First, in some cases the texts of treaties themselves seek harmonization, incorporating other treaty systems by reference, or limiting their applicability in order to preserve a clear order among otherwise potentially competing rules. For example, the Migrant Workers' Convention explicitly excludes refugees and stateless persons.[125] The Convention also explicitly places itself below any other more favorable treatment available from other applicable treaties.[126] The Crime Convention Protocols on Trafficking in Persons and Migrant-Smuggling also contain "saving" clauses that clearly preserve the applicability of rules from elsewhere in international law, including international human rights law.[127]

In other cases, the treaties do not incorporate other rules authoritatively, but nevertheless endorse a posture of harmonization and compatibility. Thus, for example, the ILO Migration for Employment Convention provides that states parties "undertake[] to respect the basic human rights of all migrant workers,"[128] thus encouraging the view that it should be read as complementary to, rather than conflicting with, human rights treaties that might offer more favorable treatment.

Even where there is no basis in the text or supporting documents, such as *travaux preparatoires* or treaty body interpretations for construing a relationship between treaties, international law does provide a series of tools for addressing potential conflicts. The Vienna Convention establishes broad principles of interpretation that encourage any given treaty provision to be read in conjunction with all other "relevant rules of international law."[129] More specifically, the Vienna Convention on the Law of Treaties establishes two somewhat mechanical techniques for resolving conflict: first, where there is a dispute in which the states are subject to differing treaties, the treaty to which all states are parties applies;[130] and, second, that where earlier and later treaties conflict, the earlier treaty applies only to the extent that it is not incompatible with the later treaty.[131]

The Vienna Convention's somewhat mechanical approach, however, has proven less useful with the rise of self-contained and specialized regimes in which chronology may not reliably indicate the states' intent

125. *Migrant Workers' Convention*, *supra* note 30, at Art. 3.

126. *Id.* at art. 81 ("Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of: (a) The law or practice of a State Party; or (b) Any bilateral or multilateral treaty in force for the State Party concerned.")

127. *See Migrant Workers' Convention*, *supra* note 30.

128. *ILO Supplementary Provisions Convention*, *supra* note 36, at art. 1.

129. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31 (May 23, 1969) [hereinafter *Vienna Convention*].

130. *Id.* at art 30(4).

131. *Id.* at art 30(2).

with respect to earlier, potentially applicable treaties. Here, too, international law seeks to resist an outcome of outright conflict, establishing principles for order among regimes that cannot be simply differentiated on the basis of chronology or membership. The International Law Commission's important report on fragmentation highlighted two of these tools. First, the principle of harmonization holds that, where possible, rules of international law should be read "to give rise to a single set of compatible obligations."[132] Second, the maxim *lex specialis derogat legi generali* would allow the more specifically tailored rule to apply to govern in the case of a potential conflict.[133] With these principles, international law aspires to become a single, internally consistent set of rules notwithstanding the emergence of specialized regimes.[134]

Applying these textual and doctrinal tools of interpretation to the above hypothetical problems, they appear resolvable in ascending levels of difficulty. Problem #1 is simply a matter of textual application: human rights groups can reference the "saving" clause in the Migrant Smuggling Protocol. As for Problem #2, the argument can be made that the ILO conventions are intended to preserve intact the rights of refugees, given the ILO Supplementary Provisions Convention's reference to the "human rights of all migrant workers." Similarly, the Migrant Workers' Convention excludes refugees and explicitly defers to more favorable treatment found in the Refugee Convention or elsewhere. The Refugee Convention does not clearly distinguish between recognized refugees and asylum seekers. This textual silence, however, is resolved through reference to both state practice and UN treaty bodies, each of which has established the distinction between asylum seekers and recognized refugees. Thus, in Problem #2 a hierarchy of norms is clearly demarcated, leaving asylum seekers with the protection available from human rights generally but without the rights specifically granted to refugees under the Refugee Convention.[135]

Problem #3 reformulates one of the most challenging areas of potential treaty regime conflict, between trade and human rights. Where trade rules are silent as to human rights, should this be taken as incorporation by reference so that the rules should be read complementarily, or, on the other

132. INT'L LAW COMM'N, UNITED NATIONS REPORT OF THE 58TH SESS. 428 (UN Doc. A/61/10) (2006).

133. *Id.* at 428.

134. *Id.* at 427 ("International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time").

