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*Labor Trafficking in the Americas in Context:
a Look into the Guest Worker Program*

**La trata de personas en América en contexto:
una mirada al programa de trabajo temporal**

Juliana Vengoechea Barrios*

Summary: I. *Introduction*. II. *Guest Worker Programs in the Agriculture Industry in the United States and Canada*. III. *Traditional Approach to Human Trafficking: Antislavery Movement*. IV. *Free Labor Approach*. V. *Successful Examples of the Free Labor Approach in Practice*. VI. *Conclusion*. VII. *Bibliography*.

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This paper is an extended version of the conference presented at the International Workshop “Trade and Investment Induced Displacement in Latin America”, organized by the Latin American Network on Forced Migration (LANFM), the Centre for Research on Latin American and the Caribbean (CERLAC) and the Centre for Refugee Studies (CRS) at York University, Toronto, Canada (October 12-14, 2011). I would like to thank Jennifer Hill for her contributions to this paper.

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RESUMEN: La trata de personas es un fenómeno social, un delito, un acto pluriofensivo de los derechos humanos y una práctica persistente a lo largo de la historia de la humanidad. Las siguientes páginas hacen una aproximación a la trata de personas desde un contexto específico, desde un espacio regional definido (flujos migratorios desde y hacia Centro y Norte América) así como desde un marco regulatorio de inmigración para trabajo temporal. Concretamente, se hace referencia a los programas de migración estacional en Estados Unidos y Canadá. Todo esto, con el fin de demostrar que la trata de personas no es un fenómeno que ocurre exclusivamente en contextos de inmigración irregular o al margen de mecanismos legales de inmigración, sino por el contrario, que ciertos mecanismos de regulación son un terreno fértil para la trata. Demostrando así como algunas de las medidas implementadas para hacer frente a esta problemática, están siendo cuestionadas, y cómo la sociedad civil y algunos académicos han desarrollado propuestas innovadoras para atender a este problema.

Palabras clave: trata de personas, trabajadores estacionales, libertad de trabajo, esclavitud moderna.

ABSTRACT: Human Trafficking is a social phenomenon, a crime, a human rights violation and a persistent practice throughout human history. The following pages approach human trafficking from a specific context, both from a concrete regional perspective (migration flows from and to Central and North America) as well as to a labor oriented immigration regulatory scheme. Particularly, the guest worker programs in the United States and Canada. In order to demonstrate how human trafficking occurs not only within contexts of irregular migration or in which legal schemes are absent, but rather how certain migratory regulation programs are fertile ground for human trafficking. Demonstrating how some of the responses and measures being implemented to tackle with human trafficking are being challenged, and how innovative proposals are being developed both by scholars and civil society.

Descriptors: Human trafficking, guest worker programs, free labor approach, modern slavery.

RÉSUMÉ: la traite des personnes c'est un phénomène social, mais aussi, un crime, une violation des droits de l'homme et une pratique qui a été présente tout au long de l'histoire de l'humanité. Dans les pages qui suivent l'approche avec laquelle on abordera le sujet est celui d'un contexte spécifique, dès un point de vue régionale concret (des flux migratoires vers l'Amérique Centrale et en provenance de celle-ci, puis en direction du Nord). Il sera également question de l'encadrement juridique de l'immigration sur la base d'un contrat de travail temporaire ; en particulier, des programmes de travailleurs invités aux États-Unis et au Canada. Tout ceci, afin de démontrer comment la traite des personnes se produit, non seulement dans les contextes de la migration irrégulière ou en absence d'un régime juridique particulier, mais, plutôt, mettant en évidence la façon dont certains programmes de régulation migratoire deviennent un terrain fertile pour la traite des personnes. Cela devrait démontrer comment certaines réponses et mesures qui ont été adoptées pour lutter contre la traite des personnes, ont finalement été remises en question, ainsi que la façon dont la société civile et certains universitaires ont développé des propositions novatrices pour résoudre le problème.

