

Forced Labor in Kazakhstan, the Russian Federation and the  
United States of America: how migrant workers are turned  
into “slaves”

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LL.M. LONG THESIS

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## **Executive Summary**

This thesis aims to review and assess policies and laws that prohibit forced labor of migrant workers in the private economy in the Republic of Kazakhstan (Kazakhstan), the Russian Federation (Russia), and the United States of America (the US).

The thesis examines the problem of forced labor of migrant workers in the selected jurisdictions through the prism of various interrelated aspects. First, the study compares the States' international commitments and considers how they implement them into national legislation. It also evaluates the role of regional human rights mechanisms that influence State willingness to protect migrant workers from exploitation. Second, the research compares labor migration policies and considers that the lack of human rights approach in labor migration policies increases migrant workers' vulnerability to forced labor. Finally, the study examines criminal legislation that prosecutes forced labor and assesses its practical implication.

Based on the analysis, the study also formulates recommendations for the States considered from a human rights perspective.

## Introduction

### *i. Statement of thesis problem*

The International Labor Organization (ILO) states that 40.3 million people suffered from different forms of modern slavery in 2016.<sup>1</sup> Sixteen million of them were in forced labor in a private economy. These numbers prove that forced labor is a matter of international concern. The main sectors at risk are construction, manufacturing, agriculture, fishing, and domestic work, and a significant share of victims are migrant workers.<sup>2</sup> Researchers underline that both documented and undocumented migrant workers fall into exploitative situations and can be the subject of forced labor.<sup>3</sup> Moreover, forced labor of migrant workers occurs in both developed and developing countries.<sup>4</sup> Forced labor of migrants can therefore be said to be one of the most pervasive violations of the human rights of migrant workers.

A vast number of international and regional instruments prohibit forced labor. However, the ILO fundamental Forced Labor Convention 29 (Convention 29) is the only treaty that provides the meaning of this concept.<sup>5</sup> In 2014, the ILO adopted a new Protocol linked to Convention 29 (Protocol of 2014).<sup>6</sup> This promising treaty recognizes contemporary challenges and provides new standards to prevent, prosecute, and protect against forced labor. The Protocol of 2014 considers migrant workers as a particularly vulnerable group to forced labor in the private economy and prescribes State obligations to take adequate measures to protect migrant workers.

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<sup>1</sup> International Labor Organization, Walk Free Foundation, and International Organization for Migration, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (ILO 2017).

<sup>2</sup> *ibid.*

<sup>3</sup> Bridget Anderson and Ben Rogaly, 'Forced labor and migration to the UK' (2005), Project Report Trades Union Congress, London < <https://www.tuc.org.uk/research-analysis/reports/forced-labor-and-migration-uk> > accessed 18 November 2019.

<sup>4</sup> Kanchana N Ruwanpura, Pallavi Rai, 'Forced Labor: Definition, Indicators and Measurement' (2004) International Labor Office Declaration/WP/18/2004.

<sup>5</sup> ILO, *Forced Labour Convention, C29*, adopted 28 June 1930 Geneva, 14th ILC session.

<sup>6</sup> ILO, *Forced Labour Convention, Protocol of 2014*, adopted 11 June 2014 Geneva, 103rd ILC session.

To eradicate forced labor of migrant workers, the ILO recommends developing a comprehensive labor migration policy and criminal prosecution of forced labor.<sup>7</sup> When human rights are missing or neglected in migration policies and governments prioritise only economic pragmatism, national security, or the fight against illegal migration – such an approach will damage any efforts to eradicate forced labor. Moreover, a mere prohibition of forced labor in labor legislation or the existence of general provisions on freedom of labor in domestic law is not enough. Klara Skrivankova considers that the absence of criminalization of forced labor prevents the appropriate punishment of perpetrators and deprives workers of protection and assistance programs. Skrivankova stressed that most of the existing supporting programs are primarily designed for victims of trafficking.<sup>8</sup> In her view, when forced labor prosecution is linked only to trafficking cases, workers in non-trafficked forced labor cannot seek justice. Furthermore, the scale of forced labor as a human rights violation remains unexplored.

This thesis thus attempts to analyze these arguments using the examples of Kazakhstan, Russia, and the US. This research will answer two central questions:

- 1) How does omitting or neglecting the human rights approach in policies governing labor migration affect efforts to eliminate forced labor of migrant workers?
- 2) Is criminalization of forced labor a crucial prerequisite to the protection of migrant workers and their access to justice?

This thesis compares policy and legislation that regulates the different stages and procedures for obtaining legal status by migrant workers and assesses opportunities for migrant workers to obtain access to the labor market in the selected jurisdictions. Chantal Thomas underlines that strict immigration controls remain ‘the single most formal and legally permitted

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<sup>7</sup> ILO, *Recommendation on supplementary measures for the effective suppression of forced labour*, adopted 11 June 2014 Geneva, 103rd ILC session.

<sup>8</sup> Klara Skrivankova, ‘*Between Decent Work and Forced Labor: Examining the Continuum of Exploitation*’ (The Joseph Rowntree Foundation (JRF) Program Paper: Forced Labor 2010) 16.  
<<https://www.jrf.org.uk/report/between-decent-work-and-forced-labor-examining-continuum-exploitation>> accessed 18 November 2019.

basis for immigrants' discrimination and coercion.<sup>9</sup> Similarly, Caress Schenk emphasizes that strict migration procedures can have the 'perverse effect' of pushing migrants into the shadow sector.<sup>10</sup> These considerations are also supported in various ILO handbooks and guidelines. The ILO reiterates that countries with high demand for cheap labor, restrictive regulation, and inconsistent application of migration and labor legislation, create 'ample space' for illegal employment.<sup>11</sup>

It is also crucial to note that when States fail to recognize the internal labor market's demand for migrant workers, then labor migration regulation is rather a security paradigm - migrants become hostages of ineffective policies.<sup>12</sup> Sarah Collinson also argues that this security paradigm threatens liberal principles. In her words, discussing immigration and related issues in terms of national security could encourage or even legitimize xenophobic and racist sentiments against migrants.<sup>13</sup> In general, such an approach does not consider migrants as rights-holders and often drives them into the informal economy and abusive working conditions. In this regard, universal and regional human rights instruments and mechanisms that see the human rights of migrant workers in the center, remain pivotal. This thesis therefore examines the influence of universal and regional instruments on law and policies in the selected jurisdictions. However, it is essential to underline that the power of universal and regional human rights treaties shrinks in Russia and Kazakhstan. Simultaneously, the US perception of international treaties as a threat to its sovereignty, is a risk to the universal concept of human

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<sup>9</sup> Chantal Thomas, 'Immigration Controls and 'Modern-Day Slavery'' in Prabha Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, 2017) 214.

<sup>10</sup> Caress Schenk, 'Open Borders, Closed Minds: Russia's Changing Migration Policies: Liberalization or Xenophobia?' *Demokratizatsiya: The Journal of Post-soviet Democratization* 18(2) 108.

<sup>11</sup> International Labor Office, 'Preventing forced labor exploitation and promoting good labor practices in the Russian construction industry' (Geneva: ILO, 2009) 17.

<sup>12</sup> Press release: "Joint statement of UN and regional experts on migration in light of stocktaking meeting in Puerto Vallarta towards a human rights-based Global Compact for Safe, Orderly and Regular Migration" issued by IACHR Press and Communication on 06.12.2017

<[https://www.oas.org/en/iachr/media\\_center/PReleases/2017/203.asp](https://www.oas.org/en/iachr/media_center/PReleases/2017/203.asp)> accessed 19 November 2019.

<sup>13</sup> Sarah Collinson, 'Migration and Security in the Mediterranean: a Complex Relationship' in King R., Lazaridis G., Tsardanidis C. (eds) *Eldorado or Fortress? Migration in Southern Europe* (Palgrave Macmillan, London 2000) 307.



rights. This research highlights that the US undermines its credibility with this approach and undoubtedly sets a precedent that other migrant-receiving countries like Russia and Kazakhstan could replicate.

Finally, this work analyzes the tendency to regulate some aspects of labor migration under bilateral or multilateral trade agreements. The UN Special Rapporteur underlines that such a tool is often dictated by the migrant-receiving countries' interests in favor high-skilled workers for temporary employment and provide fewer guarantees than human rights treaties.<sup>14</sup> Following this argument, the author analyzed how regional trade agreements integrate human rights and influence migrant workers' rights in the selected jurisdictions. The influence of integration unions and trade agreements is an issue that was often studied in the US; however, it has not yet been studied enough in the Eurasian migration corridor covering Russia and Kazakhstan. Thus, the Eurasian Economic Union (EAEU) agreement was also critically considered in this thesis.

