.

88. *Id.* at art. 54.

89. *Id.* at art. 52.

90. Ryszard Cholewinski, *The Rights of Migrant Workers*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 259 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

91. *ILO Migration for Employment Convention*, *supra* note 35, at art. 6(1)(a)(i), (b), (c) (nondiscrimination with respect to remuneration and conditions of work, social security and taxes). Nondiscrimination in work conditions is for lawful workers only (with exclusion of only a few particular categories; *see id.* at art. 11 (excluding "frontier workers, short-term entry of members of the liberal professions and artistes, and seamen"; *see also ILO Supplementary Provisions Convention*, *supra* note 36, at art. 11).

92. *ILO Supplementary Provisions Convention*, *supra* note 36, at art. 9(1).

Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

93. The ILO Supplementary Provisions Convention does provide the right to work without constraint after "a prescribed period of up to two years of lawful residence or, if the laws or regulations of the State Party only provide for fixed-term contracts of less than two years, after completion of the first work contract." Ryszard Cholewinski, *The Rights of Migrant Workers*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 258 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

social security, of trade union and cultural rights and of individual and collective freedoms.”⁹⁴

In international trade law, the GATS system of specific commitments places no automatic obligation on states to provide the right to work or to meet any minimum standards in terms of workplace conditions. However, there is the general most-favored nation treatment rule and also, within specific commitments, the requirement of nondiscrimination in the form of national treatment. States have the ability to list exceptions in schedules, and many states use wage parity tests and economic needs tests before permitting employment of foreign nationals.⁹⁵

Rather than setting constraints on labor rights, the GATS expresses nondiscrimination in terms of the regulation of trade flows: its market access obligation for specific commitments bars the prohibition of services by foreign nationals on the basis of quantitative restrictions such as number of employees or market value of services provided.⁹⁶ Because this obligation applies only to specific commitments, however, states are free to maintain such restrictions as long as they do not commit to do otherwise, and indeed such restrictions are common.⁹⁷

For those services that are listed as specific commitments, the question arises as to whether qualification and licensing requirements might constitute disguised protectionism. GATS requires that any such domestic regulations be applied in a “reasonable, objective and impartial” manner. This is further indicated to mean “not more burdensome than necessary,” unless that burden could not have reasonably been anticipated at the time the specific commitments were made.⁹⁸ Although earlier trade law jurisprudence applied a relatively strict interpretation of this “necessity test,” to mean the least trade-restrictive possible measure, more recent decisions by the WTO Appellate Body have softened this approach, balancing the consideration of necessity against other considerations such as “the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”⁹⁹

94. *ILO Supplementary Provisions Convention*, *supra* note 36.

95. TRACHTMAN, *supra* note 10, at 250. The MONP Annex allows states to “regulate entry” as long as no “nullification and impairment” which has been interpreted by some to mean “necessity test” with regards to temporary workers; to date these requirements have not been challenged as impermissible under these constraints.

96. *GATS*, *supra* note 37, at Art XVI.

97. For example, the United States maintains numerical limits on business visas within its H1-B and L1 programs.

98. *GATS*, *supra* note 37, at Art VI:1.

99. Trachtman has noted that the necessity test as applied elsewhere in GATT/WTO has been interpreted to mean the least trade restrictive possible, (Trachtman 261) though other more recent decisions (such as the AB reports in *EC Asbestos* and *Korea-Beef*) set forth a balancing test that also

with ultimate sovereignty in discretion over territorial control on the one hand, and a worldview that sees the rights of individuals as primary.

Within that general tension, further differences appear according to the particularities of each treaty system. The labor conventions, for example, peak in their emphasis on individual rights within the issue areas of conditions of work and the right to organize. The trade agreement, despite the normative clarity of the most-favored nation and national treatment principles, remains largely deferential, but peaks in its assertiveness with respect to conditions of work, as discrimination in that area is most naturally seen as a constraint on conditions of competition in line with economic concerns. The Refugee Convention states the principle of nondiscrimination more strongly than its counterparts with respect to the right to territorial entry, in keeping with that convention's emphasis on the urgency surrounding the initial conditions creating refugee status, but becomes noticeably more deferential if the criminal justice system is invoked.

We have, then, a proliferation of "self-contained"¹²³ treaty regimes addressing one or more facets of migrant workers' experiences. In some cases, treaties appear to be converging on the legal norms applicable to migrant labor. In others, divergence is clearly visible. In still others, there is at least potential ambiguity created by silence, as when general human rights norms are not mentioned in other more specialized treaties.

These convergences and divergences can yield concrete problems of legal interpretation. Consider the following hypothetical instances of inter-treaty conflict on migrant workers' rights (assuming all states involved are party to all the mentioned treaties):

1. Country X regularly arrests, detains, and deports undocumented migrant workers without a public hearing, in conjunction with the criminalization of the acts of procuring and possessing fraudulent identity documents required by the Crime Convention Protocol on Migrant-Smuggling.¹²⁴ Human rights groups protest that such actions violate the workers' rights to criminal due process, but Country X responds that neither the Migrant-Smuggling Protocol nor the accompanying

123. INT'L LAW COMM'N, *supra* note 6.

124. The Migrant-Smuggling Protocol specifies that "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the *object* of conduct" criminalized by the Protocol such as the production of fraudulent identity documents. The phrasing of this exemption suggests, however, that active participation by migrants in their own smuggling would indeed properly render them subject to criminal prosecution under the Protocol.

Crime Convention establishes any minimum standards in this respect.

2. Country Y does not permit asylum seekers to work, leading refugee lawyers to argue that the 1951 Refugee Convention has been violated. Country Y responds that the Refugee Convention applies only to recognized refugees, leaving asylum seekers with the lesser protections of the Migrant Workers' Convention and the ILO Conventions, which leave to Country Y the prerogative to grant work authorization.
3. Country X establishes a visa system that provides workers from Country Y with more favorable rules than those from Country Z. Country Z protests that such distinctions violate the human rights of Z citizens to nondiscrimination under the Civil and Political Covenant as interpreted by the Human Rights Committee. Country X responds that the WTO General Agreement on Trade in Services permits distinctions among nationals in visa systems and provides that such distinctions are not violations of the Most-Favored Nation Treatment principle according to the GATS Annex on the Movement of Natural Persons.
4. Country Z prohibits undocumented migrant workers from participating in trade unions. Country Z states that the ILO Conventions applicable to migrant workers specify organizing rights for lawful workers only. Trade union lawyers argue that these workers are entitled to participate in trade unions under both the Civil and the Political Covenant and the Migrant Workers' Convention, as well as under the ILO conventions on freedom of association and collective bargaining.

In each of the above problems, which side would prevail?

The apparent existence of gaps, conflicts, and ambiguities in the articulation of diverging legal rules from different regimes need not compel the conclusion that the legal relationship among these regimes cannot be resolved or that a single applicable legal rule cannot be identified. In other words, the divergences that result from plural legalities need not lead to a conclusion of international legal fragmentation. Indeed, to a remarkable extent, international lawyers can resolve apparent divergences in favor of the *interpretive construction* of a consistent, rather than conflicted, legal order.