Mots-clés: traite des personnes, travailleurs invités, esclavagisme moderne, travail libre.

I. INTRODUCTION

There are many legal definitions of human trafficking, both in international legal instruments as well as in domestic statutes, particularly criminal law provisions. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, defines human trafficking as

the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs... The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.¹

The United States legislation, in the Trafficking Victims Protection Act of 2000, defines severe forms of trafficking in persons as

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.²

¹ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3 paragraph (a). New York, 15 November 2000.

² United States Code, Title 8, section 1101.a.15.T.iii. (8 U.S.C. § 1101(a)(15)(T)(iii))

Finally, the Canadian Criminal Code added in 2005 three criminal offenses to tackle human trafficking. The three offenses are: to

1. Recruit, transport, transfer, receive, hold or hide a person, or exercise control, direction or influence over an adult or a minor's movements for the purpose of exploiting or facilitating the exploitation of that person.
2. Benefit materially from human trafficking.
3. Withhold or destroy a person's travel or identification documents, such as a passport or visa, for the purpose of trafficking, or helping to traffic, that person.³

Even though there is an ample repertoire of definitions of human trafficking that are found both in international law instruments and domestic statutes, I wish to use a very basic definition, one that understands human trafficking as a social phenomenon, in the context of migration and labor.

Human trafficking as set forth in the following paragraphs is understood as the exploitation of a person's labor for the economic advantage of another, in which force is present and rights of the laborer are absent. Both force and exploitation are characteristics that make human trafficking a situation in which the person being trafficked lacks the ability to exercise rights and freedoms before its employer, and receives little to no pay for the labor he or she performs. The element of volition or consent might be absent from the very beginning of the employee-employer (trafficked person-trafficker) relationship. This is the case of a person who is brought into performing the labor against his will. However, human trafficking can evolve from a situation in which the person enters into voluntarily, but afterwards finds him/herself unable to leave.

Often when discussing human trafficking there is an overlap and confusion in the use of concepts and issues such as: human smuggling.⁴

³ Canadian Parliament, Bill C-49. November 25, 2005.

⁴ Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Migrant Smuggling Protocol) defines migrant smuggling as: "...the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national".

These issues are not mutually exclusive nor are they interchangeable concepts. However, they are concepts that are closely related. A person who is initially smuggled into a country, either as a refugee⁵ in flight of persecution or as a laborer seeking work, can later find him/herself trafficked. Unfortunately, it is often the case that human trafficking and smuggling are clearly separated, and the trafficked migrant is seen as a victim whereas the smuggled migrant is seen as an accomplice to a crime. This understanding of the issues ignores the fact that migrants often face little or no choices either when fleeing persecution or leaving socio-economic insecurity. This assumption has shaped up many policies, leaving migrants with fewer and more dangerous options.

The following pages seek to bring light into the issue of human trafficking in the presence of the legal status of the migrant, focusing on human trafficking in the context of the agriculture industry in North America through the use of government regulated migrant worker programs. It aims to prove that human trafficking not only happens in direct violation or absence of legal regulations but rather as part of them. Subsequently, there is a discussion of the strengths and shortcomings of the different approaches that have been suggested to tackle with this problem.

II. GUEST WORKER PROGRAMS IN THE AGRICULTURE INDUSTRY IN THE UNITED STATES AND CANADA

1. *The US H2A Program and its background*

Foreign born workers have been a fundamental element of the United States work force for many years.⁶ In the early 1800s and until the

⁵ United Nations Convention Relating to the Status of Refugees Art. 1.a defines a refugee as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country”.

⁶ See more: Papademetriou, Demetrios G and Terrazas, Aaron. *Immigrants in the United*

beginning of World War I European immigrants arrived to the United States and through their labor helped the expansion of the United States economy. Under the Naturalization Act of 1790⁷ borders were open and there was no cap in the number of immigrants allowed to enter. This changed in 1882 when Congress passed an act to ban the employment of Chinese laborers.⁸

Migrants from Mexico began entering in great numbers into the US after the end of the Mexican-American War in 1848. In contrast with the migrants that came from Europe, Mexican laborers were able to move freely back and forth from the United States to Mexico. The laborers entered the United States for seasons, to work on farming and mining, to later return home to México.