## *ii. Choice of jurisdictions*

My professional experience in the legal protection of migrant workers from Central Asia motivated the choice of jurisdictions. Over the past decade, while assisting migrant workers in legal protection, I observed how vulnerable Tajik, Kyrgyz, and Uzbek migrant workers are in Russia and Kazakhstan to different human exploitation types. I also found a shortage of academic research on this issue.<sup>15</sup>

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<sup>14</sup> UNGA 'Report of the Special Rapporteur on the human rights of migrants on the impact of bilateral and multilateral trade agreements on the human rights of migrants,' Human Rights Council, 32<sup>nd</sup> Session, UN Doc, A/HRC/32/40 (2016)

<sup>15</sup> This work focused on three Central Asian countries – Kyrgyzstan, Tajikistan, and Uzbekistan. Kazakhstan is not traditionally a country of migrant workers' origin in Central Asia. There is a flow of highly skilled migrants from Kazakhstan to developed countries, and a small number of migrants use Russia as a country of destination. There is a lack of information on labor migration from Turkmenistan, but migrants from Turkmenistan prefer to migrate to Turkey. The number of migrant workers from Turkmenistan to Russia and Kazakhstan is low.

The most recent comprehensive study on forced labor was carried out in Russia in 2005 by Elena Tyuryukanova. Fifteen years ago, she mentioned that forced labor in Russia is noteworthy but is not a socio-political priority in Russia.<sup>16</sup> As this research showed, the situation did not significantly change. I interviewed local human rights activists while conducting this research who echoed this statement.<sup>17</sup>

In Kazakhstan, migrant workers' forced labor is regularly discussed by local and international human rights NGOs but has received less attention from academia. Migrant workers' vulnerability to modern forms of slavery in Kazakhstan is also under consideration of UN mechanisms. In 2012 and 2014, the UN Special Rapporteur on contemporary forms of slavery, Gulnara Shahinian, visited Kazakhstan. The current UN Special Rapporteur on the human rights of migrants also requested a visit to this country.<sup>18</sup> UN experts' interest in the situation of migrant workers in Kazakhstan is itself an indicator of the existence of problems with human rights violations.

The US has a role as a 'tested model' in Chapters V and VI of this research because this jurisdiction has a longstanding history as a migrant-receiving country and declares its commitment to combat human exploitation worldwide.<sup>19</sup> Migrant workers' vulnerability to forced labor in the US is well-researched. Moreover, the US State Department's annual Trafficking in Persons Report (TIP) serves as an instrument to spotlight issues of trafficking in human beings (THB) for forced labor worldwide. However, Trump's speculative rhetoric and

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<sup>16</sup> Elena Tyuryukanova, 'Forced Labor in the Russian Federation Today: Irregular Migration and Trafficking in Human Beings' (Geneva, International Labour Office, 2005) 68.

<sup>17</sup> For example, Yulia Grekhneva, interviewed through Skype on 20 of August 2020, whose answers to my questions were published online: <<https://ethnoinfo.ru/statji/2343-prinuditelnyj-trud-v-rossii-sotsialno-pravovaya-otsenka-2020>>

<sup>18</sup> OHCHR, 'Country visits' <<https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CountryVisits.aspx>> accessed 5 November 2020.

<sup>19</sup> Kevin Bales, Laurel Fletcher and Eric Stover, *Hidden Slaves: Forced Labor in the United States* (UC Berkeley: Human Rights Center 2004) 22.

his decisions against migrants weakened US efforts to combat forced labor and opened a new chapter of regression in this jurisdiction.

It should be noted that Russia and Kazakhstan have a collective historical past, with similar legal and administrative systems with Soviet roots. The political systems, legislation, and labor market regulation have many similarities in these two jurisdictions, which on the other hand significantly differs from the US. Simultaneously, Russia and Kazakhstan also have differences as migrant-receiving countries. In the Commonwealth of the Independent States (CIS) region, Russia remains the main migrant-receiving center and hosts up to 6 million workers annually, including seasonal or circular migrants.<sup>20</sup> Russia's economy primarily accommodates migrant workers from Central Asia, particularly those who are low-skilled.<sup>21</sup> This category of migrants is the most vulnerable to exploitation. The absurdity of the situation is that when exploitation of migrant workers occurs, Russian authorities detain the migrant workers and deport them for violation of migration laws instead of protecting them and criminalizing the exploiters.

Compared to Russia, Kazakhstan is less involved in global migration processes and mainly receives migrants from neighboring Kyrgyzstan, from Uzbekistan and Tajikistan. Moreover, due to Kazakhstan's geographic proximity to Russia, it also acts as a transit country for migrant workers from Central Asia. In the early 2000s, Kazakhstan attracted many migrant workers in Central Asia, but later when the construction boom began to decline, migrant flows also decreased. Since 2013, when Russia restricted its migration legislation and thousands of

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<sup>20</sup> Vladimir Mukomel, 'Integration of Migrants: Russian Federation' (Migration Policy Centre, CARIM-East Research Report, 2013/02) < <https://cadmus.eui.eu/handle/1814/27862> > accessed 18 November 2019.

<sup>21</sup> Vladimir Mukomel, 'Labor Mobility of Migrants from the Post- Soviet Expanse States at the Russian Labor Market' in Denisenko, Mikhail & Strozza (ed), *Migration from the Newly Independent States 25 Years After the Collapse of the USSR* (Springer Nature Switzerland AG 2020) 193.

migrant workers were consequently banned from re-entering Russia, Kazakhstan once again attracted migrants from the region.<sup>22</sup>

As part of the Eurasian Economic Union, Kazakhstan and Russia aimed to unify laws and policies, particularly those regulating the foreign labor force. However, Kazakhstan's labor migration policy conceptually differs from Russia.<sup>23</sup> While Russia recognizes its dependence on migrant workers, Kazakhstan refuses to.

It is prudent to note that Russia and Kazakhstan are subject to the ILO Forced Labor Convention, 1930 (No. 29), whereas the US did not ratify this. Moreover, the ILO Protocol of 2014 has been in force in Russia since January 2020, while no intention to ratify has been indicated by the other two selected jurisdictions. Meanwhile, all three jurisdictions are under respective specific regional regulation that affects (or should affect) the evolution of national legislation against forced labor of migrant workers. For instance, as a State Party to the European Convention on Human Rights (ECHR), Russia must enforce law coming from the European Court of Human Rights' (ECtHR) decisions. The US falls under the Inter-American Commission on Human Rights' (IACmHR) jurisdiction, which has a 'pioneering' practice and supports undocumented migrants' rights.<sup>24</sup> Kazakhstan is not under any progressive regional human rights mechanisms, however, both Kazakhstan and Russia are under the CIS, which *de-jure* has human rights protection mechanisms, although its effectiveness is questionable.

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<sup>22</sup> Farrukh Irnazarov, 'The Impact of Russian Re-Entry Bans on Central Asian Labor Migrants' Coping Strategies' in Marlene Laruelle, Caress Schenk (ed), *Eurasia on the Move: Interdisciplinary Approaches to a Dynamic Migration Region* (George Washington University, 2018) 101.

<sup>23</sup> Sergey Ryazantsev and Oleg Korneev, 'Russia and Kazakhstan in Eurasian Migration System: Development Trends, Socio-Economic Consequences of Migration and Approaches to Regulation' (Migration Policy Centre, CARIM-East Research Report, 2013/44) <<http://hdl.handle.net/1814/29930>> accessed 18 November 2019.

<sup>24</sup> Antônio Augusto Cançado Trindade, Concurring Opinion of Judge to the Advisory Opinion OC-18/03 <[http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda\\_opiniones\\_consultivas.cfm?lang=en](http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_opiniones_consultivas.cfm?lang=en)> accessed 18 November 2019.

### *iii. Methodology of research*

I have made a comparison of law and policies in the selected jurisdictions with the aim of identifying gaps that contribute to the vulnerability of migrant workers to forced labor. This comparative analysis considered policies and legislation covering forced labor of migrant workers in a private economy. The thesis has also examined legislation prohibiting human trafficking with the aim of forced labor, however, excludes provisions related to victims of trafficking for sexual exploitation. State-imposed forced labor, inappropriate use of public works, and prison labor were not a focus of this research. Neither were forced marriages as a form of forced labor.

The research is based on a desk study of laws and policies and is supported by secondary literature discussing the prohibition of forced labor and States' human rights obligations. This thesis also considers the ECtHR case law, reports of the IACmHR, authoritative texts from different UN organs and the ILO, including resolutions, reports, recommendations, and press releases.

Semi-structured interviews with NGO activists and human rights experts from Russia, Kazakhstan and Tajikistan were also conducted to collect additional information that compensates for the shortage of adequate studies. The US practitioners were not interviewed because the required information was accessible and sufficient to make a comparative analysis.

Forced labor is not criminalized in Russia and Kazakhstan, and therefore no case law was accessible on this issue for the purpose of research, and accordingly, US case law was not considered either.

iv. *Contents of the thesis*

The first chapter is theoretical and provides a brief overview of the definitions of forced labor, slavery, and human trafficking, to serve as a basis for further discussion of legislation in the selected jurisdictions.