135. *See* WEISSBRODT, *supra* note 3, at 110–33.

hand, does a trade rule "preempt" (even if it chronologically postdates) any other potentially applicable rule? Much has been made of this "linkage" question, though to date few have perceived the potential extension of this question to the issue of the treatment of migrant workers. In trade scholarship, however, a viewpoint appears to be emerging in line with the position of the International Law Commission discussed above, that sees both trade and human rights rules as part of a larger system of international law, with particular provisions from particular regimes to be read as part of a single legal system.[136] On this view, certain prohibitions against visa-based discrimination that arise from human rights law, for example visa systems that can be proven discriminatory on racial grounds,[137] should be read as qualifications to the WTO's permission of nationality-based visa systems.

Problem #4 also cannot be solved on the face of the treaty texts themselves, which do not specify their doctrinal relationships to each other. Turning to surrounding interpretation, the ILO freedom of association and collective bargaining conventions are, as a general matter, held to apply to all ILO members regardless of whether they have formally been ratified.[138] However, should these conventions prevail over the narrower protections of the specialized ILO Migration for Employment Convention when it has also been ratified?

In this case, the maxim of *lex specialis* might allow the narrower rule to prevail. On the other hand, the importance of freedom of association as a "core" ILO labor standard might qualify it as a "non-derogable" or *jus cogens* norm in the labor law context, allowing an override of the *lex specialis* maxim. Only a very small number of human rights norms, such as prohibition of slavery and forced labor, however, have been universally

136. ROBERT HOWSE & RUTI G. TEITEL, BEYOND THE DIVIDE: THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE WORLD TRADE ORGANIZATION (2007); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003).

137. *See id.*

138. *See* ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 34, ¶ 2. This interpretation has been affirmed in numerous concrete instances. For example, the ILO Committee on the Freedom of Association found wanting the U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) in which labor law remedies were denied to undocumented workers. The Committee observed that "the impact of *Hoffman* . . . includes undocumented workers hired by employers in full knowledge of their status and who may subsequently be dismissed for exercising their fundamental right to organize in an effort to ensure respect for basic worker's rights." INT'L LAB. ORG. COMM. ON THE FREEDOM OF ASSOCIATION, COMPLAINT AGAINST THE UNITED STATES (2003). The Committee concluded that "the remedial measures left [under U.S. labor law] in cases of illegal dismissals of undocumented workers are *inadequate* to ensure effective protection against acts of anti-union discrimination." *Id.* ¶ 610. (emphasis added).

recognized as *jus cogens*, so the analysis of non-derogability would require consideration of multiple contextual factors.[139]

Reference to some ILO jurisprudence and supporting work by eminent labor law jurists[140] points in favor of upholding the broader over the narrower standard. First, the ILO Constitution provides that "in no case shall the adoption of any Convention or Recommendation by the conference, or the ratification of any Convention by any Member, be deemed to affect any law . . . which ensures more favourable conditions to the workers concerned."[141] This provision was intended to refer only to the relationship between national and international labor standards, rather than to a conflict between international labor standards.[142] However, some international labor law specialists have argued that extension of this logic to conflicts between international instruments is supported by the "'progressive' nature of labor law" and its normative commitment to social progress, suggesting that "in the event of conflict, preference must be given in principle to the standard which is the most favourable to workers."[143] Moreover, the ILO's compliance monitoring practices reflect the "principle of the independent character of concurrent treaties" in which a state bound by different standards remains bound to each.[144]

On the other hand, other supporting material from the ILO suggests that states *should* be able to establish differential labor standards for migrant workers in general and undocumented migrant workers in particular. The ILO's 2006 non-binding guidelines on labor migration exemplify this more cautious posture.[145] The guidelines do state a commitment to a "rights-based approach"[146] and further state a preference for the extension of all international labor standards to migrant workers.[147] However, they are careful to preserve sovereign discretion in this regard by providing that "international labour standards apply to migrant workers, *unless otherwise stated.*"[148] Moreover, the guidelines reaffirm the limited

139. The International Law Commission specifies several factors to be weighed in a balancing-type analysis: Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable; whether the application of the special law might frustrate the purpose of the general law; whether third party beneficiaries may be negatively affected by the special law; and whether the balance of rights and obligations, established in the general law would be negatively affected by the special law. FRAGMENTATION OF INTERNATIONAL LAW, *supra* note 6, at 410.