However in 1924 US Border Patrol⁹ was established, creating barriers to the entrance of Mexican laborers. As Berkeley's Center for Latin American Studies has pointed out, this was the first time Mexican laborers were seen as "illegal aliens". At this time and until 1965 there was no numerical limitation regarding legal immigration from México.¹⁰

With World War II came a labor shortage in the United States, and in 1942 the "Bracero Program" was created,¹¹ through the Mexican Farm Labor Program Agreement, a bilateral agreement between Mexico and the United States that allowed Mexicans laborers to work legally in the United States on a temporary basis¹². The Program was in paper a mutually beneficial agreement, which provided jobs for unemployed Mexican workers and provided the United States agriculture industry an opportunity to meet its demands for labor. In practice, the treaty opened

States and the Current Economic Crisis, Migration Policy Institute. <http://www.migrationinformation.org/Feature/display.cfm?id=723>.

⁷ United States of America, Statutes at Large, 1st Congress, 2nd Session, Page 103-104. March 26, 1790 (1 Stat 103-104).

⁸ Bauer, Mary. Southern Poverty Law Center, Report "Close to Slavery. Guestworker Programs in the US", p. 3-6.

⁹ Created through the Labor Appropriations Act of 1924.

¹⁰ Bauer, Supra note 8.

¹¹ See more: Bracero History Archive, Center for History and New Media. At: <http://braceroarchive.org>.

¹² Hager, Sovereign, *Farmworkers and forced labor: why including agricultural guestworkers in the migrant and seasonal worker protection act prevents human trafficking*, pg 177-178; supra note 1, p. 3

a gateway for exploitation of workers, who were bound by a contract written in English that tied them to one single employer without the possibility of changing employers.¹³

The program was abolished in 1964, after media exposed the abuses that workers were subjected to.¹⁴ From 1942 until 1964 it is estimated that about 4.5 million jobs were filled by Mexican workers.¹⁵

The H2A program, which is the current scheme governing guest agricultural workers, was created towards the end of the Bracero Program, to grant nonimmigrant work visas to certain foreign workers through US employers.¹⁶ The regulations that govern the H2A program make it almost identical to the Bracero Program. The H2A program is subject to several pre-conditions, such as giving preference to domestic workers over foreign workers, the filing of a job offer according to DOL regulations and many more, but in essence the H2A program is almost identical to the Bracero Program.

It is estimated that every year around 30 000 “unskilled” laborers are temporarily brought into the United States for agricultural work under the H2A guest worker program.¹⁷

2. Canada's Seasonal Agriculture Worker Program (CSAWP)

Canada has also been a nation greatly dependent on foreign workers for the expansion of both its geography and economy. For example, Chinese migrant workers were the driving force that made the national railroad possible in the 1880s.

¹³ See more: University California Berkeley, Center for Latin American Studies, MIGRATIONS: A Collection of Views on Mexican Immigration to the United States. <http://clas.berkeley.edu/Outreach/education/migrations2003/bracero.html>.

¹⁴ Geffert, Gary “H-2A Guestworker Program, A legacy of Importing Agricultural Labor, in *THE HUMAN COST OF FOODS: FARMWORKERS' LIVES, LABOR AND ADVOCACY*, pg 113. ; Supra note 3.

¹⁵ Bauer, Supra note 8.

¹⁶ See more: USCIS website: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a-3e5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD>.

¹⁷ Bauer, Supra note 8.