The second chapter is descriptive and explains the scope of the problem in the focus jurisdictions. The section aims to show the similarities and differences in the three countries in order to understand how each resolve similar forced labor issues of migrant workers at the domestic level. While describing forced labor in Russia and Kazakhstan, migrant workers from Kyrgyzstan, Tajikistan and Uzbekistan were given specific attention.

The third chapter also provides a foundation for later analysis. It includes an overview of human rights commitments against exploitation and forced labor of migrant workers in each jurisdiction. Within this chapter, the boundaries of international and regional obligations are compared, and similarities and differences are defined.

The fourth chapter concentrates on labor migration policies. It examines specific areas of policy development from the point of view of securitization in regulating labor migration, which increases the vulnerability of migrants to forced labor. The chapter also considers State policies relating to integration unions that consider labor migration an essential part of integration. In this chapter, a new integration union in the CIS region, namely the EAEU, receives greater attention.

Chapter five is a legal and comparative one and explores the regulatory approaches to the prohibition and prosecution of forced labor in the focus jurisdictions. The chapter's main argument is that forced labor criminalization is a critical precondition for effective enforcement of human rights commitments and protection of those who have suffered from forced labor.

Chapter six provides information on the practical implication of the considered regulatory approach.

Finally, the thesis makes recommendations for creating and amending legislation and policies, focusing mainly on Russia and Kazakhstan. Personal reflections regarding the protection of Central Asian migrant workers from forced labor in a private economy are also provided based on my practical experience in promoting Tajik and Kyrgyz migrant workers' rights in Russia and Kazakhstan.

## **I. Definition of ‘Forced Labor’ in International Law and its Interconnection with Slavery and Trafficking in Persons**

Acts of human exploitation - slavery, forced labor, servitude, serfdom, debt bondage, and trafficking - are interconnected but have independent definitions, different features and indicators. These differences are sourced either from treaties and national laws or established by court jurisprudence. However, there exists scholarly discussions and debates surrounding the conceptual clarity of these terms. Although this paper does not aim to participate in this debate, it will provide a brief overview of definitions of forced labor, slavery, and human trafficking, to provide a basis for further discussion of policy and legislation in the selected jurisdictions.

### *i. Forced labor*

The ILO has classified three typologies of forced labor; 1) imposed by the State, 2) by private agents for sexual exploitation, and 3) by private agents for labor exploitation.<sup>25</sup> State-imposed forced labor such as military services, prison labor, or work under normal civic obligations, is usually allowed by domestic law but has specific restrictions. These restrictions are listed in international law, particularly in ILO Conventions No. 29 and No. 105.

Forced labor in the private economy, imposed by private individuals, groups, or companies, is prohibited. This human rights violation exists in two forms:

1. Forced labor imposed by private agents for sexual exploitation that covers any commercial sexual activity; and

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<sup>25</sup> International Labor Office, *Profits and Poverty: The economics of forced labor* (first published 2014 Geneva: ILO) 5.



2. Forced labor imposed by private agents for labor exploitation, including bonded labor, forced domestic work, forced labor of migrants in economic sectors, forced begging, and work in the context of slavery or vestiges of slavery.<sup>26</sup>

Because this thesis is focused on the forced labor of migrant workers in private sectors for labor exploitation purposes, further discussion will cover only this issue.

The definition of forced labor is provided in ILO Convention No. 29 (of 1930). The Convention 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 him voluntarily.”<sup>27</sup> Each of the four elements in the definition – work or service, exacted under menace of penalty, any person, involuntary – is explained in ILO commentary sources and court jurisprudence. ‘Work or service’ includes all types of labor and employment, in any industry or sector, regardless of its legal/formal or illegal/informal nature.<sup>28</sup> ‘Any person’ refers to children and adults regardless the nationality.<sup>29</sup>

The ILO Convention does not distinguish between physical and psychological ‘means of penalty.’ The ILO identifies that ‘means of any penalty’ include physical and sexual violence, imprisonment, financial penalties, threats of dismissal from current employment or exclusion from future work, exclusion from the community and social life, removal of rights or privileges, deprivation of food, shelter or other necessities, a transfer to worse working conditions, or loss of social status.<sup>30</sup> Additionally, the ILO states that workers can be subject to coercion either

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<sup>26</sup> *ibid.*

<sup>27</sup> Article 2 of the Convention №29 excludes military service, work or service which forms part of the normal civic obligations of the citizens, work or service exacted from any person because of a conviction in a court of law, any work or service exacted in cases of emergency, from the definition of forced or compulsory labor.

<sup>28</sup> International Labor Office, ‘Combating forced labor: a handbook for employers and business’ (2nd ed. 2015), 10.

<sup>29</sup> *ibid.*

<sup>30</sup> ILO, *A global alliance against forced labor* (2005 Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work) 11.

directly or indirectly. For instance, bearing witness to other co-workers' intimidation or coercion could be considered a psychological means of penalty.<sup>31</sup>

The ECtHR has also determined how a 'penalty' could be manifested. In *CN & V. v. France*, the ECtHR observed that it could be demonstrated through physical violence or restraint and certain forms of a psychological nature, such as threats to denounce a person's irregular status to the police or immigration authorities.<sup>32</sup> In *Siliadin v. France*, the ECtHR found that although the penalty was not used to threaten the applicant, she was nevertheless "in an equivalent situation" in terms of the perceived seriousness of the threat.<sup>33</sup> The applicant was an adolescent girl living unlawfully in a foreign land. The Court concluded that those vulnerability aspects could determine a means of penalty even without direct threats (verbal or physical).

Concerning voluntariness, Skivankova emphasizes that in forced labor situations, a worker is deprived of the freedom of choice. She argues that in situations of forced labor, the employer's power is absolute, and a worker is unable to refuse the conditions of work because of penalties or punishment that may ensue.<sup>34</sup> Moreover, underprivileged workers have no bargaining power and cannot negotiate employment conditions with the employer. It is important to note that workers' subsequent consent to work in such a situation shall be considered irrelevant. Agreement by deception or fraud should not reasonably be regarded as real or actual consent or used to determine a person's will.<sup>35</sup>

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<sup>31</sup> International Labour Office, *Guidelines concerning the measurement* (ICLS/20/2018/Guidelines) <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms\\_648619.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_648619.pdf)> accessed 28 December 2019.

<sup>32</sup> *CN & V v France*, Judgment from 11 October 2012, App No 67724/09, paragraph 77.

<sup>33</sup> *Siliadin v France*, Judgment from 26 October 2005, App No 73316/0, paragraph 118.

<sup>34</sup> Klara Skrivankova (n 8).

<sup>35</sup> *ibid.*

The ILO identifies the following non-exhaustive indicators of involuntary work as a result of fraud or misrepresentation:<sup>36</sup>

- Involuntary or uninformed recruitment, at birth or through transactions such as slavery or bonded labor.
- Situations in which the worker must perform a job of a different nature from that specified during recruitment without further consent.
- Abusive requirements for overtime or on- call work not previously agreed with the employer.
- Work in hazardous conditions to which the worker has not consented.
- Work in dangerous conditions with or without compensation or protective equipment, to which a worker has not consented.
- Work with very low or no wages.
- Degrading living conditions imposed by the employer, recruiter, or third- party.
- Work for other unagreed employers.
- Work for an extended period or a longer period than agreed.
- Work with limited or no freedom to terminate the work contract.

According to the ILO, if two or more factors are present, there is a strong indication of forced labor.<sup>37</sup> Skrivankova notes that these indicators are still problematic in practice to determine the extremity of a situation.<sup>38</sup> Lewis, Waite, and Hodgkinson stress that these indicators have to be considered in light of power relations, where one side experiences the

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<sup>36</sup> ILO Special Action Programme to combat Forced Labour, 'ILO Indicators of Forced Labour' (2012) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_203832.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf)> accessed 28 December 2019.

<sup>37</sup> ILO, (n 25) 2.

<sup>38</sup> Skrivankova (n 8) 7.

absence of voluntariness, degrading conditions, and the impossibility of exit situation.<sup>39</sup> Thus it is crucial to consider the ILO indicators of penalties not in isolation but instead as connected, taking into account the duress, degrading conditions, and power relations between an exploiter and a worker.

It is also important to underline that labor exploitation could be the inception of forced labor.<sup>40</sup> Likewise, in cases of exploitative conditions, as in some cases of forced labor, a worker could receive meager wages, stay in inadequate conditions that contravene health and safety, experience a lack of breaks, leave, and sick/holiday pay. The critical difference is that a worker is not subject to physical or psychological coercion and can leave the employer. Someone in forced labor cannot.

