Globalization and Migration for Work: Human Rights Questions

By Rebecca Smith, National Employment Law Project
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Prosecute, Prevent, Protect: Migrant Labor, Forced Labor and Human Rights

Introduction

In the Dominican Republic, Haitian sugar-cane cutters are housed in deplorable living conditions, their labor rights ignored. (Kennedy and Tilly 2001) In the United States, Indian “guestworkers” live in sweltering labor camps, crowded 24 workers to a room, under curfew. (Preston, 2008)

In Ireland, a work permit regime for migrant workers that ties immigrant workers to one employer is criticized for leading to abuse of migrant workers. (Irish Independent 2001) The same system exists in the US and around the world.

In South Korea, despite a court ruling to the contrary, the government refuses to recognize a union because its members include unauthorized workers. In the United States, despite an international court ruling to the contrary, unauthorized workers illegally fired for union activities are not entitled to compensation.

One out of every 35 persons living on earth is an international migrant. (Global Commission on International Migration 2005) Nearly 200 million people (including migrant workers and their families, refugees and permanent migrants) are now living permanently or temporarily outside of their country of origin, and at least 50% of these are economically active. The United States is home to some 20% of the world’s migrants. Six to seven million of these
are unauthorized immigrant workers. Another 155,000 are temporary guestworkers in seasonal industries. (Department of Homeland Security Yearbook 2007)

A number of trends have meant both that companies can make huge profits by moving money and people around the globe, and that, for increasing numbers of people, migration has become the only option for a better future. These include the traditional “push” and “pull” factors of poverty and war and the more recent militarization of borders. They also include newer economic and political developments that come under the heading of “globalization” – internationalization of financial markets, the increasing role of the International Monetary Fund and the World Trade Organization on governance policies, new technologies in communication and transportation, deregulation and privatization, and the surge in multi-national corporations. At the same time that the pressure to migrate intensifies, governments have enacted restrictive immigration policies and harsher practices and penalties for violations of these laws. It has become at once more difficult, costly and dangerous to migrate and impossible to stay home.

In the United States, as in many countries, would-be immigrants must choose between migrating illegally and taking their chances at living in the shadows and engaging in low-paid, high-risk jobs, or entering the country as legal, temporary guestworkers, often after paying huge “recruitment fees” to labor contractors which must be worked off in this country. While migration patterns, economic opportunities, and national laws vary greatly from country to country, migrants worldwide face eerily similar treatment: legal schemes that exclude them, whether lawfully or unlawfully present in a country, from labor protections; unregulated recruitment practices that force them into debt bondage; and temporary worker programs that deny workers the ability to change jobs or work towards permanent settlement in the host
country. At the same time, tepid protection schemes and practices mean that abuses go unremedied and that victims of trafficking are left without recourse.

This paper represents a modest effort to gather the law and practices that would represent a more comprehensive protection scheme. I argue that without correcting imbalances in labor rights between migrants (both documented and undocumented), on the one hand, and nationals of a country on the other; without confronting three aspects of the guestworker program: unregulated labor brokers, the “single employer” rule, and the lack of a pathway to permanent residence in a country, and without aggressive efforts to identify and protect victims of trafficking, migrant workers will continue to fall into situations of forced labor. The United States, which sees itself as a champion in the fight against slavery worldwide, must confront these causes of slavery at home, in order to live up to its obligations under international law and to lead by example. Fortunately, models exist – in treaties, judicial pronouncements and the approaches of some governments and migrant communities themselves – that policy-makers within the United States and worldwide can consult, study and adapt.

**Current US Policies and Practices**

*The Treatment of Unauthorized Workers*

The United States’ highest court and various state courts have excluded unauthorized workers from employment rights and remedies available to their documented and U.S. citizen counterparts. (1) Discrimination against unauthorized workers in practice has always been with us, but discrimination in law was further fueled by a United States Supreme Court decision, *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, in which the country’s highest court limited unauthorized workers’ right to an effective remedy for violation of their freedom of association. (2)
In *Hoffman*, the United States Supreme Court held that an unauthorized worker, fired in retaliation for participating in a union organizing campaign, was not entitled to the remedy of back pay (compensation for wages lost because of unlawful firing) under the National Labor Relations Act (NLRA) due to his immigration status. Although unauthorized workers are considered “employees” under the NLRA, after *Hoffman*, they are no longer entitled to back pay when illegally fired in retaliation for having exercised their right to freedom of association (unless they can show that they currently have lawful employment status). (NLRB General Counsel 2002) After *Hoffman*, the only remedies available when unauthorized workers are wrongfully terminated are as follows: the employer who illegally fires an unauthorized worker may be ordered to post a notice at the workplace, and may be told to “cease and desist” violating the law. There are no monetary remedies available to the unauthorized individual who suffers the retaliatory termination.

Though unauthorized workers have always been subject to arguments that they are without labor rights and to retaliation for claiming those rights, the impact of *Hoffman* has extended far beyond its narrow holding, and created an explosion in litigation over migrant workers’ rights. As a consequence, some states have relied upon the *Hoffman* decision to sanction unequal treatment under other core labor and employment laws, either by eliminating or severely restricting state-law based workplace protections for unauthorized workers. These include access to state workers’ compensation for workplace injuries, protection from workplace discrimination and entitlement to lost wages for injuries causing loss of work. (3) Under the current legal scheme, whether an unauthorized worker is entitled to the protection of a variety of labor rights depends largely on the law of the state in which he or she is employed.