The Canadian Seasonal Agriculture Worker Program (SAWP) is a guest worker program that seeks to counteract labor shortage in the Canadian agricultural sector. This program is authorized by the federal government through the Department of Human Resources and Skills Development (HRSDC) and administered by privately run user-fee agencies.¹⁸

The Canadian guest worker program is the product of bilateral agreements between the country of origin of the worker and Canada where the governments of both countries recruit and select candidates.¹⁹

The first SAWP agreements were reached in the 1960s with Caribbean countries, and in 1974 Mexico began sending workers to Canada. About 85% of guest workers travel to Ontario to work on farming. The maximum stay is 8 months, approximately 18,000 migrant farm workers from the Caribbean and Mexico arrive in Canada to work in the fields, orchards and greenhouses every year.²⁰

3. *Exploitation under guest worker programs*

Despite the differences between the US and Canadian migrant workers programs, which are several, there are common elements that lead to work conditions that are exploitative in nature and that turn the relationship between employer and employee one of forced labor.

The Southern Poverty Law Center, in its 2006 report “Close to Slavery: guest worker Programs in the United States” exposes many of the issues that will be highlighted here.

Exploitation generally begins at home. US Employers find their workers through labor recruiters that charge high fees to the worker,

¹⁸ See more: Human Resources and Skills Development Canada http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml; Commission for Labor Cooperation, *Protection of Migrant Agricultural Workers in Canada, Mexico and the United States* <http://www.naalc.org/english/pdf/study4.pdf>;

¹⁹ Hill, Jennifer. “Binational guestworker unions: moving guestworkers into the house of labor” in *FORDHAM URB. L.J.* Vol XXXV, pp. 312 and 313.

²⁰ Justice for Migrant Workers, *The seasonal agriculture workers program* <http://www.justicia-4migrantworkers.org/bc/pdf/sawp.pdf>.

that range anywhere from \$500 to over \$10,000. The fees are charged to cover the cost of travel, visa processing and other expenses. Workers obtain high interest loans to cover these fees, and generally have to leave the deed to their house as collateral. From the start-off workers begin their seasonal employment with high debts, which many times takes several years to be repaid. Even though the US legal provisions require employers to reimburse the cost of travel and visas, these rarely get paid back to the worker.²¹ In the case of the Canadian Program, employers need not to cover or reimburse the cost of travel to Canada, so workers who wish to travel usually also have to take loans to afford the cost of travel. Many times workers have to obtain the money from loan sharks²² that use the safety of the worker's family as leverage and will constantly harass and threaten the families.

Frequently, the workers find themselves in situations where they are held in debt bondage, and are unable to leave, even when their visas have expired, until they pay their debt in full.

Given that in the United States the H2A visa is tied down to a single employer, the employer holds what has been referred to as the "deportation card" in the employment relationship. Often workers' passports are withheld under the argument that the employer is the owner of the visa. If the worker complains about working conditions, unpaid wages, or anything else regarding their health and safety, employers will threaten the employee with calling Immigration and Customs Enforcement (ICE) and getting them deported. This necessarily implies that the workers live and work in constant fear. Additionally, as Human Rights Watch reported while examining the H2A Program in North Carolina, there is a widespread fear of being blacklisted if they discuss their employment conditions with legal aid services or if they become active in the union. Being deported or blacklisted would make it impossible to seek a visa to return to work in the future.²³

²¹ Bauer, Supra note 8, pp. 9-11.

²² See more: *The Economist. Canada's guest workers. Not such a warm welcome. The temporary foreign workers pouring into Canada are often exploited*, November 22, 2007. <http://www.economist.com/node/10177080>.

²³ Bauer, Supra note 8, pp. 15-17

Despite both Programs having specific provisions regarding wage and working hour conditions, in practice workers get paid substantially less than what they were promised and are entitled to. Likewise, in many cases they are paid according to the amount of produce they pick, the hours spent preparing the fields for harvest are unpaid.²⁴