Furthermore, the ILO states that forced labor does not cover situations of “pure economic necessity,” i.e., when a worker feels unable or unwilling to leave a job because of the real or alleged absence of employment alternatives.<sup>41</sup> A human rights violation will only occur where a State or its agent is involved in forced labor or its ‘acquiescence’ to the use of forced labor by private entities.<sup>42</sup>

## ii. *Slavery*

Slavery is the most severe and extreme form of human exploitation.<sup>43</sup> The prohibition of slavery is enshrined in the main UN and regional human rights treaties, but its definition was drawn only in the League of Nations’ 1926 Slavery Convention.<sup>44</sup> This Convention establishes

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<sup>39</sup> University of Leeds, ‘Tackling forced labor among refugees and asylum seekers: a guide’ (Published 2014 by the University of Leeds, Woodhouse Lane, Leeds, LS2 9JT, UK).

<sup>40</sup> *ibid.*

<sup>41</sup> International Labor Office, *The cost of coercion* (Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 98th Session, first published 2009) 5.

<sup>42</sup> Organization of American States, Inter-American Court of Human Rights, *Workers of Fazenda Brasil Verde v Brazil*, Judgement (Preliminary Objections, Merits, Reparations and Costs), 20 October 2016, 292.

<sup>43</sup> Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Martinus Nijhoff, Leiden, 2015) 345.

<sup>44</sup> As is indicated in the subsequent chapters, the prohibition of forced labor is subject of the Article 4 of the European Convention of Human Right, Article 8 of the International Covenant on Civil and Political Rights,

‘slavery’ as a status or condition where ‘any or all of the powers attaching to the right of ownership are exercised’ over another person.<sup>45</sup> Throughout the last decade, scholars have extensively debated the possibility of extending the classical understanding of this definition, taking into account so-called modern forms of slavery. As a supporter of a broad interpretation of the definition of slavery, Bales outlined that the key elements of slavery include violence and the threat of violence, loss of control over one’s life, lack of free movement, and lack of payment.<sup>46</sup> Allain, adhering to the classic understanding of slavery established in the 1926 Slavery Convention, criticized this approach. He considered that attaching the status of slavery to any exploitation (servitude, forced labor, bonded labor, or serfdom) will ‘obfuscate’ the definition of slavery that, in his view, has a precise connotation in international law.<sup>47</sup> David Weissbrodt, former Member of the UN Sub-Commission on the Promotion and Protection of Human Rights, believed that controversy around slavery sources from two arguments. First, as mentioned above, there is no single opinion about which practices should be categorized as slavery. Second, antislavery activists consider that a widened definition will increase State response and provide survivors with remedial measures.<sup>48</sup>

Allain notes that regional and national courts have also given impetus to these debates.<sup>49</sup> In *Siliadin v. France*, the ECtHR, guided by the definition of the 1926 Slavery Convention, accepted the interpretation of slavery in its “classic” meaning.<sup>50</sup> The Court highlighted that the applicant was deprived of her autonomy, but she was not held in slavery “in the proper sense,”

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Article 6 of the American Convention on Human Rights, and Article 11 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>45</sup> League of Nations, Convention to Suppress the Slave Trade and Slavery (25 September 1926, 60 LNTS 253, Registered No. 1414).

<sup>46</sup> Andrea Nicholson, Minh Dang, Zoe Trodd ‘A Full Freedom: Contemporary Survivors’ Definitions of Slavery’ (18 Human Rights Law Review, 2018) 689 – 693  
<<https://academic.oup.com/hrlr/article/18/4/689/5195670>> accessed 24 December 2019.

<sup>47</sup> Allain, (n 43) 421.

<sup>48</sup> Office of the United Nations High Commissioner for Human Rights, ‘Abolishing Slavery and its Contemporary Forms’ (HR/PUB/02/4) <<https://www.ohchr.org/Documents/publications/slaveryen.pdf>> accessed 28 December 2019, 4.

<sup>49</sup> Allain, (n 43) 162-166.

<sup>50</sup> *Siliadin v France*, (n 33) paragraph 122.

i.e., she was not under legal ownership, and her status was not reduced to an “object.”<sup>51</sup> Scholars criticized this interpretation, arguing that the ECtHR in its judgment narrowed the concept provided in the Slavery Convention.<sup>52</sup>

Unlike the ECtHR, the High Court of Australia, in the *Queen v Tang*’s decision, made clear that the 1926 Slavery Convention’s definition applies to *de jure* and *de facto* conditions.<sup>53</sup> The Court underlined that it is important not to “debase the currency of language, or to banalize crimes against humanity” by extending the meaning of the definition. Slavery, in the view of this Court, takes place only if the person is equated to a “commodity, an object of sale and purchase.”<sup>54</sup> In slavery, a person’s labor is used in an “unrestricted manner,” and services are used without adequate compensation.<sup>55</sup> This decision gave additional arguments to the supporters of the traditional approach to the definition of slavery.

Scholars believe that in the 2010 *Rantsev v Cyprus and Russia* case, the ECtHR had a chance to shed some light on the definition debate, but the Court dismissed this opportunity. It stated that it was “unnecessary” to identify whether the treatment against Ms. Rantseva constituted slavery, servitude, or forced and compulsory labor, as trafficking falls within the scope of the ECHR’s Article 4.<sup>56</sup> Instead of clarifying the definition, the Court recognized human trafficking as synonymous with slavery.<sup>57</sup>

Finally, in 2012, Members of the Research Network on the Legal Parameters of Slavery consisting of prominent experts and scholars, developed the Bellagio-Harvard Guidelines. This academic declaration summarized the previous theoretical debates and formulated ten

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<sup>51</sup> *ibid.*

<sup>52</sup> Vladislava Stoyanova, ‘Dancing on the borders of article 4 Human trafficking and the European Court of Human Rights in the Rantsev case’ (Netherlands Quarterly of Human Rights 2012 Vol 30, No 2) 163-194.

<sup>53</sup> Jean Allain, ‘R v Tang: Clarifying the Definition of Slavery in International Law’ (Melbourne Journal of International Law, Vol 10, No 1, 2009) 246-257.

<sup>54</sup> *The Queen v Tang* [2008] High Court of Australia 39, 28 August 2008, paragraph 32-50.

<sup>55</sup> *ibid.*

<sup>56</sup> *Rantsev v Cyprus and Russia*, Judgment from 10 May 2010 App No 25965/04 paragraph 282.

<sup>57</sup> Jean Allain, “Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery, Human Rights Law Review” (Human Rights Law Review Volume 10, Issue 3, September 2010) 551–552.

Guidelines about the main differences of slavery from other forms of human exploitation. The authors of the document agreed that possession is a foundation of slavery.<sup>58</sup> Thus in forced labor cases, control over a person equal to ownership is not exercised. If harsh and exploitative conditions are the preface for forced labor, then forced labor itself could be a preface for slavery.

### *iii. Human trafficking*

Human trafficking is defined in numerous legal instruments. However, the first agreed and internationally binding definition of this term came with the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, to the UN Convention against Transnational Organized Crime (the Palermo Protocol).<sup>59</sup> The Palermo Protocol defines ‘trafficking in persons’ as:

[T]he 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 labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.<sup>60</sup>

This Palermo Protocol definition is complex. The provision establishes three elements of trafficking: the specific acts, the means, and the purpose. Although the Palermo Protocol includes forced labor, slavery, and practices similar to slavery, and servitude as forms of

<sup>58</sup> Members of the Research Network on the Legal Parameters of Slavery, ‘2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery’, Guideline 3.

<sup>59</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Resolution 55/25 of 15 November 2000).

<sup>60</sup> Article 3(a).

exploitation, their nature is not further defined in this treaty. As a criminal offense, human trafficking is not designed to outlaw forced labor per se; criminalization occurs only when movement is involved and the criminal conduct contains all three elements.<sup>61</sup> Thus, the Palermo Protocol does not create an international regime as the 1926 Slavery Convention and ILO Convention No.29 do. Instead, the Palermo Protocol sets a procedural framework and requirement for each State to criminalize trafficking in persons within its jurisdiction.

Practitioners and scholars emphasize that the boundaries of forced labor and labor trafficking still are challenging to define.<sup>62</sup> In the words of Stoyanova, even regional courts have not brought clarification on the issue. As mentioned above, in *Rantsev v. Cyprus and Russia*, the ECtHR added human trafficking to the conceptual apparatus of Article 4 without explaining its features.<sup>63</sup> However, defining boundaries could shine some light for the practical application of ILO international standards defined in ILO Protocol 2014.

### *Conclusion*

Definitions of slavery and forced labor enacted in international instruments remain relevant. Despite some continued critique, generally, the universal and regional human rights mechanisms cannot be said to have reconsidered these definitions. For instance, the ECtHR and UN Human Rights Committee examined only its practical application and have neither extended nor redefined these definitions. All three jurisdictions – Kazakhstan, Russia, and the US - could use these established terms in their national law to better develop domestic instruments and mechanisms to fight against forced labor.

<sup>61</sup> Judy Fudge and Kendrs Strauss, 'Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014) 535.

<sup>62</sup> Roger Plant, 'Forced Labor, Slavery and Human Trafficking: When do definitions matter?' (Anti-Trafficking Review, Issue 5, 2015) 153–157 < [www.antitraffickingreview.org](http://www.antitraffickingreview.org) > accessed 26 December 2019.