140. *Cf.* Statute of the International Court of Justice, art. 38(1)(d).

141. ILO Constitution, art. 19(8).

142. VALTICOS, *supra* note 55, at 73.

143. *Id.*

144. *Id.*

145. ILO, MULTILATERAL FRAMEWORK ON LABOUR MIGRATION: NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH TO LABOUR MIGRATION (2006).

146. *Id.* at 2.

147. *Id.* at 16.

148. *Id.* (emphasis added).

position of the ILO Migration for Employment Convention that guarantees equality only between nationals and *regular* migrant workers.[149] These guidelines make no mention of the "progressive" interpretive lens advocated by some jurists. Rather, they reaffirm a pragmatism that ultimately defers to sovereign territorial control and refrains from casting even core ILO labor standards in contravention of that deference insofar as migration is concerned. The guidelines therefore suggest that the narrower ILO Migration for Employment should prevail over the broader scope of the ILO conventions on freedom of association and collective bargaining.

Coming back to Problem #4, the doctrinal murkiness created by divergences in the ILO's interpretive approaches may nevertheless be dispelled through deployment of the more mechanistic chronological rule set out by the Vienna Convention on the Law of Treaties.[150] The chronological test would ultimately uphold the broader UN Migrant Workers' Convention rule, which allows trade union participation to undocumented migrant workers, to prevail, assuming that the state ratified the 1990 UN Convention at a date later than the 1949 Migration for Employment Convention. Thus, looking to treaty body interpretations and applying general rules of construction would probably resolve Problem #4 by recognizing an expansive interpretation of the right to organize in the UN Migrant Workers' Convention and broader ILO jurisprudence emerging over the narrower ILO Migration for Employment Convention position.

The above section demonstrates that international lawyers possess tools of interpretation that can respond in many cases to the appearance of incoherent or conflicting rules. Those tools, however, retain the characteristics of legal analysis in any context: though some answers can be neatly solved on the basis of established "bright-line" rules, others—such as the latter two problems hypothesized above—necessitate an active engagement with underlying normative commitments as well as a meta-level commitment to coherence in the international order. In other words, doctrinal divergences ultimately do expose the politics of plural legalities, even if those divergences can be knit back together through mechanisms of legal interpretation.

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149. *Id.* ("In formulating national law and policies concerning the protection of migrant workers, governments should be guided by the underlying principles of the Migration for Employment Convention . . . particularly those concerning equality of treatment between nationals and migrant workers in a *regular* situation. . . .") (emphasis added).

150. The Vienna Convention on the Law of Treaties is pertinent to the resolution of apparent conflicts in international labour obligations. *See* VALTICOS, *supra* note 55, at 74. However, according to international labor law experts, the Vienna Convention should be applied only where principles are not available from within the specialized jurisprudence of labor law. *See id.* at 73–74. This hierarchy of interpretive practices of course itself reflects the Vienna Convention's maxim of *lex specialis.*

II. NORMATIVE CONVERGENCES AND DIVERGENCES

The international lawyer's concern in the face of fragmentation is not only doctrinal incoherence, but a dissolution of the overall aspiration toward a harmonious international order. The concern is that:

> specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, loss of an overall perspective on the law.[151]

Underneath the doctrinal question lies the specter of conflicting politics that give rise to *normative* fragmentation: "normative orders that are fundamentally different in their underlying conceptual structure."[152] As the International Law Commission's Report on Fragmentation remarked:

> 'Trade law' develops as an instrument to regulate international economic relations. 'Human rights law' aims to protect the interests of individuals and 'international criminal law' gives legal expression to the 'fight against impunity.' Each rule-complex or 'regime' comes with its own principles, its own form of expertise and its own 'ethos,' not necessarily identical to the ethos of neighboring specialization.[153]

Legal regimes can collide with each other not only in their specific rules, but also in their larger goals. Thus, if as the report suggests, the general thrust of trade law is to liberalize markets,[154] and the general thrust of human rights law is to protect individuals,[155] and the general thrust of labor law is to support workers,[156] these regimes tend not to reach, formally or informally, the issues posed by illegal migration. At the same time, the *general* effect of criminalization, promoted both internationally and nationally, may be viewed as hostile not only to the liberalization of markets for migrant labor, but possibly also to the protection of individual migrant workers.