III. TRADITIONAL APPROACH TO HUMAN TRAFFICKING: ANTISLAVERY MOVEMENT

Human trafficking has gained increased awareness in recent years. Media coverage such as CNN's "Freedom Project" and influential books like Kevin Bales' "The slave next door" have put human trafficking on the forefront of human rights violations. The approach that has been most publicized is one that presents human trafficking as a practice similar if not equal to slavery. Modern day slavery is a synonym that is commonly used to refer to human trafficking. This approach has been very popular because it has found a way to unite great numbers of people towards what is considered to be both a morally reproachable and an outrageous practice. This has allowed for the movement to gain momentum and many supporters. The anti slavery movement or prohibition approach at first sight seems effective and successful, as James Pope highlights, it defines an unwanted activity, punishes the perpetrators and assists the victims. The moral reproach of human trafficking facilitates mobilizing people and tends to neutralize or isolate opposition.²⁵ This has been the case with sex trafficking, where both feminist and traditional religious groups have found common ground and have worked together.²⁶ Equal-

²⁴ See more: Southern Poverty Law Center, Immigration Justice reports; Polaris Project.

²⁵ Pope, James G., "A free labor approach to Human Trafficking", in *University of Pennsylvania Law Review*, vol.158, pp. 1854.

²⁶ Carl Raschke, a professor of religious studies at Denver University said: "Evangelical Christians and secular feminist organizations are not people that would regularly work together on international causes." But human trafficking, he says, "is one of those hot topics... Everybody wants to get involved". http://blogs.westword.com/latestword/2011/03/human_trafficking_conference_university_denver.php.

ly, it has allowed for a more globalized consensus regarding the international criminalization of the issue, allowing for different countries to cooperate with each other in the prosecution of traffickers.²⁷ However, in practice the anti-slavery movement is somewhat problematic. On the one hand it seeks to protect the “perfect victim”,²⁸ a person who has been pervasively abused and coerced to work through physical or extreme violence. However in cases of economic exploitation of workers in which force is exerted through other means that do not fall under the “extreme” forms of violence, support and political leverage is harder to find. Bales and Soodalter have suggested that “other practices of labor exploitation do not involve violence sufficiently immediate or intense to amount to slavery”.²⁹ This search for the “perfect victim” one that has been subjected to “enough” abuse is problematic for advocates and attorneys who often find cases in which exploitation and force is exerted in different ways that do not meet this high, exceptional standard.

The antislavery movement has focused mainly on the prosecution of traffickers, which has presented several difficulties. On the one hand, prosecutors have a very hard time prosecuting cases under human trafficking criminal statutes and proving the case is often a very difficult and costly task. Prosecutors have to invest greatly limited resources to prosecute the cases. Sometimes they have to make a cost benefit analysis, deciding to prosecute the cases under other criminal statutes where their case is easier to prove. As Anthony DeStefano has pointed out, prosecutors have to reject a high proportion of human trafficking

²⁷ After the Palermo Protocol was enacted, the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) was created to promote the global efforts to fight against human trafficking and managed in cooperation with ILO, IOM, (UNICEF), the Office of the High Commissioner for Human Rights (OHCHR), the Organization for Security and Cooperation in Europe (OSCE). See more: Human Trafficking: A Brief Overview. Social Development Notes. Conflict, crime and violence. No. 122 / December 2009. Page 10 at http://sit.eresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1239390842422/6012763-1239905793229/Human_Trafficking.pdf.

²⁸ See more of the “perfect victim” conceptualization in Jayashri Srikantiah, Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law, 85 B.U. L. REV. 151, 179-84 (2007).

²⁹ Bales, Kevin and Soodalter, Ron, *The slave next door: Human Trafficking and Slavery in America Today*, 2009.

cases based on the weak evidence, anticipating the difficulties of proving criminal intent, problems with witnesses and the low deterrence value of the case.³⁰ This has been the case with forced labor in agriculture which is often prosecuted under labor law violations or sex trafficking cases prosecuted under prostitution statutes.³¹

Likewise, the traffickers who are prosecuted and convicted are mostly those who are at the bottom of the chain of exploitation, who are easily replaceable, and the people at the top are very hard to prosecute because culpability is hard, if not impossible, to prove.³²