Lack of formal remedies, coupled with the “enforcement only” approach to migration that is exemplified in the ten-fold increase in workplace immigration raids, many of them carried
out in military-like fashion, with subsequent criminal prosecutions of migrants, have pushed increasing numbers of unauthorized workers underground. Policies and practices that focus on immigrants as criminals rather than victims of crime are sure to miss exploitative situations. Perhaps the clearest recent example of this dynamic is the May 2008 immigration raid at Agriprocessors, at the time the largest raid in the history of the United States. Of the some 600 workers arrested in Postville, Iowa, 306 were turned over to the U.S. Attorney’s office to face criminal charges for working with false papers including Social Security fraud and identity theft. (Leopold 2008) At the time, Agriprocessors was under investigation by at least three state and federal labor agencies, and the Immigration and Customs Enforcement agency (ICE) knew this. In fact, in a section of the warrant application used to gain entry into the plant, an ICE agent cites repeated serious health and safety and wage and hour violations as evidence, not that workers may have been victims of labor trafficking, but that the company may be guilty of harboring unauthorized workers. (Hoagland 2008) Rather than interview the workers as potential victims of trafficking, ICE chose to prosecute them.

*The Treatment of Guestworkers*

There are currently two guestworker programs for temporary work lasting less than a year in the U.S.: the H-2A program, for temporary agricultural work, and the H-2B program, for temporary nonagricultural work. In 2007, the United States issued about 155,000 H-2B visas and about 87,000 H-2A visas, primarily to Mexicans, though the number of guestworkers from other, non-Spanish speaking countries is on the rise.
Many of these workers face abuse before they ever leave home. Labor contractors and recruiters may impose significant fees, ranging from $500 to well over $10,000, on workers as a condition of gaining access to the job-applicant pool in the foreign country. (Southern Poverty Law Center 2007) They may charge high interest rates for lending the money to pay those fees. They may threaten that family members in the home country will be harmed if the participating worker does not comply with the recruiters’ demands. They may also threaten the worker inside the U.S. with dire consequences if the worker challenges unfair or illegal conduct during the employment.

Workers have little recourse to recover these fees. While courts have ruled that H-2A and H-2B workers are entitled to the protection of the Fair Labor Standards Act (covering minimum wage and overtime pay), and that certain recruitment fees and travel costs must be repaid by employers at the beginning of employment to the extent that they reduce wages below the minimum wage, the United States Department of Labor (DOL) has refused to enforce the rulings, leaving vulnerable workers to attempt to recover these costs on a case by case, court by court, basis. (4)

Once workers arrive in the United States, promises of steady work at lucrative wages frequently go unmet, with many workers kept idle, particularly at the beginning or end of the season. Nor are guestworkers entitled to safety net benefits such as unemployment compensation or Social Security benefits. For employees injured at work, workers’ compensation benefits are often cut off when they return to their home countries. Even worse, in the case of death of an employee, many individual state statutes provide for payment of lower amounts of survivors’ benefits to family members living outside the United States.

These violations of the guestworker contract often go unremedied for a number of reasons. Like guestworkers in other countries, H2A and H2B workers are only allowed to work for the
employer who sponsors their visa. If a job is lost, so too is the right to remain in the United States. The common practice of withholding of passports, though illegal, serves to ensure that workers stay put. Many workers find the potential consequences of a complaint, which include not only job loss and loss of a visa, but potentially loss of the deed to their homes, as too high a price to pay.

Further, there is frequently no one to complain to: U.S. DOL takes the position it cannot legally enforce the contractual rights of guest workers. Efforts of non-profit organizations that operate transnationally cannot meet the need. (5) Rather than making efforts either legislatively or administratively to strengthen its administrative powers, DOL has recently proposed rules that would exacerbate its weaknesses, by reducing its level of oversight and continuing a disavowal of an enforcement role for itself. (U.S. DOL 2008 and 2008a) Nor are most guestworkers entitled to the assistance of legal aid lawyers: except in the context of H2B reforestation workers, H2B workers are explicitly denied the right to representation by no-cost lawyers under the Legal Services Corporation Act.

**Trafficking in Forced Labor and the US Response**

Migrants can be taken advantage of or be subjected to exploitation by those who facilitate their journey. Many migrants or their families who cannot repay their debts are forced into slave-like working conditions and life-long debt or bondage. Others may become targets of human traffickers who force them to toil in sweatshops, fields, brothels or construction sites and to live under inhumane conditions. (International Red Cross 2007)
In the United States and around the world, the situation of migrant workers, both lawfully and unlawfully present in the country of employment, is almost by definition one of forced labor, marked by coercion, deception, confinement, exploitation and, frequently, violence. Cases of forced labor and debt bondage have been chronicled by many sources, ranging from the Central Intelligence Agency to the Southern Poverty Law Center. (Richard 2000; SPLC 2007; Knudsen, 2005; McKee 2005; Nam 2007) The unauthorized construction worker or domestic worker, often dependent on the employer for both housing and employment, isolated by language and geography, kept working by the implicit or explicit threat of deportation, is easy prey for an employer who is disinclined to comply with labor laws. In many guestworker programs, the lack of visa portability, putting control of workers’ immigration status in the hands of the employer, combined with exploitation in recruitment and subcontracting, leave workers in extremely vulnerable situations.

