

# HUMAN TRAFFICKING AND FORCED LABOR:

## A RECOMMENDATION

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Only within the last several years that the definition of human trafficking has been expanded to include forced labor in otherwise legal occupational sectors. The Anti Human Trafficking Conventions of 1904, 1933, and 1949, addressed only sexual forms of human trafficking in their definitions. Non-sexual forced labor as a form of human trafficking was absent from international law until 2000. While international community should be proud of expanding the definition of human trafficking, the change presents further legal headaches. A major issue in the discussion of modern slavery, human trafficking, and human smuggling is the absence of clearly defined and consistent terms among international treaties. The legal field requires precision of language and with a lack of harmonious and precise definitions for concepts like "human trafficking," "human smuggling," and "forced labor," the law (and therefore law enforcement) will continue to flounder.

During the 1990s and early 2000s, many countries dealt with human trafficking only in the contexts of prostitution and illegal immigration. Until recent-

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ly, only a few European states, such as Belgium, Poland, and the Ukraine<sup>2</sup> used broader legislation that satisfied the European Council framework. In Holland, illegal trafficking was limited to trafficking for the purpose of prostitution, while in France the regulation of trafficking was only included in the prostitution law, itself.<sup>3</sup> Greek legislation merely prohibited trafficking in female minors, while the UK prohibited illegal entry into the country but had no specific laws about trafficking.

In the United States, federal law enables prosecution of all traffickers and enslavers, and providing protection for all victims. Ann Jordan, formerly the director of Global Rights Initiative Against Trafficking in Persons and a co-founder of Freedom Network, observed that America remained focused on sex trafficking in spite of its encompassing legislation. She said that “the broad scope of the law is being eroded by a U.S campaign that equates prostitution with trafficking, and is redirecting resources to end prostitution rather than to end trafficking.”<sup>4</sup> The anti-prostitution faction within trafficking is the most vocal and its influence on the American legislative process, primarily through a faithful lobbying presence of conservative and religious leaders, has been strongly felt. Authors Kevin Bales and Ron Soodalter observe, “The shift in grant funding shows that the [U.S] federal government is collaborating with an anti-trafficking program that heavily emphasizes the issue of sex trafficking, to the detriment of labor trafficking efforts.”<sup>5</sup>

In 2000, the UN pushed for a broader policy that would function at the international level. The European Council followed suit in 2002. These coalitions produced two major documents that expanded the scope of human trafficking: the

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2 Article 149, Criminal Code of Ukraine, <http://www.legislationline.org/download/action/download/id/1710/file/e7cc32551f671cc10183dac480fe.htm/preview> (last visited Feb. 20, 2010)

3 Legislation, Organization for Security and Co-operation in Europe, <http://www.legislationline.org/?tid=178&jid=19&less=false> (last visited Feb. 20, 2010)

4 Ann Jordan, *Sex Trafficking: The Abolitionist Fallacy*, FOREIGN POLICY IN FOCUS (2009).

5 KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 111 (1<sup>st</sup> ed., 2009)

UN Convention on Trans-national Crime and the Council Framework Decision of Combating Trafficking in Human Beings, respectively. Three years later, in May 2005, the Council of Europe's Third Summit of Heads of State and Government adopted a plan that called for the "widest possible ratification" of legislation that would encourage action against human trafficking to "strengthen the prevention of trafficking, the effective prosecution of its perpetrators and the protection of the human rights of the victims."<sup>6</sup> Many summit ambassadors were hopeful that human trafficking would eventually achieve universal jurisdiction.<sup>7</sup>

The aforementioned UN and Council treaties make two significant breaks and hopeful advancements from previous legislation. First, they make a distinction between trafficking victims and smuggling migrants<sup>8</sup>. The differences between smuggling and trafficking are summarized briefly in the table below:<sup>9</sup>

<b>Trafficking</b>	<b>Smuggling</b>
Can take place within the borders of a state	Always a cross-border crime
Illegal border crossing not necessary	Migrants enter illegally
Human rights problem	Migration problem

6 Heads of States and Government of the Council of Europe, Warsaw, *Action Plan: Strengthening the Security of European Citizens II, 1*, CM(2005) 80 final, 17 May 2005.

7 At present (Feb. 2010) universal jurisdiction does not apply to the crime of human trafficking or to the trafficking of women, as it does with slavery. For further information on trafficking as a crime that should receive universal jurisdiction, see Nina Tavakoli, *A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime*, 9 *Inter. Crim. L. Rev.* 77, 77-98 (2009).

8 United Nations General Assembly, 55<sup>th</sup> Session, Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, GA. Res. 55/25, Annex III, Supp. 49, at 65, UN Doc. A/45/49 (2001).