<sup>63</sup> Vladislava Stoyanova (n 52).



Moreover, this chapter concludes with two essential points relevant to the subsequent analysis. First, slavery includes a broader range of practices and conditions than forced labor and is the most extreme form of human exploitation. As such, it should be separate from forced labor in law. Second, trafficking and forced labor are two related but very distinct concepts. They certainly overlap, but not all forced labor instances result from trafficking in persons. Therefore, forced labor should be considered a stand-alone crime. With this in mind, the next chapters will provide more detail on the rationalities of forced labor criminalization based on ILO standards and regional courts' views.

## II. Scope of the Problem of Forced Labor of Migrant Workers in the US, Russia, and Kazakhstan

This part provides an overview of the scale of forced labor of migrant workers in the focus jurisdictions. The chapter aims to show the statistics and similarities and differences of the problem in three countries to understand further how the Governments respond to such human rights violations. This chapter includes a short overview of the xenophobia against migrant workers. This research considers that xenophobia comes from different levels and affects the vulnerability of migrants to forced labor.

### *i. Labor migration in the focus jurisdictions: a statistical overview*

The US is an attractive destination country for immigrants and migrant workers worldwide, with a centuries-long history. Russia appeared in the arena of international migration only after the dissolution of the Soviet Union. It quickly became a center of gravity for migrant workers, predominantly from the post-soviet region, China, Turkey, and Vietnam.<sup>64</sup> Contrary to these two centers of attraction for labor migrants, migration flows to Kazakhstan are less impressive. However, Kazakhstan's rising prosperity makes it the second most prominent destination country for migrant workers from Central Asia.<sup>65</sup>

Over 9 million temporary visas to nonimmigrants were issued in 2018 in the US.<sup>66</sup> Migrants coming to the US have different reasons for mobility, however, international labor migration is an important motivation.<sup>67</sup> The US issues 14 kinds of visas for temporary workers,

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<sup>64</sup> Tyuryukanova, (n 16).

<sup>65</sup> Bhavna Dave, 'Informal Practices and Corruption In Regulation of Labor Migration in Kazakhstan' (IDE-JETRO, 2013) <[https://www.ide.go.jp/library/Japanese/Publish/Download/Report/2012/pdf/C24\\_ch2.pdf](https://www.ide.go.jp/library/Japanese/Publish/Download/Report/2012/pdf/C24_ch2.pdf)> accessed 13 October 2019.

<sup>66</sup> Brittany Blizzard and Jeanne Batalova, 'Temporary Visa Holders in the United States' (Migration Policy Institute, 2019) <<https://www.migrationpolicy.org/article/temporary-visa-holders-united-states-2018>> accessed 27 October 2019.

<sup>67</sup> UN Economic Commission for Europe, 'The Measurement of Labor Migration to the United States' (Conference of European, 2018) <[https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.10/2018/mtg1/USA\\_Labour\\_ENG.pdf](https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.10/2018/mtg1/USA_Labour_ENG.pdf)>

though statistical data on visas issued for seasonal agricultural workers (H2A) and seasonal and temporary nonagricultural workers (H2B) is primarily considered for this thesis. Each year the US issues no less than 100,000 visas (H2) for temporary jobs, wherein H2B visa for seasonal and temporary nonagricultural work is limited to 66,000 visas annually.<sup>68</sup> In 2019, in total, 302,424 visas were issued for the H2 visa programs.<sup>69</sup>

The primary recipients of H2 visas are migrant workers from South America, Central America, and the Caribbean.<sup>70</sup> Migrants from Mexico usually obtain 90 percent of the H visas, and migrant workers from Central America, mainly from Guatemala, receive no less than 3 percent of the total visas issued for migrants regularly.<sup>71</sup> However, there is a need to be cautious when interpreting US statistical data as the system for calculating the number of migrant workers is quite complicated. Several data collection sources use different statistical indicators. Moreover, measuring migrant workers is problematic because many international migrants working in the US do not always have a visa to work when entering. Instead, these migrants come to the US with various visas, not necessarily one that allows them to work, and they access the labor market only after having already entered the country.<sup>72</sup>

Russia regularly receives from 2.7 to 4.2 million migrant workers from Central Asia (almost 16 percent of this region's economically active population) on a visa-free regime.<sup>73</sup> In addition to the visa-free regime, several factors drive Central Asian migrant workers to Russia:

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accessed 16 September 2019.

<sup>68</sup> Blizzard and Batalova (n 66).

<sup>69</sup> US Department of State Bureau of Consular Affairs, 'Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2015-2019s' <<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>> accessed 19 November 2019.

<sup>70</sup> ILO, 'Labour migration in Latin America and the Caribbean. Diagnosis, Strategy, and ILO's Work in the Region.' (ILO Technical Reports, 2016/2) 59.

<sup>71</sup> *ibid.*, 60-61.

<sup>72</sup> *ibid.*

<sup>73</sup> Sergey Ryazantsev, Marina Khramova, 'The Impact of the COVID-19 Pandemic on the State of Migrants and Remittances in Central Asia' (IOM, Almaty 2020) <<https://kazakhstan.iom.int/publications>> accessed 15 November 2020.

- Economic factors (low salaries and high unemployment in Central Asian countries in contrast to relatively high wages in Russia).
- Socio-demographic characteristics (the demographic crisis of Russia leads to a reduction in the national labor force. Therefore, the influx of foreign labor is a significant development resource for this country).
- Cultural and historical factors (common post-soviet history).
- Infrastructural factors (the availability of air and land transportation) and geographic proximity.
- High birth rates and the relatively young average age of Central Asia's population.<sup>74</sup>

In 2019, Russia received, in total, 5,478,249 foreigners who entered the country for the purpose of work. Approximately 8.2 percent of this number were migrant workers from Kyrgyzstan, 21.5 percent from Tajikistan, and 38.4 percent from Uzbekistan.<sup>75</sup>

Kazakhstan became a destination country for migrant workers from Central Asia in the mid-2000s.<sup>76</sup> Traditionally this country is the second option for migrant workers from Central Asia. In 2019, approximately 420,000 migrant workers from Central Asia were registered in Kazakhstan.<sup>77</sup> However, Kazakhstan has the least reliable statistics on labor migration.<sup>78</sup> Human rights activists doubt official statistics and believe that most migrants reside and work in

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<sup>74</sup> Sergey Ryazantsev, 'Labour Migration from Central Asia to Russia in the Context of the Economic Crisis' (Russia in Global Affairs Valdai papers, 2016) <<https://eng.globalaffairs.ru/articles/labour-migration-from-central-asia-to-russia-in-the-context-of-the-economic-crisis/>> accessed 25 June 2019.

<sup>75</sup> Russian Ministry of Internal Affairs (MVD), 'Separate indicators of the migration situation in the Russian Federation for January - December 2019 with distribution by region', <<https://xn--b1aew.xn--p1ai/Deljatelnost/statistics/migracionnaya/item/19365693>> accessed 22 January 2020.

<sup>76</sup> Erica Marat, 'Labor Migration in Central Asia: Implications of the Global Economic Crisis' (Central Asia-Caucasus Institute & Silk Road Studies Program, 2009) 25.

<sup>77</sup> Sergey Ryazantsev, Marina Khramova, (n 70).

<sup>78</sup> This statement was made by local authorities and NGO representatives during the International Conference.

Kazakhstan with irregular status.<sup>79</sup> For instance, in 2018, the International Federation for Human Rights (FIDH) estimated rather that 1.5 million migrant workers reside in Kazakhstan.<sup>80</sup>

ii. *The prevalence of forced labor in the US, Russia, and Kazakhstan*

More than 150 years have passed since the US stopped practicing legal slavery. Nowadays, the country has become a recognized leader in combating forced labor and trafficking in human beings worldwide. Despite proactive measures in the US, the practice of forcing people to work against their will, often in inhuman conditions, continues. A decade ago, Bales stressed that it is still challenging to identify victims of slavery and forced labor in the US because they are generally hidden. He underscored that victims of forced labor in the US come from numerous ethnic groups, however, the Chinese, Mexicans, and Vietnamese compose the largest groups.<sup>81</sup>

Migrant workers in the US are predominantly involved in agriculture, construction, mining, and transportation. Female workers are occupied in services and caregiving occupations. The top industries where forced labor or labor trafficking of migrant workers exists are agriculture, transportation, landscaping services, and construction.<sup>82</sup>

In 2018, the nonprofit US organization, Polaris, released a report, “The Typology of Modern Slavery,” which identified and described 25 types of sex and labor trafficking taking place in the US.<sup>83</sup> The report highlighted vulnerability to trafficking and exploitation in the US

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<sup>79</sup> International Federation on Human Rights (FIDH), ‘Migrant Workers in Kazakhstan: No status, no rights’ (September 2016 / N°681a) <[https://www.fidh.org/IMG/pdf/note\\_kazakhstan\\_681a\\_6\\_sept\\_2016\\_uk\\_web.pdf](https://www.fidh.org/IMG/pdf/note_kazakhstan_681a_6_sept_2016_uk_web.pdf)> accessed 25 December 2019.