"Global legal pluralism . . . is not simply a result of political pluralism, but is instead the expression of deep contradictions between colliding

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151. INT'L LAW COMM'N, *supra* note 9, at 11.

152. Merry, *supra* note 1, at 873.

153. INT'L LAW COMM'N, *supra* note 9, at 14.

154. The normative focus of international trade law on liberalization has been contested those who would emphasize the trade regime's origination in a Fordist "embedded liberalism" that viewed deregulation of trade as only one of a variety of governmental tools aimed at achieving full employment and social welfare. *See, e.g.*, Robert Howse, *From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System*, 96 AM. J. INT'L L. 94 (2002).

155. For a discussion of some of the internal complexities and external compromises of human rights law, see DAVID KENNEDY, THE DARK SIDES OF VIRTUE (2004).

156. For a brief discussion of internal normative rifts between "economic and social" aspects of the ILO, see *supra* notes 17–19 and accompanying text.

sectors of a global society."[157] Aleinikoff has conceptualized international law on migration, similarly, as dividing into three general categories: those treaties that see migration in terms of labor flows, those that see it as a question of human rights, and those that emphasize state control and security.[158]

Among these three, the realm that most challenges "traditional notions of state sovereignty,"[159] is that of human rights. International human rights law formally extends liberal egalitarianism farther than international trade or labor law, although how far depends on interpretive questions that have yet to be resolved. At the same time, multilateral human rights enforcement is ineffective in terms of the provision of recourse for individual claimants.[160] The Migrant Workers Convention is hampered by a lack of signatories. The Criminal and Political Covenant, although it has more signatories and so could presumably be used to reinforce the principle of protecting the human rights of undocumented migrant workers, is limited in its ability to offer any recourse to right-holders. In addition, signatories like the United States would argue, albeit not without controversy, that their reservations to the treaty restrict potential right-holders to that recourse offered under domestic constitutional law.[161]

The relative ineffectiveness of human rights regimes has led some commentators to call for a more trade-centered approach to migration.[162] Such an approach falters on the belief, central to many in international labor law, that "labor is not a commodity."[163] Nevertheless, some scholars have argued that an economic approach may in fact yield the greatest welfare for

157. 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).

158. 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).

159. *Id.* at 469 ("human rights discourse counterbalances traditional notions of state sovereignty, which view states as possessing unbridled authority to regulate immigration").

160. Regional human rights systems may harbor more potential. *See* Connie de la Vega and Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35 (2005) (describing the Inter-American human rights system).

161. *See* 138 Cong. Rec. S4, 781-01 (Apr. 2, 1992) (setting forth Senate reservations to the Civil and Political Covenant). For challenges to the validity of reservations, see Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); David Weissbrodt, *The United States Ratification of Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

162. *See, e.g.*, Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997).

163. INT'L LAB. ORG., *supra* note 18. For a discussion of the conceptual and legal challenges to viewing migrant labor as trade, see Jennifer Gordon, *Explaining Immigration Unilateralism*, 104 NW. U. L. REV. 3 (2010).

the world's workers, making the case for the liberalization of migrants' rights in the economist's language of gains from trade.[164]

The trade regime also would appear to hold the attraction of greater institutional effectiveness than the human rights regime. As the discussion above has suggested, however, the WTO has proven extremely pragmatic in its extension of institutional authority to the question of migration and labor regulation. Despite the relative strength of the World Trade Organization generally, the existing subdivision governing trade in services is much less effectual. This is because, as indicated above, in services the basic WTO disciplines of nondiscrimination and national treatment apply only to those sectors that are voluntarily made subject to them—in contrast to the rules governing trade in goods or intellectual property, where these principles automatically apply.[165] And within the relatively weak division of trade in services, those provisions governing migrant (temporary) labor are the weakest and most qualified. The practical effect of the trade regime is to confer the privileges of liberalization only to high-skilled workers. The GATS by itself establishes almost no baseline, leaving the issue almost entirely to the political will of states.

Within this arena of interstate relations and politics, the WTO has managed to attract some attention to the issue of migrant labor. For the first time ever, the WTO is fielding serious proposals by member states to include negotiations on low-skilled labor migration. WTO members are currently engaged in the "Doha" Round of Negotiations, launched by the 2001 WTO Ministerial Conference and accompanying Ministerial Declaration (the "Doha Declaration") setting forth goals for negotiations. The Doha Declaration states that "negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries."[166] The negotiations on trade in services are expected to form an important part of the results for the Doha round. The Declaration calls for a focus on rules governing movement of natural persons and the effect of those rules on prospects for development.