9 Harald Haugom Olsen, *The Snake From Fujian Province to Morecambe Bay: An Analysis of the Problem of Human Trafficking in Sweated Labour*, 16 *Euro. J. of Crime, C. Law and C. Jus.* 11 (2008).

Crime against person	Crime against the state
Involves an exploitative purpose (forced labor is always implicit)	Mutual interest between the smuggler and the smuggled
Profit comes from the sale of trafficked persons [sic] sexual services or labor	Profit comes from the movement of the person
Persons trafficked are victims	Persons smuggled are clients
Involves coercion	Voluntary

Second, the UN and the European Council both include forced labor in their definitions of human trafficking. The legislation is restated below, taken from the UN's Trafficking Protocol in 2000. This was the world's first international definition of human trafficking. The treaty contains three main elements, all of which must be fulfilled for an act to be properly considered human trafficking:

1. An action, consisting of: Recruitment, transportation, transfer, harboring or receipt of persons;
2. By means of: Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving of payments or benefits to achieve the consent of a person having control over another;
3. For the purpose of: Exploitation (including, at a minimum, the exploitation of prostitution and other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.)<sup>10</sup>

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<sup>10</sup> The only exception is for children to whom the requirements relating to means do not apply, see Trafficking Protocol, *supra* note 11, art. 3(c).

It is notable that the UN does not define the term "forced labor" for itself, deferring instead to definitions previously devised by earlier conventions. The most widely cited definition is found in the International Labour Organization (ILO) Convention Concerning Forced or Compulsory Labour (C029, 28 June 1930), a definition that has also been adopted by the European Court of Human Rights. The ILO defines forced labor as "All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."<sup>11</sup>

It is difficult for the judicial system to ascertain whether or not a person has offered himself voluntarily for work or service two reasons. First, a person's consent could be the result of coercion, deception, fraud, etc. Second, it is not always clear the extent to which individuals have given their consent. One could, for example, have consented to work hard in poor conditions but not to give up personal freedom. According to the European Court of Human Rights, courts must evaluate the validity of consent in light of all the case's circumstances, and even then an individual's consent is not always sufficient to rule out forced labor. Thus, for courts to establish forced labor there must be both a lack of consent to the circumstances as they truly exist and an absence of control over one's own labor.<sup>12</sup>

In 2005, the ILO posited that human trafficking was a subset of forced labor. It assumed that forced labor could be dissected into the following subordinate categories: state-imposed, private-imposed, economic exploitation, and sexual exploitation. In *A Global Alliance against Forced Labor* the ILO stated that "the very concept of forced labor, as set out in the ILO standards on the subject, is still poorly understood."<sup>13</sup> In an attempt to advance the definition of forced labor, the

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11 International Labour Organization, Convention Concerning Forced or Compulsory Labor, C029, Art. 2.1, (1930).

12 Van der Musselle v. Belgium, Application No. 8919/80 Eur. Ct. H.R. (1983).

13 International Labour Organization Director-General, *A Global Alliance Against Forced Labor: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, 93<sup>rd</sup> Session of International Labour Conference (2005).

report listed the following criteria for forced labor practices, which is as follows:

**Table 21: Identifying Forced Labor in Practice:** <sup>14</sup>

<b>The “route into” forced labor:</b>	<b>Actual presence or credible threat of:</b>
<ol style="list-style-type: none"> <li>1. Birth/descent into “slave” or bonded status</li> <li>2. Physical abduction or kidnapping</li> <li>3. Sale of person into the ownership of another</li> <li>4. Physical confinement in the work location— in prison or in a private detention</li> <li>5. Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance</li> <li>6. Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.)</li> <li>7. Deception or false promises about types and terms of work</li> <li>8. Withholding and non-payment of wages</li> <li>9. Retention of identity documents or other valuable personal possessions</li> </ol>	<ol style="list-style-type: none"> <li>1. Physical violence against worker or family or close associates</li> <li>2. Sexual violence</li> <li>3. (Threat of) supernatural retaliation</li> <li>4. Imprisonment or other physical confinement</li> <li>5. Financial penalties</li> <li>6. Denunciation to authorities (police, immigration, etc.) and deportation</li> <li>7. Dismissal from current employment</li> <li>8. Exclusion from future employment</li> <li>9. Exclusion from community and social life</li> <li>10. Removal of rights or privileges</li> <li>11. Deprivation of food, shelter, or other necessities</li> <li>12. Shift to even worse working conditions</li> <li>13. Loss of social status</li> </ol>

As observed by Christal Morehouse, “Only three of the ILO’s 2005 criteria do not apply strictly to human trafficking. These are: ‘dismissal from current

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<sup>14</sup> *Id.* at 6.

employment under the menace of penalty', 'exclusion from future employment through menace of penalty', and 'physical confinement in prison.'"<sup>15</sup> Morehouse contends that the ILO's distinction between human trafficking and forced labor may be better understood as "two partially overlapping" categories for several reasons.<sup>16</sup> First, the dismissal from or barring of employment as an unaccompanied factor is not considered severe enough to be a situation of modern enslavement through trafficking. Second, the removal of organs, taking part in a chain of exploitation, and an irrelevance of the victim's consent to exploitation are not considered part of forced labor. Third, the involuntary nature found in forced labor and trafficking is shared. Given these reasons, the international theoretical framework implies that the two crimes are distinct.