The U.S. Department of State estimates that 800,000 people are trafficked across international borders annually. (U.S. Department of State 2008) The International Labor Organization estimates that, at any given time, there are 12.3 million people in forms of involuntary servitude worldwide. (ILO 2005) Of these, estimates of numbers of workers trafficked into the United States vary from a low of 14,500 per year to a high of 50,000 per year. (State 2008; Trafficking Victims Protection Act Preamble 2000)

In various statutes, the United States has long pledged not only to end slavery, but to eradicate its “badges and incidents.” (McKee 2005) Towards that end, in 2000, Congress passed key legislation -- the Trafficking Victims Protection Act of 2000 (TVPA) -- which provides for prosecution, prevention and protection of victims of trafficking within the United States. The TVPA included broad definitions of trafficking, including debt bondage and involuntary servitude. It also created new trafficking-related crimes based in part on these expanded
definitions (18 U.S.C. §§ 1589-1594). It provided that victims of trafficking would be eligible to remain in the United States, under a newly-created T visa if he or she (1) is a victim of a severe form of trafficking, (2) has complied with any reasonable request for assistance in investigation or prosecution (or is under eighteen); and (3) would suffer extreme hardship if removed from the country. Social benefits are available to provide a safety net while victims recover. The TVPA also provides a U visa for survivors of crime who have suffered substantial physical or mental abuse and have been helpful, or are likely to be helpful in prosecuting the crime. In 2003, the statute was amended to include a private right of action for victims of trafficking, after advocates noted than only a few hundred victims per year were being offered T visas.

After nearly a decade, the numbers of victims who receive T and U visas has remained low, with fewer than 300 T visas issued in 2007. (U.S. Department of State 2008) To date, no U visas have been issued.

Critics point out a number of shortcomings in the law. Foremost among them is that law enforcement tends to view trafficking victims only in the context of the stereotypical – a female worker, literally sold into work for the purposes of prostitution, or, as one commentator put it, “chained to a bed in a brothel.” (Haynes 2007) The broad, nuanced, continuum represented by what is regarded only as “smuggling,” on the one hand, (in its simplest case, where a worker pays to be guided across international boundaries and does not remain in he control of the smuggler), and “trafficking,” on the other (the stereotypical case of sexual slavery), often escapes law enforcement’s understanding. In a number of cases, law enforcement has declined to prosecute cases unless there was an actual physical barrier preventing the workers’ escape. (Kim 2007)
Second, within these stereotypical cases, the linkage to prosecution means that law enforcement tends to see as victims only those whom law enforcement itself has rescued. The Department of Justice (DOJ) has also taken the position that victims of trafficking must be processed as deportable aliens by ICE before any ICE interview to determine whether they are victims of trafficking. This relatively new requirement, which is very intimidating and has potentially serious ramifications for the victim, has undoubtedly prevented some trafficked people from reporting their cases to DOJ.

The reluctance of victims to come forward may also be related to the juxtaposition of large-scale immigration raids against a protectionist scheme. As exemplified in the Agriprocessors raid, ICE does not screen potential victims of trafficking who are picked up in immigration raids, even when it knows that labor abuse is being investigated at a workplace. Victims arrested in a raid may face detention and deportation, rather than help with visa applications, should they come forward. Victims who have not been “rescued” by law enforcement but identified by non-governmental organizations, must engage in a complicated dance with the Department of Homeland Security (DHS) to ensure that they can make their applications without being exposed to detention.

Third, prosecutions under the Act have been overwhelmingly against sex traffickers, as opposed to labor trafficking. The focus of labor trafficking prosecutions has not been on large corporations who, directly or through labor recruiters, subjected workers to debt bondage and forced labor, and have instead targeted individual homeowners or small businesses.

As a recent example of this narrow view of the law, Indian welders employed as guestworkers for Signal International, based in Pascagoula, Mississippi, left their jobs and filed litigation in March 2008. The workers claimed that they had been forced to work through force,
fraud and coercion. The guestworkers were charged recruitment fees of up to $20,000, and were housed in closely guarded, overcrowded labor camps. They faced aggressive retaliation when they organized to defend themselves against what they viewed as illegal activity. (Preston 2008; Rosenbaum 2008) Despite pleas by Congressional members and the amassing of reams of evidence in their case, six months after reporting the trafficking crimes, the Department of Justice has continued to refuse to grant them “continued presence,” or the temporary right to remain in the United States as victims of trafficking.

Finally, particularly in a post 9/11 world, there are also political pressures to treat smuggling and trafficking as distinct phenomena, with the vast majority of immigrants treated as law-breakers, rather than victims. (Anderson and O’Connell Davidson 2003) The Signal workers were subject to surveillance by ICE officials as they engaged in a "truth tour" in support of their cause, traveling from Louisiana to Washington, DC. (Daily Labor Report 2008)

As part of the TVPA, the United States took on a role of monitoring of anti-trafficking efforts worldwide. In a yearly report, the United States State Department reviews the indicia of trafficking, conducts case studies worldwide, makes recommendations for “best practices,” and grades countries on their performance. The report is an invaluable tool and contribution to anti-trafficking efforts. However, there is a disconnect between the State Department’s recommendations and the practices of law enforcement, including ICE, within the US. For example,

The State Department criticizes countries that focus on the voluntary nature of transnational movement and that do not see undocumented workers as potential victims of transnational organized crime.
It recommends that destination countries have systems in place to screen workers, in order to identify victims of trafficking before they are deported for immigration violations. However, the United States has no such screening system.

While the State Department identifies debt bondage for foreign temporary workers as a form of trafficking, the Department of Labor refuses to follow court rulings that would serve to cancel these debts.