Developing-country members of the WTO are increasingly concerned with addressing low-skilled labor migration head on, particularly since many are significant exporters of such labor. Several countries have offered proposals that would elaborate rules on the movement of natural persons, and some of these proposals directly link movement of natural persons with

164. *See, e.g.*, JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); TRACHTMAN, *supra* note 10.

165. The Doha round includes an effort to expand the commitments under trade in services; since it is subject to controversy, it is uncertain how this will turn out.

166. Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 14, 2001).

development.[167] Perhaps the boldest call, however, has come from the United Nations Development Programme, which has urged the negotiation of WTO rules liberalizing constraints on low-skilled labor migration.[168] There have also been some negotiations regarding creating a basis for easier authorization of workers who fall into the GATS categories. The so-called GATS visa has been promoted by the Indian government, and also by U.S. and European businesses.[169] This would effectively amend the GATS Annex on the Movement of Natural Persons. However, with the Doha negotiations in serious trouble for a host of reasons, the likelihood that WTO Members will martial the political will necessary to extend significantly GATS coverage is limited.

As suggested at the beginning of this section, state control and security represent an important part of the normative spectrum in international law affecting migrant labor. Whereas both human rights law and trade law can be viewed as normatively driven by liberal individualism, each in different ways recognizes the counterbalancing effect of the state, either explicitly, or implicitly in institutional effect. Nevertheless, it might be argued that in these areas of international law, at least conceptual primacy lies explicitly with liberalism, and posits the state as a limiting factor. By contrast, the set of treaties coordinating states' treatment of transnational crime—the Crime Convention and the accompanying protocols on trafficking in persons and migrant-smuggling—shift normative emphasis to state security. In these instruments, state control and security are paramount, with individual rights operating as the limiting factor.

There is no necessary doctrinal conflict between the "crime" treaties and their counterparts in human rights, labor, and trade law insofar as migrant workers are concerned, as Section II.F. above demonstrates. Even where no *doctrinal* divergence exists, however, the crime treaties potentially represent a *normative* divergence. As a normative matter, the crime treaties may reinforce an association of migration with dangerous and threatening criminal activity. The treaties establish bases for coordinating

167. *See* Communication from India, *Proposed Liberalization of Movement of Professionals*, S/CSS/W/12 (Nov. 24, 2000); Communication from United States, *Movement of Natural Persons*, S/CSS/W/29 (Dec. 18, 2000); Communication from Japan, *Negotiating Proposal on Temporary Movement of Natural Persons*, S/CSS/W/4/S.2 (July 1, 2001); Communication from EC, *Negotiating Proposal on Temporary Movement of Service Suppliers*, S/CSS/W/45; Communication from Canada, *Negotiating Proposal on Temporary Movement of Natural Persons Under GATS (Mode 4)*, S/CSS/W/48 (Mar. 14, 2001); Communication from Colombia, *Negotiating Proposal on Temporary Movement of Natural Persons*, S/CSS/W/97 (July 9, 2001).

168. UNITED NATIONS DEVELOPMENT PROGRAMME: MAKING GLOBAL TRADE WORK FOR PEOPLE (2003).

169. Richard Self & B.K. Zutshi, WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) Under the GATS: Temporary Entry of Natural Persons as Service Providers: Issues and Challenges in Further Liberalization under the Current GATS Negotiations (Apr. 11, 2002).

the policing of borders against illegal migrants,[170] by allowing states to extend immigration-related investigations extraterritorially into commercial carriers under the control or auspices of other states parties,[171] and by consolidating repatriation practices for both "smuggled migrants" and "trafficked persons."[172]

The crime treaties are much more explicit and detailed in their treatment of border control, of course, than the counterpart treaties in trade, labor, or human rights. They give fairly detailed guidelines[173] for the coordination of law enforcement among member states in combating these criminal offenses.[174] If a state party refuses the request of another state party to extradite an individual, it becomes subject to an obligation to prosecute that individual internally.[175] There are also extensive provisions regarding "mutual legal assistance" during the stages of criminal investigation that antecede formal indictment and extradition.[176] The Trafficking Protocol, of course, has at its center the goal of reducing the suffering of victims of "modern-day slavery." To that end, the Protocol

170. *See Migrant Smuggling Protocol*, *supra* note 40, at art. 11(1) ("Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.").