While theoretical distinctions are not without merit, research suggests that there are overwhelmingly deep ties between forced labor and human trafficking. Jill Van Voorhout observed that "while it is difficult to estimate the magnitude of this crime due to the illegal nature of this employment and its recent criminalization... [i]t has been clearly demonstrated that human trafficking for labor exploitation occurs on a large scale."<sup>17</sup> According to the ILO, at least 2.45 million people worldwide are currently victims of forced labor as a consequence of trafficking.<sup>18</sup> Several studies confirm this connection, identifying individuals in many nations who were victims of both forced labor and human trafficking.<sup>19</sup> The ILO posits that

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15 CHRISTAL MOREHOUSE, *COMBATING HUMAN TRAFFICKING: POLICY GAPS AND HIDDEN POLITICAL AGENDAS IN THE USA AND GERMANY* 78 (2009).

16 MOREHOUSE, *supra* note 15.

17 International Labour Organization, *supra* note 16.

18 *Id.* at 14.

19 **Germany:** N. Cyrus, *Trafficking for Labor and Sexual Exploitation in Germany*, ILO, Geneva, 2050. **Belgium:** Centre of Equal Opportunities and Opposition to Racism (CEOR), *Trafficking in Human Beings, Annual Report, Belgian Policy on Trafficking and Smuggling in Human Beings: Shadows and Lights*, 2005. ; and A. Bucquoye & W. Cruysberghs, *International trafficking of humans in Belgium*, 2003. **The Netherlands:** J. van der Leun & L. Vervoon, *Slavery and Forced Labor in the Netherlands*, 2004; and Bureau of the National Report of Human Trafficking, *21<sup>st</sup> Century: Slaver and Responses*, 2006. **United Kingdom:** B. Anderson and B. Rogaly, *Forced*

these victims work in a variety of economic sectors including domestic, hospitality, and culinary services, textiles, agriculture and horticulture; automotive and shipping; as well as shoplifting, pick-pocketing, and CD/DVD piracy.<sup>20</sup> Due to the lack of emphasis on this kind of victimization, men and boys, as well as women, not under sexual exploitation, have largely gone unrecognized as separate and astounding large categories of victims.

The theoretical framework of the ILO discussed previously demonstrates that human trafficking and labor exploitation are not synonymous in every case. One can see that even though these two issues differ greatly in their respective complexities, substantial overlap exists. The ILO's approach to defining human trafficking as a subset of labor exploitation is narrow.<sup>21</sup> This approach does not reflect that human trafficking is a severe form of labor exploitation which differs from other forms of low-wage exploitation or lesser forms of psychological threats such as termination from employment or being barred from future employment.

In *A Global Alliance against Forced Labor*, the ILO asked the following question: "Are the abusive recruitment and employment practices to which migrant workers are particularly vulnerable best dealt with through providing for the offense of forced labor or that of trafficking in domestic policy frameworks?"<sup>22</sup> While the question is phrased in an either/or manner, it is possible that due to the substantial (yet not total) overlap of the two issues and the absence of a clear institutional mandate on how to fight human trafficking at the global level, the ILO

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*Labour and migration in the UK*. Study Prepared by COMPAS in collaboration with Trades Union Congress, 2005; and UK Home Office, *Tackling Human Trafficking—Consultation on Proposals for a UK Action Plan*, 2006. **Poland and Czech Republic**: T. Obokata, "Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights of State's Interests?," *Web Journal of Current Legal Issues*, 2001. **United States**: Patrick Belser, *Forced Labor and Human Trafficking: Estimating the Profits*. Cornell, 2005; and *Free the Slaves, Hidden Slaves: Forced Labor in the United States*. UCal Berkley, 2004.

20 International Labour Organization, *supra* note 16, at 14.

21 MOREHOUSE, *supra* note 15.

22 International Labour Organization, *supra* note 16, at 7.

would best address the issues of human trafficking and forced labor in tandem. Only in respecting the relative complexities of each of these separate issues can great progress be made; yet, the close connections between forced labor and trafficking make it imperative that they be dealt with together. Due to the significant overlap between forced labor and human trafficking, the UN should consider mandating the ILO to be an International Anti Human Trafficking and Forced Labor Organization.