The State Department identifies confiscation of documents as a trafficking tool, but the U.S. has never prosecuted a major employer for document confiscation.

Law and Practice: What can the US learn from the International Community?

Slavery and prevention of forced labor are the first principles of international human rights law. The 1815 Declaration Relative to the Universal Abolition of the Slave Trade was the first international human rights instrument, issued in condemnation of the trans-Atlantic slave trade. It was further refined in two League of Nations Conventions in 1926 and 1930, the latter of which added a prohibition on forced labor, in a series of ILO Conventions, and made a feature of the ICCPR, the Universal Declaration of Human Rights, and is recognized in a number of regional instruments such as the American Declaration of Human Rights, American Convention and the European Convention. More recently, the modern versions of slavery were addressed in the United Nations Transnational Organized Crime Convention, and its Protocols on smuggling and trafficking. (Weissbrodt 2002)

The United States has recognized the primacy of anti-slavery efforts in international law in the preamble to the TVPA. 18 U.S.C. 7101(b)(23) If the U.S. and other countries are committed to eradicating slavery, all emblems of slavery and all of its forms in the world, they
must adopt the best practices that exist worldwide in anti-trafficking conventions and policies. But countries must also go further, as I hope this modest review of experiences has shown. If, as the State Department has said in its annual report on trafficking, there is a strong correlation between forced labor and policies that exclude groups of workers from the protection of labor laws, then the U.S. and other countries must have a more comprehensive response. States must take more seriously other human rights principles, including those that outlaw discrimination and that provide for labor rights such as free access to employment, and apply these principles against their policies towards unauthorized workers and in guestworker programs. With respect to exclusions of both unauthorized workers and guestworkers from core labor protections, States are bound by ratification of particular treaties, as elaborated in judicial pronouncements, to remove such exclusions. Finally, states, including the United States, must look seriously not only at substantive law but at the best practices that have emerged as part of the worldwide debate on migration.

*The law: The Principle of Non-discrimination and its implications for labor-migration policies*

Principles of international law, including several instruments signed and ratified by the United States, offer protection for migrant workers with respect to a destination country’s labor laws. Most instruments, either explicitly or through interpretation, make no distinction between the rights of migrants in either regular or irregular situation, on the one hand, and nationals of a country, on the other. For example, the International Covenant on Civil and Political Rights (ICCPR), is open-ended; it prohibits discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (italics added). The United States is directly bound by the ICCPR, having ratified the treaty in 1992. Of specific
In its General Recommendation No. 30 on Discrimination Against Non-Citizens (2004), the Committee on the Elimination of Racial Discrimination (CERD) observed that States are obligated under the ICERD to guarantee equal treatment between citizens and non-citizens, with limited exceptions allowed for some political rights such as the right to vote and stand for election. Differential treatment based on citizenship or immigration status is only allowed under the ICERD if it pursues a legitimate aim and is proportional to achievement of that aim.

Recent court pronouncements, in both national and international forums, have interpreted principles of non-discrimination in a way that makes it clear that labor rights of migrant workers must be equivalent to those of a country’s nationals. In September 2003, the Inter-American Court of Human Rights issued a landmark Advisory Opinion on the juridical condition and rights of unauthorized immigrants. The Court held that “the migratory status of persons can never constitute a justification in depriving them of the enjoyment and exercise of their human rights, including those related to work.” The Court found that international principles of equal protection and non-discrimination, including those contained in the American Declaration, the American Convention, the OAS Charter, and ICCPR prohibit discrimination, in that case against unauthorized immigrants, with respect to their labor rights. (InterAmerican Court 2003)
The Court’s Advisory Opinion followed an ILO Committee on Freedom of Association case, in which the Committee concluded that a Spanish law which provided that foreigners could exercise trade union rights only “when they obtain authorization of their stay or residence in the country” violated the fundamental right to freedom of association. (ILO 2001) The CFA confirmed in the Spain case that Article 2 of Convention No. 87 “recognize[s] the rights of all workers, without distinction whatsoever, to establish and join organizations of their own choosing,” with the only permissible exception relating to the armed forces and police. (ILO 2001)

Subsequent to the ILO and Inter-American Court decisions, South Korean courts have also dealt with this issue. A High Court decision handed down on February 1st, 2007, called for government recognition of the Migrant Workers’ Trade Union. The case arose when the South Korea Government rejected calls for the formation of a migrant workers’ trade union. The Ministry of Labor rejected the Migrant Trade Union's application for union status and demanded the union’s list of members, (including unauthorized workers from Bangladesh, Nepal, Vietnam, the Philippines, Sri Lanka and Indonesia), arguing that irregular migrant workers did not qualify as workers under South Korean law. A lower court upheld the Ministry's rejection of the permit, but on appeal, the High Court overturned the decision, recognizing the right of unauthorized immigrants to form a union. The Ministry appealed to the Supreme Court, and a decision is expected sometime late 2008. A complaint is also pending in front of the ILO Committee on Freedom of Association. (Goss 2008; Amnesty International 2007; Illegal Aliens can form Unions 2007)
In its earlier Advisory Opinion, the Inter-American Court reiterated the principle that discrimination is allowable only if it is both legitimate and narrowly tailored, but did not elaborate on the kinds of discrimination that it would consider legitimate and proportional. However, a 2004 English House of Lords judgment relied on the non-discrimination principles of the ICERD and ICCPR in finding unlawful discrimination in the UK’s racial profiling of Roma immigrants at Prague Airport, after a high number of Czech nationals sought asylum at the airport, and were subjected to longer and more intrusive questioning than others at the airport. (6) That opinion confirms that the standard for justifying unequal treatment under the ICERD and the ICCPR is higher than the “rational basis” standard that American lawyers are familiar with: the House of Lords indicated that governmental recitation of even the fight against terrorism as a basis for unequal treatment would not justify discrimination. (Regina 2004)