<sup>80</sup> *ibid.*

<sup>81</sup> Kevin Bales, (n 19).

<sup>82</sup> Polaris, ‘Labor Trafficking in the US: A Closer Look at Temporary Work Visas’ (2015) 8 <<https://polarisproject.org/resources/labor-trafficking-in-the-us-a-closer-look-at-temporary-work-visas/>> accessed 25 December 2019.

<sup>83</sup> Polaris, ‘The Latino Face of Human Trafficking and Exploitation in The United States’ (2018) <<https://polarisproject.org/resources/the-latino-face-of-human-trafficking-and-exploitation-in-the-united-states/>> accessed 25 December 2019.

as a result of migration and stresses that for there to be positive changes, the US must reexamine its current temporary work visas system.

The US temporary work visa system is the evident cause of migrant workers' forced labor in the US, as was repeatedly mentioned by various scholars, experts and NGOs. Fletcher, Bales and Stover believe that such a requirement provides incentives for unscrupulous employers to use forced labor. In their view, its elimination would help reduce low-wage workers' vulnerability to exploitation.<sup>84</sup> The ILO also supported this claim and stressed that the so-called guest worker program's hiring system results in worker indebtedness and tying workers to the employer.<sup>85</sup> Polaris emphasizes that the threat of migrants being deported is a 'potent weapon' for traffickers and exploiters.<sup>86</sup>

While there is a considerable level of exploitation and forced labor of migrant workers in the US, the country's efforts to prevent modern forms of slavery meet existing minimum standards. The US Department of State included the country in the top ten world countries taking adequate actions to respond to modern slavery.<sup>87</sup> In its Global Slavery Index (GSI), the international human rights organization Walk Free Foundation noted that the US has a strong political will to combat modern forms of slavery. The Government allocates appropriate resources to this cause.<sup>88</sup> Additionally, civil society in the US is a power that holds the US accountable for 'ensuring its obligations and delivering its promises.'<sup>89</sup>

Russia's situation differs significantly from the US. The GSI assessed Russia's protection system from human trafficking and forced labor as the weakest among European countries. The US Department of State's Trafficking in Persons Report (TIP Report) placed Russia in the

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<sup>84</sup> Kevin Bales, (n 19) 23, 66.

<sup>85</sup> ILO, 'Labour migration in Latin America and the Caribbean' (n 66) 59.

<sup>86</sup> Polaris, (n 82).

<sup>87</sup> US Department of State, 'Trafficking in Persons Report 2020' (27 June 2020) 419-422  
<<https://reliefweb.int/report/world/trafficking-persons-report-2020>> accessed 15 September 2020.

<sup>88</sup> Walk Free Foundation, 'The Global Slavery Index' (2018)  
<<https://www.globalslaveryindex.org/resources/downloads/>> accessed 15 September 2019.

<sup>89</sup> *ibid.*

lowest Tier 3. This rate means that the Government does not fully meet the minimum international standards for eliminating trafficking and forced labor.<sup>90</sup>

There is a shortcoming of scholarly research that assesses the rate of forced labor of migrant workers in Russia. Until now, the most comprehensive study remains Elena Tyuryukanova's work conducted with the ILO in 2005.<sup>91</sup> From existing articles, it could be concluded that the situation has not profoundly changed, and workers from Kyrgyzstan, Tajikistan and Uzbekistan remain the most vulnerable to forced labor in Russia. According to Mukomel, migrants from Central Asia are the most susceptible to exploitation and forced labor as they are unskilled and mainly engage in unqualified work.<sup>92</sup>

Unlike academics, human rights NGOs often examine Central Asian workers' exploitation in Russia and repeatedly point out the authorities' unwillingness to protect migrant workers.<sup>93</sup> Andrei Yakimov, an expert who works with ethnic minorities at the PSP-Fund, a charitable organization from St. Petersburg, explained that in 2019 more than 35 percent of appeals to their organization were related to exploitation or forced labor of migrant workers from Central Asia.<sup>94</sup> According to Yulia Grekhneva, from the International Information Center in Ekaterinburg, migrants are usually offered relatively good working conditions in Russia by private employment agencies (PEA) or recruiters in their home country. In fact, when in Russia, workers often are forced to perform a job not agreed upon, work overtime, work in risky conditions, work with very low or no wage, all without consent. In many cases, migrants are

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<sup>90</sup> US Department of State, (n 87).

<sup>91</sup> Elena Tyuryukanova, (n 16).

<sup>92</sup> Vladimir Mukomel, (n 20) 193.

<sup>93</sup> Human Rights Watch (Organization) (ed), *'Are You Happy to Cheat Us?': Exploitation of Migrant Construction Workers in Russia* (Human Rights Watch 2009); Anti-Discrimination Center (ADC) Memorial, International Federation for Human Rights (FIDH), *From Tajikistan to Russia: Vulnerability and abuse of migrant workers and their families* (FIDH 2014); Jane Buchanan, *Red Card: Exploitation of Construction Workers on World Cup Sites in Russia* (Human Rights Watch 2017).

<sup>94</sup> Interview with Andrey Yakimov, Expert on work with ethnic minorities at the NGO PSP-Fund in St Petersburg, Russia (interview via skype, August 16, 2020).

not connected with the employers and rather are controlled by a recruiter or an intermediary.<sup>95</sup> Experts example the seizure of passports, control of the movement of migrants, and regular non-payment or delay in payment, as means of controlling workers. Migrants cannot leave the workplace and when they realize that they are exploited, they may already have debts for accommodation, meals or fined by other means.

According to experts, migrants do not choose to contact the police or other governmental authorities. Interactions with law enforcement bodies is the most undesirable scenario for migrant workers because, in many cases, these bodies tend to deport potential victims of human exploitation rather than shield them from exploitation.<sup>96</sup> Further, and more worrying, in some cases official bodies may have some relation or connection to exploiters. The so-called “Golyanovo slaves” case could be an example. In 2012, a group of civil society activists in Moscow freed 12 victims of forced labor and slavery from the grocery store “Golyanovo” in the Moscow District. According to the Russian Civic Assistance Committee, women migrant workers from Central Asia were forced to work from early morning until late at night. They were not fed or were fed slop made from rotten vegetables. They were prohibited from talking with customers and were not allowed to leave the premises. Migrants were regularly beaten and some of the women were raped. In 2009, one of these women managed to escape and went to a Russian police station to file a report against the shop owners. The policemen took the woman back to the shop employers. In 2010, this migrant woman escaped again, and this time she contacted the International Organization for Migration (IOM) in Moscow and human rights activists who helped migrants, and they were released.<sup>97</sup> Activists initiated the investigation process, but all their efforts resulted in nothing. In 2016, human rights defenders submitted a

<sup>95</sup> Interview with Yulia Grekhneva, Head of the Legal department of Migrant Assistance Bureau of Non-profit partnership International Information Center’s in Ekaterenburg, Russia (interview via Skype, 20 of August 2020).

<sup>96</sup> US Department of State (n 83) 419.

<sup>97</sup> The Civic Assistance Committee, ‘Golyanovo Slaves. Case Reached Strasbourg’ <https://refugee.ru/en/news/delo-golyanovskih-rabov-doshlo-do-strasburga/> accessed 25 December 2019.



complaint to the ECtHR for alleged violation of Article 4 (Prohibition of slavery and forced labor).<sup>98</sup> Another four years later, in 2020, the ILO Committee of Experts raised a question on the “Golyanovo slaves” case and requested the Russian Federation to respond in this regard.<sup>99</sup>

It is also important to note that the weak governance of labor migration in Central Asian countries is another factor in workers’ forced labor in Russia. Though academic research studying this phenomenon is limited, expert interviews and media monitoring demonstrates this well. Ulugbek Avezov, Head of the Migrant Resource Center of the Tajik NGO Human Rights Center, highlighted that Tajik workers often fall into forced labor when they use existing private or State employment agencies to find a job in Russia.<sup>100</sup> For instance, in 2018, a group of Tajik migrants used a State agency to find a job in Russia. They were forced to work unpaid, over time, without holidays, and were provided inadequate living conditions. They could not leave the employer as their passports were seized.<sup>101</sup> When they managed to call their relatives and the case received publicity, Tajik authorities helped them to return home. Yet no investigation of this case in Russia or Tajikistan was initiated.<sup>102</sup> Kazakhstan has similar features of forced labor of migrant workers as seen in Russia. NGO activists indicate that without appropriate controls over employers, migrant workers’ labor exploitation often turns into forced labor, and sometimes slavery.<sup>103</sup> In 2009, Human Rights Watch (HRW) documented the forced labor of migrant workers and child labor in Kazakh plantations supplying tobacco

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<sup>98</sup> *ibid.*

<sup>99</sup> ILO, ‘Application of International Labour Standards 2021. Addendum to the 2020 Report of the Committee of Experts on the Application of Conventions and Recommendations’ (ILO, 2021) 289. [https://www.ilo.org/ilc/ILCSessions/109/reports/reports-to-the-conference/WCMS\\_771042/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/109/reports/reports-to-the-conference/WCMS_771042/lang-en/index.htm) accessed 15 February 2021.