One of the most common measures that have been adopted to combat human trafficking is heightened border control. This measure starts with the wrongful assumption that human trafficking only occurs across borders and through illegal means of entry. Furthermore, as James Hathaway has explained thoroughly and with great concern in an effort to respond to transnational trafficking, the expansion of border control has also heightened the control of people smuggling.³³ People smuggling is many times the only way migrant workers have been able to adjust to the global economy and to reach a place where they can find employment. Tightened border control tends to raise the cost of migration, increasing the indebtedness of immigrant workers to labor smugglers and rendering them more vulnerable to workers' rights violations and debt bondage.³⁴

Finally, the most troubling issue with the prohibition approach or at least as it has been developed so far, is that it does very little for the persons who are being exploited. As Pope points out "it does nothing to ensure that freed slaves have somewhere to go".³⁵ Protections under the TVPA in the United States will grant victims of human trafficking

³⁰ DeStefano, Anthony M., *The war on human trafficking: U.S Policy assesed 2007*, pp. 133-134. In Pope, Supra note 25. p. 1857

³¹ See more: University of Michigan Law School, Human Trafficking Law Project at <http://www.law.umich.edu/clinical/humantraffickingclinicalprogram/humantraffickingproject/Pages/default.aspx>.

³² Pope, Supra note 25 pg 1856

³³ Hathaway, James "The human rights quagmire of "human trafficking"" in *Virginia Journal of International law* (2008).

³⁴ *Idem*.

³⁵ Pope, Supra note 25. p. 1857.

a U or T nonimmigrant visa, if the person assists law enforcement in the investigation of the traffickers and meets the statutory definition of human trafficking. Once they are granted the visa they are able to access some of the social services similar to those that refugees receive. However, unless they are minors, persons who are trafficked will only receive these benefits if they assist law enforcement. This makes social assistance dependent on criminal investigations and prosecutions. Persons who are trafficked are not identified as victims of human trafficking and are often deported for overstaying the authorized period of their visas, for immigration law violations, such as entering illegally, and are charged and convicted with state and federal crimes.

IV. FREE LABOR APPROACH

James Pope, who advocates for a free labor approach to human trafficking, highlights three strengths of this approach. First, it focuses on the workers rather than on the traffickers, pursuing the granting of rights that secures economic independence or providing them with tools that allow them to exercise what Pope calls the “power below”.³⁶ Second, it does not rely primarily on government resources and enforcement, but on worker self activity, and lastly it focuses on the creation and sustenance of an alternative to slavery, where workers have not only the possibility to walk away from their employers but can also exercise rights that are essential to participating in a system of free labor.³⁷ However, these advantages contrast with the great disadvantage that consensus and widespread support for free labor rights and practices is harder to find. The free labor approach does not have the political leverage and advantages of the antislavery movement.

Strong supporters of the prohibition approach, Bales and Soodalter have recognized the importance of free labor rights, especially those of self-organizing and concerted activity, particularly in industries such as

³⁶ As James Pope explains, “When workers have rights they can exert the “power below” to give employers the “incentive above” to avoid slavery and servitude”, *Supra* note 25, p. 1859.

³⁷ *Idem.*

agriculture and domestic work. They agree with Pope, that when workers have rights they can exert the “power below” to give employers the “incentive” above to avoid forced labor.

V. SUCCESSFUL EXAMPLES OF THE FREE LABOR APPROACH IN PRACTICE

Tracing back to the example with which we started. In Immokalee, a town in the southern part of the State of Florida, known as the “tomato capital of the US”, the tomato fields have been the destination of many documented workers, holding H2A visas as well as of undocumented workers. Immokalee has been the fertile ground of many cases of human trafficking, including many that have had media coverage such as the Navarrete brothers’ case. Workers in the tomatoes fields faced all kinds of abuses, ranging from extensive periods of work without pauses to drink water to physical beatings and killings.³⁸