The developing international law around discrimination has obvious implications for the U.S. and other countries’ unwillingness to grant full labor rights to unauthorized workers and guestworkers, at least in the context of freedom of association, wage and hour laws, compensation for injuries and for discrimination. Further, the definition of “discrimination” as defined broadly in treaty and judicial decision, might be extended to require countries to allow guestworkers to change jobs freely or to work towards residency status, especially given the potential for labor trafficking inherent in the systems. It remains to be seen whether a State’s objective to protect its national workforces and labor markets would justify treating guestworkers with less than adequate protections.

The law: The Siliadin case, forced labor, and the right to seek employment freely
In 2005, the European Court of Human Rights issued a landmark decision finding that a Togolese domestic worker in Paris had been subjected both to forced labor and involuntary servitude at the hands of her employers. Brought to France by her father to perform domestic labor, and then transferred to a second employer, Ms. Siliadin worked as many as 15 hours per day for the family, Her work went essentially unpaid. Her papers were confiscated by her employer, who had promised that her immigration status would be regularized. The Paris Court of Appeal, an intermediate court, had acquitted the defendants of the criminal offense of not paying Siliadin, on the grounds that she had some “autonomy” in her situation. (Mantouvalou 2006)

The court found that Ms. Siliadin had been subjected both to forced labor and to involuntary servitude. The European and ILO Forced Labour Conventions provide that forced or compulsory labor is work ‘exacted . . . under the menace of any penalty’ and also performed against the will of the person concerned, that is work for which he ‘has not offered himself voluntarily.’ The Court found sufficient “menace of penalty” in that Siliadin “was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. [Siliadin’s employers] nurtured that fear and led her to believe that her status would be regularized.”(7)

The Siliadin case has some potential broaden the international community’s understanding of forced labour and its broad application to many common immigrant worker situations. While it was not explicit, the Court indicated that the fact that Ms. Siliadin was undocumented and fearful of arrest, coupled with her employer’s assurances of regularization of status, perhaps even apart from her age, and absent severe violations of labor standards, may be sufficient to show that a worker has been subjected to forced labor; that is, that even subtle exploitations of a worker’s vulnerabilities may constitute sufficient coercion to amount to forced
labor. If the understanding of forced labor is, as the Siliadin Court suggests, broad enough to include false immigration-status related promises or threats made to a worker who is by definition vulnerable because of his or her precarious immigration position, the case has potential to significantly broaden the protections of anti-slavery laws. Although the TVPA is arguably open to the same interpretation, thus far U.S. courts have not been willing to extend the definition of “involuntary servitude” that far. (8)

Further, like the discrimination decisions noted above, Siliadin may also have some implications for further articulating the CERD’s Article 5 right to “free choice of employment,” in the context of guestworker programs. While such programs may not lead inevitably to forced labor, the fact that workers in the program have no option to leave their employment might violate human rights principles of forced labor or free choice of employment. Siliadin represents some forward movement in understanding the complexity of migration pressures and in overcoming the tendency to treat all unauthorized workers as “consenting” to their situation. (9)

**Migration and Labor in the International Community: the context for debate**

In recent years, many international bodies have turned their attention to the potential and the challenges of migration. A Global Commission on International Migration (GCIM) set up by the governments of Sweden and Switzerland to place migration on the global agenda presented recommendations to then-UN Secretary General Kofi Annan in 2005. The following year, Secretary Annan issued his own report and recommendations on migration. Annan issued his own report on migration, appointed a Special Representative on International Migration, and convened a High Level Dialogue (HLD) on Migration and Development in September 2006 in
New York. The HLD was followed by the first meeting of the Global Forum on Migration in Brussels, Belgium in 2007, with a second meeting in Manila in 2008.

While the records of these meetings, reports and recommendations frequently include practices that would end labor discrimination against migrant workers and promote protection against forced labor, they focus on migration from a trade-based standpoint, often centering on agreements between governments for the temporary movement of workers and on the potential for migration to contribute to development of both sending and receiving countries, rather than placing the human rights of migrants at center stage. The United Nation’s Special Representative, has stated that he believes that the international discussion on migration is more usefully approached from an “economic, rather than rights-based” criteria. (Sutherland 2006)

Given the chronic unwillingness of migrant-receiving countries to enter into binding multilateral obligations such as the Migrant Workers Convention, this approach may have merit. Yet the frame leaves little room for discussion of the treatment of migrant workers in a way that addresses their developing rights under international law and the steps that governments can take to guarantee their rights. Groups operating on the ground, working with migrants in both sending and receiving countries, who are in a position to see the dire needs and daily human rights abuses, have not been fully incorporated into this process. (10) NOTE: These should be the same box or delete boxes. It seemed a little off point so I used a box, but couldn’t get it to be in the same box.