<sup>100</sup> Interview with Ulugbek Avezov, Head of Migrant Resource Center of Tajik NGO Human Rights Center (Dushanbe, May 12, 2020).

<sup>101</sup> Mullorajab Yusufzoda, ‘*Намедонем кучо равем – на ҳуҷҷат дорем, на маблағ*’ (We don’t know where to go - no documents, no money), Radio Liberty (March 5, 2019) <<https://www.ozodi.org/a/29803843.html>> accessed 25 December 2019.

<sup>102</sup> Interview with Ulugbek Avezov, Head of Migrant Resource Center of Tajik NGO Human Rights Center (Dushanbe, May 12, 2020).

<sup>103</sup> Interview with Shakhnoza Khasanova, Director of Kazakh NGO Sana Sezim (Poland, September 29, 2020).

to Philip Morris.<sup>104</sup> They reported that migrant workers were not paid wages or were threatened that they would lose most or all of their salaries as a means of forcing them to work. Some migrants were required to fulfill additional housework (cleaning, repairing) unrelated to growing tobacco. After this international scandal, the Government began to reduce the number of tobacco fields. However, cases of forced labor or exploitation of migrant workers started to appear in the private agricultural sector. The UN Special Rapporteur on contemporary forms of slavery, Gulnara Shahinian, visited Kazakhstan in 2012 and 2014. She noted that male migrant workers are predominantly exploited in private construction, and female migrant workers were exploited as domestic workers. The Special Rapporteur indicated that migrant workers were forced to work in inadequate working conditions, not paid or paid with delay, and their identity cards were seized.<sup>105</sup> Shahinian found that migrants from Uzbekistan and Kyrgyzstan were the primary victims of forced labor. Migrants were afraid to leave their employers because they threatened to report their irregular status to the police.<sup>106</sup>

In 2017, FIDH, NGO “Antidiscrimination Center Memorial,” and Kazakh NGO International Legal Initiative (ILI), published a new report that revealed the extent of migrant workers’ forced labor in Kazakhstan’s agriculture sector. According to these NGOs, the “master” usually seizes migrants’ documents, intimidates them with physical violence, and places migrants in conditions unsuitable for humans.<sup>107</sup> In many cases, workers received little more than food in exchange for work, which was rarely high-quality or satisfying. Those who

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<sup>104</sup> Human rights Watch (HRW), ‘Hellish Work’ Exploitation of Migrant Tobacco Workers in Kazakhstan (2010) <<https://www.hrw.org/report/2010/07/14/hellish-work/exploitation-migrant-tobacco-workers-kazakhstan>> accessed 25 December 2019.

<sup>105</sup> UN Human Rights Council, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian (A/HRC/24/43/Add.1 27 June 2013) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14405&LangID=E>> accessed 15 September 2019.

<sup>106</sup> *ibid.*

<sup>107</sup> International Federation for Human Rights (FIDH), ADC Memorial, ILI, ‘Invisible and exploited in Kazakhstan: the plight of Kyrgyz migrant workers and members of their families’ (2018). <<https://www.fidh.org/en/region/europe-central-asia/kazakhstan/invisible-and-exploited-in-kazakhstan-new-report-sheds-light-on-the>> accessed 15 September 2019.

managed to escape rarely went to the police because they feared expulsion or distrusted the police's ability to protect their rights. Often, law enforcement officers themselves were the link between a migrant worker and an employer.<sup>108</sup>

In December 2018, the UN Special Rapporteurs addressed the Government of Kazakhstan about Babaraim Akimov's case. Akimov was a Kyrgyz migrant worker subjected to forced labor in Kazakhstan and was held in extreme and deteriorating conditions. In this communication, the Special Rapporteurs indicated the negative role of intermediaries who use migrants' vulnerability and the absence of adequate State control over migrants' working conditions.<sup>109</sup> In 2019, human rights defenders again highlighted Kazakhstan's failure to identify migrant workers as victims of forced labor or human trafficking and protect them.<sup>110</sup>

As can be seen from the analysis, while the US is considered to have a strong visa scheme and dedicate resources to the cause, Russia and Kazakhstan dedicate little in academic research, have weak governance and provide little or no State response to complaints. Consequently, the scope of the problem is greater in Russia and Kazakhstan than it is in the US.

### *iii. Xenophobia - a factor increasing the risk of migrant vulnerability to forced labor*

Migrants are often associated with global diseases, cultural change and loss of identity, or global terrorism.<sup>111</sup> Such sentiments toward migrants result in their discrimination. Particularly during times of economic hardship, prejudice against migrants could increase

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<sup>108</sup> *ibid.*

<sup>109</sup> OHCHR, 'Database of Communication Report and Search' (OHCHR, 21 December 2018) AL KAZ 6/2018 < <https://spcommreports.ohchr.org/TmSearch/Results> > accessed 15 September 2019.

<sup>110</sup> Solidarity Center, International Labor Initiatives, Public Fund Insan Leilek, Kazakhstan International Bureau for Human Rights and the Migrant Workers' Union of Kyrgyzstan, 'Shadow report on implementation of the Global Compact for Safe, Orderly and Regular Migration in the Central Asian region' <[https://migrationnetwork.un.org/sites/default/files/docs/shadow\\_report\\_on\\_implementation\\_of\\_the\\_global\\_compact\\_for\\_safe\\_orderly\\_and\\_regular\\_migration\\_in\\_the\\_central\\_asian\\_region.pdf](https://migrationnetwork.un.org/sites/default/files/docs/shadow_report_on_implementation_of_the_global_compact_for_safe_orderly_and_regular_migration_in_the_central_asian_region.pdf)> accessed 20 November 2020.

<sup>111</sup> Lars Rensmann, Jennifer Miller-Gonzalez, 'Xenophobia and Anti-Immigrant Politics' (The International Studies Encyclopedia, 2010) < [https://www.researchgate.net/publication/237009965\\_Xenophobia\\_and\\_Anti-Immigrant\\_Politics](https://www.researchgate.net/publication/237009965_Xenophobia_and_Anti-Immigrant_Politics) > accessed 25 June 2020.

tensions due to competition (or perceived competition) for social goods, including jobs, between migrants and other society members.<sup>112</sup> In this context, political leaders using xenophobic sentiments can create anti-immigrant agendas and a shift towards more restrictions in the labor market. Restrictions could push migrants into the shadow market of an economy where exploitation is high. Simultaneously, migrants' cheap labor can become competition to local employees, which also produces negativity of the receiving society towards migrants.

Among the considered jurisdictions, xenophobia is most critical in Russia. According to Russia's "Levada Center," 72 percent of Russian citizens would like to limit labor migration.<sup>113</sup> Migrant workers from Central Asia frequently suffer hate attacks in Russia, particularly in the last decade. Although Russia does not maintain official statistics on victims of hate crimes, NGOs found that between 2010-2016, 42 percent of hate crimes' victims were Central Asian natives.<sup>114</sup> Although the level of hate crimes against Central Asian natives has decreased, ethnic intolerance is still observed. For instance, in 2018, the police in Khabarovsk of the Russian Federation conducted an "Illegal Migrant" raid and detained more than 80 Central Asian migrant workers. The policemen severely beat migrants and shouted xenophobic slogans, which outraged human rights activists.<sup>115</sup> HRW immediately released a statement and stressed that Russian police selectively check the most vulnerable and voiceless Central Asian migrant workers, arbitrarily detain them, and use inhumane and degrading treatment against detainees.

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<sup>112</sup> United Nations Office on Drugs and Crime (UNODC), 'Combating violence against migrants. Criminal justice measures to prevent, investigate, prosecute, and punish violence against migrants, migrant workers, and their families and to protect victims' (2015) 3 <<http://hdl.handle.net/20.500.12389/22082>> accessed 15 September 2019.

<sup>113</sup> The Moscow Time, 'Xenophobia Is Still on the Rise in Russia – Poll' (September 18, 2019) <<https://www.themoscowtimes.com/2019/09/18/xenophobia-is-still-on-the-rise-in-russia-poll-a67326>> accessed 25 September 2019.

<sup>114</sup> Data prepared using the reports of Moscow-based Russian NGO SOVA Center.

<sup>115</sup> Kanat Altynbayev, 'Mass beating of Kyrgyz migrants by Russian police sparks outcry' (Caravanserai, 19 December 2019) <[https://central.asia-news.com/en\\_GB/articles/cnmi\\_ca/features/2019/12/19/feature-01](https://central.asia-news.com/en_GB/articles/cnmi_ca/features/2019/12/19/feature-01)> accessed 25 December 2019.