171. *See id.*; *Trafficking Protocol*, *supra* note 41, at art. 11.

172. *See, e.g.*, *Migrant Smuggling Protocol*, *supra* note 40, at art. 18(1) ("Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return."); *Trafficking Protocol*, *supra* note 41, at art. 8(1) ("The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.").

173. There is also a more general obligation to cooperate. *See Crime Convention*, *supra* note 39, at art. 27 ("States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems," especially in aid of conducting inquiries regarding identity of persons or property related to crimes; and general exchange of information). The Crime Conventions has established progressively more extensive obligations relating to extradition. For an account of this progression toward "thick" institutional obligations, see Chantal Thomas, *Disciplining Globalization*, 24 MICH. J. INT'L L. 549 (2004) ("The 2000 Convention . . .. developed additional mechanisms to increase efficacy in criminal enforcement . . . expanded subject matter jurisdiction . . . encourages the use of "special investigative techniques, such as electronic or other forms of surveillance and undercover operations" to aid enforcement . . . and requires members to 'institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions . . . in order to deter and detect all forms of money laundering.").

174. A state party to the Crime Convention must ensure a minimum domestic criminal law environment by establishing formal sanctions for the Convention's defined criminal offenses. *See Crime Convention*, *supra* note 39, at art. 11. States Parties must make criminal such offenses not only when they involve a transnational component, but also even if they are wholly domestic. *Id.* at art. 34.

175. *See Crime Convention*, *supra* note 39, at art. 16(10) ("A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.").

176. *See Crime Convention*, *supra* note 39, at art. 18 .

does contain language promoting the protection of human rights of trafficking victims. However, whereas the Protocol's language relating to criminalization and repatriation establishes mandatory obligations, the provisions relating to assistance of victims and human rights protection are aspirational.[177]

The crime treaties also appear quite robust institutionally when compared with their counterparts in trade and human rights. They have many more participating members than the UN Migrant Workers Convention, the ILO migrant labor conventions, or the General Agreement on Trade in Services.[178] Moreover, unlike the former, the international criminal law treaties contain a great deal of *administrative* obligations—specifications as to how states parties should go about implementing the treaty's provisions. The apparatus established by these conventions is thus much broader in its purview and its authority.

Both because of their explicit normative emphasis on security, and because of their institutional authoritativeness, the crime treaties may create an effect of throwing a shadow of suspicion over entire regions of the world that are viewed thereafter as suppliers of criminality. Certainly, in a post-9/11 world in which major political powers have declared an ongoing state of heightened alert, the social atmosphere may be one in which popular concerns in developed countries around increased economic instability in the globalization era very easily dovetails with increases in perceived criminal dangers beyond borders.

The normative ordering described above could, by some, be perceived as a legitimate, if controversial, corollary of the sociolegal facts of national identity, territorial sovereignty, and citizenship. However, the social benefits of policing identity must be considered in light of the probable social costs, which include the ironic, or tragic, likelihood that criminalizing

177. *Compare Trafficking Protocol*, *supra* note 41, at art. 5 on criminalization (states "shall . . . establish as criminal offenses") and art. 8 on repatriation (states "shall facilitate and accept . . . the return of [a "victim of trafficking"]") *with id.* at art. 6 on the establishment of social services programs (states "shall consider implementing measures to provide for the physical, psychological and social recovery of victims") and art. 7 on the status of victims (states "shall consider adopting . . . measures that permit victims of trafficking . . . to remain in . . . territory").

178. Although all WTO members are formally signatories to the GATS, the fact that GATS principles apply only to those sectors for which Members have actively made concessions, and the fact that only a minority of Members have made such concessions, effectively means the level of participation is low. *See* Sungjoon Cho, *Development by Moving People: Unearthing the Development Potential of a GATS Visa*, *in* DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 457 (Joel P. Trachtman & Chantal Thomas eds., 2009) (stating that the "the ratio of full liberalization in Mode 4 market access ranges from 0 to 4%, compared with 18–59% in Mode 1 (cross-border, such as e-commerce), 24–69% in Mode 2 (consumption abroad, such as foreign outpatients), and 0–31% in Mode 3 (commercial presence, such as foreign subsidiaries.").

markets in many cases probably does not decrease them, but only renders them more violent.[179]