The efforts that offer up the most useful practices, because of its traditional focus on human rights as a central focus of migration discussions, take place at the International Labor Organization (ILO). The Conference of the ILO has adopted a plan focused on the 86 million migrant workers in
the global economy. (ILO, 2004) It has developed a non-binding multilateral framework on labor
migration, which along with promoting decent work at home, so that the pressure to migrate is
reduced, places emphasis on equality of treatment for migrants and nationals (Article V, Sec. 8),
effective labor inspection schemes, including sanctions for violations of workers rights and legal
services to assist in proceedings (Article 5, Sec. 10, Article VI, Sec. 11) and calls for licensing,
supervision and regulation of private employment agencies (Article VI, Section 13) (ILO 2005a) It
has developed manuals to guide country’s decision-making on combating forced labor and on
establishing effective labor migration policies, directed towards protection of human rights. (ILO
2005b; ILO 2006) The ILO has repeatedly called on the international community to incorporate
migrant organizations themselves into its policy development. (ILO 2007)

Model Practices: Trafficking and the Council of Europe response

As the international community became more aware of the modern form of the slave trade
and especially of the involvement of organized crime in exploitation of women and children, it
developed new instruments to combat it. In 2000, 148 countries gathered in Palermo, Italy to open
the UN Convention against Transnational Organized Crime. Eighty countries drafted two new
protocols to dealing with trafficking and smuggling respectively. The Trafficking Protocol came into
force on December 23, 2003. The Protocol offers an internationally agreed-upon definition of
trafficking, defined as “recruitment, transportation, transfer, harbouring 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.” It further defines exploitation as 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 . . .” While its wording is slightly different from the United States TVPA, it generally covers the same ground, and raises some of the same questions.

The Protocol is an advance over the TVPA in that it expressly provides that consent of a victim of trafficking to exploitation is irrelevant, when any of enumerated means (coercion, abduction, fraud, deception, abuse of power etc.) were used. While the U.S. State Department has said that consent is irrelevant under the TVPA, in practice cases involving the individual’s initial consent have not generally been viewed as “trafficking” cases. Perhaps because of its origins as an amendment to the transnational crime protocol, like the TVPA, the Trafficking Protocol is written from a perspective of prosecution of crime, rather than protection of human rights or labor rights. (Zalewski 2005) As a consequence of this perspective, the Protocol recommends, but does not require, that states provide care, support, and relief from deportation to victims. (Kapur 2005)

These flaws were corrected in the Council of Europe’s Convention on Action against Trafficking in Human Beings, which entered into force on February 1, 2008. The Convention breaks new ground in that it places new emphasis on protection of victims of trafficking. In particular, it de-links protective visas for victims of trafficking from criminal prosecution of traffickers.

The 14 states that have thus far ratified the Convention agree to criminalize trafficking, but they also commit to ensuring that a mechanism is in place for the accurate identification of trafficked persons. Under the Convention, trafficking victims are granted time to recover and are offered medical care, counseling, education for their children, housing, and a suitable standard of living, regardless of whether they agree to participate in any proceedings the authorities may
decide to pursue against those responsible for their ordeal. The states offer victims access to redress, including provisions for corporate liability for trafficking.

Most importantly, Article 14 of the Convention provides that each party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

a) the competent authority considers that their stay is necessary owing to their personal situation; or

b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

Thus, two of the most fatal flaws in the Protocol and in the TVPA are corrected in the Council of Europe’s Convention: access to a visa is made nearly mandatory, and the high burden of cooperation in prosecution – a burden that many victims are not able to meet since cooperation could jeopardize the lives of themselves or their family members – is lifted.

Model Practices: Labor Inspection

As noted, under international law, workers’ immigration status should be irrelevant to their protection under core labor standards. (U.N. Secretary General 2006; U.N. Committee on Migrant Workers 2006; GFMD 2007) Ensuring, through labor inspection and appropriate screening of migrant workers as victims of labor abuse or trafficking, that such standards are met is a complementary, necessary and no less crucial undertaking.

Experience on enforcement of labor standards in the United States has shown that workers are best able to enforce their rights when they have two complementary means of
enforcement: access to an active enforcement agency and to a right to sue privately in their own name. This is so because when budgetary shortfalls or lack of will prevent agencies from protecting workers, a private right of action means that individuals may continue to assert their claims. But if private litigation is the only route, lack of access to lawyers prevents many low-wage workers from enforcing their own rights.

Access to agency enforcement is limited in the United States as it is elsewhere in the world. In its simplest terms, adequate labor inspection is a question of staffing. The ILO recommends a ratio of one inspector per 10,000 workers in industrial market economies. (ILO 2006) At present, the United States Department of Labor’s Wage and Hour Division (WHD) has one inspector per 110,000 workers in the country. (Smith and Ruckelshaus 2007) A recent Government Accountability Office review of the Wage and Hour Division concludes that DOL is not effective and call for strong measures to reverse this trend. A series of case studies by the GAO paint a chilling picture of the Wage and Hour Division's (WHD) response to worker complaints, including instances where WHD inappropriately rejects complaints, fails to adequately investigate complaints, and neglects investigations until it is too late. The general GAO report finds that overall WHD enforcement dropped by more than one third in the period 1997-2007, and admonishes DOL for not keeping adequate and very basic data on incoming complaints, not using its commissioned study to target and enhance its effectiveness, and failing to confer with external groups such as worker advocates and the states. The ILO’s recommendations for adequate labor inspection systems include a recommendation for consultation with both employer and worker groups. (ILO 2006)

In terms of private enforcement, international law, including the ICCPR, the Universal Declaration of Human Rights and a number of regional instruments to which the United States is a party, require that workers have unimpeded access to the courts and legal assistance. The OAS OC-
advisory opinion emphasized that American States are obliged to ensure effective protection of the law including access to the services of lawyers. To meet this obligation, the United States must ensure that unauthorized workers and all H2B guestworkers are eligible for legal aid.