There, the Coalition of Immokalee Workers, a grassroots movement formed by low wage farm workers in 1993 to improve conditions and compensation, has been active in advocating for the rights of all migrant workers, using both free labor approach and anti slavery strategies. A particularly successful strategy was the boycott they launched in 2001 against the Taco Bell food chain which is part of Yum! Brands, the world’s largest restaurant corporation.³⁹ Exposing in the media the inhumane working conditions and the abuse workers were subjected to in the tomato fields and how badly they were paid, they demanded that the food chain pay one extra cent per pound of tomatoes, and those proceeds would go towards the raise of wages. In 2005 the boycott proved to be successful when Taco Bell agreed to CIW’s demands. The agreement established several groundbreaking improvements for tomato pickers. For the first time a fast-food corporation was bound to make an ongoing payment to farm workers in its supply chain to ad-

³⁸ Bauer, *Supra* note 8.

³⁹ See more: Coalition of Immokalee Workers webpage <http://www.ciw-online.org/agreementanalysis.html>; Yum! Brands website <http://www.yum.com/company/ourbrands.asp>.

dress substandard farm-labor wages.⁴⁰ This resulted in almost doubling the percentage of the final retail price that goes to the workers who pick the product. The first Code of Conduct for agricultural suppliers in the fast food industry was established, which includes a monitoring body for complaints, composed of members of the CIW. Finally it created market incentives for agricultural suppliers willing to respect their workers' human rights, even those rights that are not guaranteed by domestic law. It gave transparency to 100% of the purchases of tomatoes that Taco Bell does in the State of Florida.⁴¹

CIW's Fair Food Campaign has also been successful in reaching agreements with McDonald's, Burger King, Subway, and Whole Foods Market.⁴²

Centro de los Derechos del Migrante (CDM) is the first transnational workers' rights law center based in Mexico to focus on U.S. workplace rights. CDM has been successful in several fronts pursuing free labor strategies. An example of this is the partnership it established with Proyecto de Derechos Económicos Sociales y Culturales (PRODESC) a Mexican NGO in their Binational Labor Justice Initiative. Together they developed a "Manual for binational justice: a regulatory framework for the defense of migrant workers in the United States and México" in 2010.⁴³ This is a reference manual that compiles Mexican and US labor and immigration regulations as well as immigrant and labor rights under international law. CDM and PRODESC understand binational labor justice as fundamental to guarantee and promote labor rights.⁴⁴ Through this initiative different workshops were developed for lawyers and advocates from Mexico and the US to discuss the tools that exist in the

⁴⁰ *Idem.*

⁴¹ See also: Coalition of Immokalee Workers webpage <http://www.ciw-online.org/agreementanalysis.html>; Pope, *Supra* note 25 pg 1863; Bales and Soodater, *supra* note 28.; Bauer, *Supra* note 8.

⁴² See also: Coalition of Immokalee Workers webpage: <http://www.ciw-online.org/101.html>.

⁴³ See more: PRODESC webpage <http://www.prodesc.org.mx/wp-content/uploads/2010/10/en/manual-binational-justice-presentation.pdf>.

⁴⁴ See more: PRODESC webpage <http://www.prodesc.org.mx/english/labor-rights/>.

current legislation and to discuss the possibilities of strengthening binational alliances.⁴⁵

Finally, as Jennifer Hill exposes, the idea that was prevalent in the past, under which it was impossible to organize guest workers, has proven to be untrue. In the United States, the Farm Labor Organizing Committee (FLOC) in 2004 received recognition for about 8,500 guest workers employed by the North Carolina Growers Association. Likewise in 2006 the United Farm Workers signed the first nationwide union contract protecting agricultural guest workers. Global Horizons is one of America's largest suppliers of foreign farm workers, operating in dozens of states.⁴⁶

The United Food and Commercial Workers is an international labor union that has been successful in organizing several farms in Canada as part of a long term outreach program. An example was a contract between UFCW Canada and Floralia Growers of Abbotsford, B.C., which provides wage improvements, and establishes protections for the rights of seasonal migrant agriculture workers to return to Canada under the federal government's SAWP.⁴⁷