CONCLUSION: POLITICS AND PLURAL LEGALITIES

The above sections have examined international legal regimes potentially governing migrant labor. The foregoing has argued that disparate treaties may converge or diverge both doctrinally and normatively. On the one hand, the principle of nondiscrimination can challenge sovereignty, reflecting the logical extension of a liberal legal internationalism that paradoxically consumes its own original subjects, the states that established it. In this progressionist narrative, aspects of the legal identity of states, including the right to police borders, become increasingly challenged. On the other hand, against this dynamic of liberalism, an antagonistic or mediating principle of the *necessity* for policing and border control can be seen in all the treaties analyzed above, but most clearly in the regime of criminalization. In this view, it is precisely the larger liberalization of orders that justifies and requires states to intervene to prevent illegality and to preserve the underlying construct of the original order.

In the former view, migrant workers register primarily as human beings. Their legal subjectivity becomes relevant under a conceptual and doctrinal paradigm that identifies individuals as the ultimate and sacrosanct constituents of law. The latter view adopts a lens of sovereignty that continues to see states as the primary occupants of the legal terrain, with both rights and responsibilities relating to territoriality. Here, migrant workers register primarily as objects of governance in a paradigm that privileges border control as a prerogative of states.

For a topic as politically fraught as immigration, and particularly immigrants who are active participants in domestic job markets, this normative tension becomes even more important. From a migrant worker advocate's perspective, where there is divergence, there is the danger that the divergence will be exploited by those hostile to non-citizens as a group; that is, that more antagonistic norms toward migrant workers will prevail.[180]

Indeed, the emergence of different rule systems within human rights, labor, trade, and crime regimes in international law appears to embody not

179. Chantal Thomas, *Undocumented Migrant Workers in a Fragmented International Order*, 25 MD. J. INT'L L. 187 (2010).

180. *Cf.* WEISSBRODT, *supra* note 3, at 37 (identifying the general problem that "treaties function as creating common moral standards" but gaps can allow countries to justify "noncompliance" and in particular the problem that "international law and thematic mechanisms relating to non-citizens have [traditionally] focused on non-citizen sub-groups while neglecting broader protections for non-citizens as a whole" and calling for "clear, comprehensive standards governing the rights of non-citizens").

just legal pluralism, but also legal fragmentation: "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions, and spheres of practice."[181] These self-contained systems may diverge at the level of the overarching set of principles or the "ethos"[182] of a system of laws. Some commentators have responded to the plural legalities of international migration by calling for consolidation: an international "Bill of Rights" for migrant workers,[183] for example, or more ambitiously, an institution such as a "World Migration Organization."[184] Others assert that normative convergence is already building not only in the academy but also in practice and in policy,[185] through various "modes of norm production, regime creation and management" that include international conventions, regional norms, customary international law, national implementation processes, and state cooperation.[186]

For these jurisprudential discourses, important questions are posed by convergence and divergence in the way treaties address migrant workers in terms of both specific doctrinal questions and underlying norms and principles.

If for jurists, this untidiness is disconcerting, for those with even higher stakes it is more so. For advocates of migrant worker rights, the fractured quality of laws on migrant labor may illuminate the depth of the gap between treaties as "standards of global justice" and the reality that migrant workers may face.

181. INT'L LAW COMM'N, *supra* note 6, at 9.

182. INT'L LAW COMM'N, *supra* note 134, at 11.

183. Aleinikoff, *supra* note 4, at 477.

184. *See, e.g.*, Jagdish Bhagwati, *The World Needs a New Body to Monitor Migration*, FINANCIAL TIMES, Oct. 24, 2003, at 24; Bimal Ghosh, *Towards a New International Regime for Orderly Movements of People*, *in* MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? 6 (Bimal Ghosh ed., 2000).

185. *See* HOWSE & TEITEL, *supra* note 140. A number of intergovernmental dialogues on migration, such as the UN High-Level Dialogue on International Migration and Development, September 14–15, 2006, and the Berne Initiative of the Swiss Federal Office for Refugees, and the Global Migration Group. Several international organizations maintain extensive ongoing policy divisions on intergovernmental coordination, such as the International Organization for Migration's Commission on Global Governance. For more information on such activities, see TRACHTMAN, *supra* note 10, at 15–23.

186. Aleinikoff, *supra* note 4, at 471.