*Model Practices: Regulation of Labor Intermediaries.*

Costs imposed on laborers for the “privilege” of working abroad can place laborers in a situation highly vulnerable to debt bondage...When combined with exploitation by unscrupulous labor agents or employers in the destination country, these costs or debts, when excessive, can become a form of debt bondage. (U.S. State Department 2008)

As more migrants are hired through profit-making recruitment agencies worldwide and complaints of debt bondage have proliferated, a number of UN- and other agencies have struggled with the role of private recruitment agencies. Both the GCIM report and the UN’s Committee on Migrant Workers have cited lack of regulation of these agencies as a hurdle to protection of migrant workers, and the ILO calls dependence of migrants on private intermediaries a major factor behind forced labor. It recommends regulation of labor intermediaries as a primary means of combating labor trafficking. (GCIM 2005; Committee on Migrant Workers 2006; ILO 2005b) The U.S. Department of State advocates that they be criminally punished. (U.S. Department of State 2008)

These recruiters must be regulated, but experience has shown that they cannot be adequately regulated without placing responsibility on the employers who use them. As noted above, in the U.S. advocates have sought to make employers liable for the excessive recruitment fees charged to workers, with limited success. There exists no system of oversight of foreign recruiters, and, as noted, the DOL takes the position that it cannot enforce H2B workers’ contracts. (11)
In the Philippines, recruiters are jointly liable with employers for protection of migrants’ rights and working conditions. (GFMD 2007) In that country, recruitment agencies must be licensed, bonded, subject to direct enforcement of contracts by workers, and they must disclose the identity and biography of each of their recruiters. (ILO 2005b; ILO 2006) Up to 90% of all Overseas Filipino Workers (OFWs) are deployed by licensed recruiters and manning agencies, of which there are some 1,400 operating in the Philippines. (GFMD 2007)

The ILO recommends a system of monitoring of labor recruiters which includes records inspection and physical inspection, publicizing lists of recruiters who have been sanctioned or blacklisted, and a thorough review of workers’ contracts both prior to signature and during employment, to ensure compliance. (ILO 2006) Licensing systems also exist in Pakistan, Israel and Russia.

Countries vary in their approaches to recruitment fees: In Philippines, these are allowed up to the sum of one month’s pay. In India, low-skilled workers may be charged up to $45 US. In Canada, middle-people such as labor recruiters, are excluded from the overseas recruitment process: there are no recruitment fees, workers are selected directly from the field, and are processed by the Canadian Embassy. Employers are obligated to cover the up-front travel costs. (GMFD 2007)

Each of these approaches presents its own challenges in terms of governance and monitoring, adequate funding for monitoring, and choices to be made between government-operated recruitment systems and privately-operated, licensed systems. Advocates in the Philippines have criticized their system for its lack of adequate oversight and funding. (Center for Migrant Advocacy 2008). But each presents a model worth further study in order to ban the debt-bondage inducing system that now pervades guestworker programs.
Model Practices: Role of NGO’s.

Just as they do in establishing migration labor policies, non-governmental organizations, such as trade unions and workers centers, have a pivotal, but underappreciated, role in monitoring labor abuse guarding against forced labor and slavery. Diaspora organizations, made up of migrant workers themselves, exist in many countries. They have first hand experience of the major labor and immigration abuses that workers face on a daily basis. These groups are in the best position to supplement government-provided orientations, and to know what policies will provide the best protection for migrant workers before, during and after their journeys. As organizations that workers trust, they are in the best position to provide orientation to workers both pre-departure and in their destination countries, negotiate and monitor fair contracts, and identify abusive employment agencies and those involved in trafficking.

Migrant information or resource centers have been identified as a useful conduit for migrants and others to inform themselves better prior to going abroad, lack of information also having been identified as a contributor to forced labor. (ILO 2006) In a number of countries, including the Philippines and Guatemala, worker centers overseas dispense information, advice, counseling, skills upgrading and help to stranded migrants, particularly women. (GFMD 2007)

The Migrant Forum in Asia is one example of a cross-border network that is devoted to advancing the human rights of migrant workers in both sending and receiving countries. The Forum, with members in Bangladesh, Hong Kong, India, Indonesia, Korea, Malaysia, the Philippines, works on many levels to protect workers’ rights: many of its member groups operate as migrant centers, much like workers’ centers in the United States, and are connected to workers in both sending and receiving countries. MFA operates an active listserv where
members can share issues, actions and strategies. Working from a base in migrant communities,
it is able to develop, across borders, best human rights policies and practices.

Here in the United States, both major agricultural unions, the United Farm Workers and
the Farm Labor Organizing Committee, have organized agricultural guestworkers. The UFW
recently signed an agreement with the Mexican State of Michoacan, which has a long history of
migration to states in the Western United States. Under the agreement, UFW and the State of
Michoacan will exercise joint oversight of the H2A recruitment process, in order to ensure that
workers are not charged recruitment fees, and workers will be connected to the UFW in order to
present grievances for their treatment within the U.S. (Ferris 2008)

For its part, FLOC has had an agreement since 2004, with the North Carolina Growers
Association, covering some 7,000 H2A guest workers and 800 growers in the southern part of
the United States. A recent renewal of the contract eliminates recruitment fees and incorporates a
seniority provision, as well as continuing the existing grievance procedure which guarantees
worker's voice at the work site.