In Canada several noteworthy cases have helped improved the possibilities of unionizing for guest workers that come to the country under SAWP. The Supreme Court in a 2007 ruling held that the Canadian Constitution provides "at the least the same level of protection" for the right to bargain collectively as granted by the standards of the ILO.⁴⁸

VI. CONCLUSION

We live in a globalized world, where the demand for labor is not sufficiently met in some countries, whereas in others there is labor short-

⁴⁵ See more: CDM webpage <http://cdmigrante.org/The%20Binational%20Labor%20Justice%20Initiative.html>.

⁴⁶ Hill, Supra note 19; See also: http://www.ufw.org/_board.php?b_code=org_vic.

⁴⁷ UFCW Canada http://www.ufcw.ca/index.php?option=com_content&view=article&id=661&catid=5%3Amedia-releases&Itemid=5&lang=en.

⁴⁸ Pope, Supra note 25, p. 1866.

age. This is the case of America as a whole. North American countries do not have enough laborers to meet the needs of the agriculture industry. In contrast, Southern and Central American countries have many laborers and not enough jobs.

Guest worker programs are not as some have called it “a distinctively modern form of transnational migration”, it is possible to find examples of such programs in the early 19th century where Polish agriculture workers traveled to work in Prussia, the workers from what is now Mozambique travelling to work in diamond fields in South Africa and workers from Philippines working in the Middle East and Asia.⁴⁹ As Cindy Hahamovitch has explained, all these programs were and are compromises designed to maintain high levels of migration that are acceptable to anti-immigrant movements. This allows employers to hire foreign workers that can be isolated and who work for little to no pay, who are easily threatened and disciplined.⁵⁰ Governments receive development aid from poor countries in the form of ready workers without the responsibility of integrating them to their society or provide them with welfare. This is what Hahamovitch defines to be the “perfect immigrant” theory. However the imperfections of the system are self evident.

This presentation seeks to illustrate how abuse does not only happen in the realm of “illegality”, understood to be those cases in which migrants are undocumented, but rather that the legal schemes regulating migration can easily become the tools for abuse and exploitation. I do not wish to say that a migrant worker is better off being undocumented than documented, because I do not believe this to be the case. However, I do think a worker can be subjected to the exact same situation of abuse by an employer in the fields regardless of whether he was recruited and arrived legally, was smuggled, or was trafficked across borders. If the person is not free to leave, it being because he is indebted with his coyote, a loan shark back home, or because he is retained against his will, and that person is performing work for little to no pay, under conditions that threaten his / her health and safety, that person is in a situa-

⁴⁹ Hill, *Supra* note 19, p. 312.

⁵⁰ See: Cindy Hahamovitch, “Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective 1”, in 44 *LABOR HIST.* 69, 2003.

tion of forced labor, understood to be a form of human trafficking. The effects of this trafficking do not only affect the laborer in the field, but his family that might be miles and miles away.

The International Labor Organization (ILO) estimated in 2005 that global profits made from forced laborers exploited by private enterprises or agents reaches \$44.3 billion every year, and that the agriculture industry is “probably host to the largest number of forced laborers”.⁵¹

Human trafficking, and more specifically labor trafficking can be tackled both negatively, as the prohibition approach suggests, and positively through free labor strategies. Anti slavery measures have not only been highly popular but in many cases effective. This presentation illustrated how free labor solutions, which tend to be less popular, have also been effective, and have given workers the power to advocate for their rights. Hopefully, the free labor approach will someday gain the momentum that the anti slavery movement has today, and together they build paths that make of the agriculture industry one in which people find jobs that are sustainable and dignifying.

For this to be achieved, compromises have to be reached. As members of a globalized world we need to accept our part, and be aware that the patterns of our demands have a direct effect on how others are treated. If we become silent spectators of this issue, improvements will be harder if not impossible to reach.

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