Recently, Mexican guestworkers present in Canada under the Seasonal Agricultural Workers
Program won a union contract that guarantees them a grievance procedure, a right to be recalled
each season based on seniority. The contract also contains language to protect them from being
evicted from their employer-owned lodgings, or expelled from Canada until their case is heard by an
independent arbitrator, one year after the Manitoba Labor Board certified the union election. (UFCW
2008) In South Korea and in Germany, respectively, trade unions have incorporated migrant workers
into their ranks and conducted know your rights campaigns directed towards unauthorized workers.

Conclusion
As it is currently practiced, globalization has meant displacement of millions of families worldwide. In this context – with so many human beings working outside their country of origin and so many of them delivered into situations of wage exploitation, discrimination, and retaliation should they speak up about it, the need to protect the human rights of migrant workers in countries of destination is as urgent and compelling as it is daunting. Systems that create unequal labor rights for unauthorized workers and guestworkers are ready-made for modern-day slavery. Most well-intentioned governmental efforts to combat involuntary servitude and debt bondage have not addressed either the causes or the effects of forced labor in a comprehensive way that incorporates labor protections, adequate screening and labor inspection systems, and adequate protection of victims. Nevertheless, in just a few years, judicial decisions, models of worker organizing, and covenants have developed that can, if with more study and development, create a level playing field for migrant workers. The task for U.S. policy-makers and advocates alike is to look both within and beyond our borders for the practices that move towards migration as a freely engaged-in choice undertaken by workers who have a full voice at work in the global economy.
(1) This paper uses the term “unauthorized” worker to describe immigrant workers who do not possess authorization to be employed pursuant to U.S. law. This group includes workers who are in the United States legally for various reasons (on student visas, asylum applicants, etc.) but who nevertheless lack authorization to work. The term “undocumented” immigrant, a more common but less precise term, is often used to describe immigrants whose presence in the U.S. is illegal. These workers form a subset of the immigrant population that is unauthorized to work. Most relevant court decisions are based on the presence or absence of work authorization.


Balbuena v. IDR Realty LLC, 6 N.Y. 3d 338 (N.Y. 2006)(holding that immigration status can be a factor to reduce benefits received by an unauthorized worker’s family in a wrongful workplace death claim); Ramroop v. Flexo-Craft Printing, __ N.E. 2d __, 2008 WL 2519849 (N.Y.Ct. Apps. June 26, 2008).


(5) In a FOIA response Connie Klipsch, Regional Administrator, Employment Standards Administration, Atlanta Regional Office, USDOL, to Ivy Hernandez (January 9, 2008) stated, “I regret to inform you that in fact this agency does not have jurisdiction over the H2B visa program under the Immigration Reform and Control Act of 1986. Your request should have been directed to Department of Homeland Security.” At least two non-profit organizations, the Global Workers Justice Alliance and the Centro de los Derechos del Migrante, coordinate U.S. lawyers’ attempts to represent clients who have already returned home, but the need for legal services is much greater than their present capacity.

(6) R. v. Immig. Officer at Prague Airport, ex parte European Roma Rights Center, cited in Cholewinski. A court judgment in South Korea in 2007 held that unauthorized workers who are already on the job must be considered “laborers” under that country’s trade union and labor relations adjustment Act, and held that the union involved, Migrant’s Trade Unions of Seoul, Gyeonggi and Incheon Region could not condition the establishment of the union on MTU’s submission of a list of the names of its members. Appeal is pending to the Supreme Court. (Goss 2008; Illegal Aliens can Form Unions 2007).
(7) With respect to “servitude,” the Court said that case-law had established that this means an obligation to provide one's services that is imposed by the use of coercion. The Court said that her work was not voluntary because she had not chosen it in the first instance. It relied on the fact that Ms. Siliadin was a minor without resources, had no other accommodation, her papers had been confiscated and that she’d been promised regularization of her status, and was rarely permitted to leave the house.

(8) In a pre-TVPA case, the Ninth Circuit Court of Appeals said, for example, We recognize that economic necessity may force persons to accept jobs that they would prefer not to perform or to work for wages they would prefer not to work for. Such persons may feel coerced into laboring at those jobs. That coercion, however, results from societal conditions and not from the employer's conduct. Only improper or wrongful conduct on the part of an employer subjects him to prosecution. To illustrate this point further, an employer who truthfully informs an individual that there are no other available jobs in the market, merely provides an opportunity for a person to work for low wages, or simply takes advantage of circumstances created by others is not guilty of an offense. *U.S. v. Mussry*, 726 F.2d 1448 (9th Cir. 1984).

(9) One writer has also analyzed guestworker programs in the context of the Thirteenth Amendment’s prohibition of slavery, saying, in much the same way as the European Court did, “a highly textured understanding of the realities faced by deported immigrants reveals that quitting is an unacceptable option,” and that the visa programs, from an economic standpoint, exert the same downward pressure on “free” wages that were present in slavery systems. (Ontiveros 200)

(10) The approach has left some international migrant rights organizations and some countries wondering how this new frame will advance the human rights of migrants. They view with
dismay the Secretary-General’s failure to include in his report a recommendation that governments ratify the Migrant Workers’ Convention. (NGO Response to Secretary-General’s Report 2006)

Advocates view critically as well the GFMD relative noninclusiveness, in which civil society is relegated to a separate event preceding the meetings of the Global Forum, with a separate report. (Non-Governmental Liaison Service 2006; GFMD Report of the Civil Society Day 2007)

(11) The Department does not claim that it lacks authority to enforce H2A contracts, but advocates have found its oversight of that program lacking as well.
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