HRW called on Russian authorities to stop the practice of racial profiling and arbitrary detentions of migrant workers.<sup>116</sup>

Anti-migrant sentiments and hate crimes against migrants also have a political nature. For example, in Russia they are used to challenge migration policies and the migrant influx from post-soviet countries. The recent statement of Russia's Investigative Committee (IC) recognizes this argument. After the police detention of members of a Nazi group that mostly attacked Central Asian natives, the IC stated that these killings were “demonstrative, politicized, and an instrument of pressure on state bodies to change the current migration policy.”<sup>117</sup>

Similarly, xenophobia against migrants in the US can be seen to follow political trends. Although the US is perceived to be a “country of immigrants,” i.e., founded by settlers and immigrants, its history has painful periods when migrants were perceived as a threat.<sup>118</sup> Open antagonism against migrants dates back to the political agenda in 2016 with the “build the wall” rhetoric against Mexicans. Erica Lee mentioned that although policies controlling migration flows had xenophobic elements before, the idea that the US is a nation of immigrants and that there is strength in diversity is still alive.<sup>119</sup> Therefore Trump's anti-immigrant decisions led to protests among ordinary US citizens, politicians, and influential persons.<sup>120</sup> On the contrary, in Russia, one hardly observes any discontent with anti-immigrant decisions despite the fact that just 30 years ago, many migrant workers lived as one country with Russians. The only exception now is the weak voice of human rights activists.

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<sup>116</sup> HRW, ‘Russia: Police Round Up Migrant Workers. Racial Profiling, Beatings in Detention’ (December 24, 2019) <<https://www.hrw.org/news/2019/12/24/russia-police-round-migrant-workers>> accessed December 25, 2019.

<sup>117</sup> Information agency TASS, ‘Investigative Committee indicted six of Tesak's associates for ethnic killings’ (December 23, 2020) <<https://tass.ru/proisshestviya/10333799>> accessed 25 December 2020.

<sup>118</sup> The notorious Chinese Exclusion Act (1882) could be an example of an aggressive reaction to increased Chinese migrants' flow to the US.

<sup>119</sup> Taylor McNeil, ‘The Long History of Xenophobia in America’ (September 24, 2020) <<https://now.tufts.edu/articles/long-history-xenophobia-america>> accessed 10 November 2020.

<sup>120</sup> *ibid.*

On the other hand, in Kazakhstan xenophobic sentiments against migrant workers are low, and the Government restricts such attitudes.<sup>121</sup> As a young country, it is difficult to understand whether this may change with the political climate, however, experts believe the increase of labor migration may raise xenophobic sentiments in Kazakhstani society too.<sup>122</sup>

### *Conclusion*

The scope of the problem is dire and forced labor is widespread in all three jurisdictions, regardless of their political and economic situation. Russia and Kazakhstan have many similarities regarding the factors that push migrant workers into forced labor. Migrants come in a visa-free regime, independently or sometimes, they use private employment agencies or recruiters in their home country to find a job abroad. Often, migrants fall into unscrupulous employers' hands and their working conditions are not controlled by the State. The vulnerability of migrants to forced labor is also predetermined by the lack of effective migration governance in Central Asian countries that send migrant workers to countries of destination, such as Tajikistan. On the other hand, although migrant workers come to the US under a visa regime, there is no guarantee that migrants will stay safe from exploitation where visas may be temporary, or employers may abuse their power and threaten migrants with deportation.

The level of xenophobia against migrants is abnormally high in Russia, and workers from Central Asia face this intolerance much more than other foreign workers. This situation could be an additional factor increasing migrant workers' vulnerability and enhancing their fear to interact with the official bodies or local population when in abusive employment conditions. Similarly, anti-migrant sentiments can be seen to rise and fall in the US. On the other hand,

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<sup>121</sup> Khamza Sharifzoda, 'Why Is Kazakhstan a Growing Destination for Central Asian Migrant Workers?' (The Diplomat, June 13, 2019) <<https://thediplomat.com/2019/06/why-is-kazakhstan-a-growing-destination-for-central-asian-migrant-workers/>> accessed 25 September 2019.

<sup>122</sup> Interview with Shakhnoza Khasanova (n 103).

Kazakhstan has little xenophobic sentiment towards migrant workers. Yet, it cannot be said that Kazakhstan or the US is safer for migrant workers or that they are less likely to fall into forced labor or be exploited. Migrants are equally at stake in all three States, but xenophobic sentiments as seen in Russia could legitimize such exploitation and forced labor.

Although the US encounters similar problems of forced labor of migrants, its political and legal system does not overlook severe human rights violations, particularly given the vibrant civil society in the US. There is strong political will to fight forced labor and robust NGOs and human rights defenders to resolve cases of human exploitation despite any political agenda. On the other hand, Russia and Kazakhstan dedicate few resources to investigating reports of issues and its civil society is rarely heard. In the worst cases, State authorities in these countries may be linked to the employer reported to be subjecting migrants to forced labor.

### **III. Universal and Regional Human Rights Obligations to Protect Migrant Workers and Eradicate Forced Labor in the Selected Jurisdictions**

Understanding the scale of migrant workers' forced labor in the focus jurisdictions is necessary to assess the extent to which universal and regional human rights obligations and mechanisms can influence domestic law to reduce forced labor of migrant workers. Thus, this chapter provides an overview of the relevant international human rights instruments applicable in the three selected countries and compares their level of commitment to protecting migrant workers from forced labor.

#### *i. Universal legal frameworks against forced labor: boundaries of responsibilities*

##### *a) UN treaties*

The prohibition of forced labor is established in Article 8 of the International Covenant on Civil and Political Rights (ICCPR).<sup>123</sup> The ICCPR prescribes that “no one shall be required to perform forced or compulsory labor” (art. 8.3(a)), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) establishes the same on migrant workers and members of their family (art.11). Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not directly prohibit forced labor, it declares the right of everyone “to gain his living by work which he freely chooses or accepts” (art. 6.1).<sup>124</sup> Finally, Article 6 of the Convention on the Elimination

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<sup>123</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999.

<sup>124</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol 993, p.3.



of All Forms of Discrimination against Women (CEDAW) requires the suppression of all forms of trafficking in women and exploitation of the prostitution of women.<sup>125</sup>

All three jurisdictions have obligations under the ICCPR. Russia and Kazakhstan have also ratified its Optional Protocol (which facilitates an individual complaint mechanism), whereas the US has not. Russia has also maintained its membership in the ICESCR since 1973 and CEDAW since 1981. Kazakhstan joined both treaties as an independent State in 1998 and 2006, respectively. The US signed the ICESCR in 1977 but still has not ratified it. Neither has it ratified the CEDAW. As such, Russia has been subject to these obligations longer than Kazakhstan, and the US is not considered a party to either Convention.

The next UN treaty that should be mentioned is the 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (the 2000 Protocol), supplementing the UN Convention against Transnational Organized Crime (the Palermo Protocol).<sup>126</sup> The Palermo Protocol is a binding UN treaty creating a procedural framework to combat trafficking, including trafficking with the aim of forced labor, that all three jurisdictions have ratified. The Protocol requires States to criminalize trafficking acts, establish protection and repatriation mechanisms of victims, prevent trafficking crime, and enhance intergovernmental cooperation. The US made a reservation to the Palermo Protocol's acceptance and asserted its constitutional regime's prevalence over the treaty.

#### *b) ILO treaties*

As demonstrated above, UN instruments' relevant provisions require members to prohibit forced labor, exploitation, and guarantee free will in choosing work. However, these

<sup>125</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol 1249, p.13.

<sup>126</sup> UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en)> accessed 22 November 2019.

instruments contain nothing on preventing, protecting, and accessing remedies for forced labor victims. Such requirements are included in the following ILO instruments.

It is important to note that ILO conventions have a special place in the universal legal framework, and these instruments differentiate from UN treaties. For instance, reservations are not permitted during the ratification process of ILO Conventions.<sup>127</sup> The absence of the possibility to make reservations reduces the “diluting effect” of the international treaty.<sup>128</sup> In addition, the ILO Declaration on Fundamental Principles and Rights at Work enumerates the Forced Labour Convention No. 29 (1930) and the Abolition of Forced Labour Convention (1957) as one of the eight “fundamental conventions” of the ILO.<sup>129</sup> Thus, their implementation could be monitored by the ILO regardless of whether a particular State has ratified them or not. This means that a State cannot be a tokenistic party to a treaty without intent to enforce it domestically, as can be seen with UN treaties.

The ILO Forced Labor Convention, 1930 (No. 29) contains the definition of forced labor and requires Member States to suppress it. Kazakhstan and Russia ratified this treaty. The US did not. In 2014, the ILO adopted a new Protocol to Convention 29, which is expected to be endorsed by all member states who ratified Convention 29.

The Protocol of 2014 recognizes migrant workers are vulnerable to forced labor in a private economy and prescribes that States must apply the established standards irrespective of a workers’ legal status in the national territory.<sup>130</sup> Additionally, the 2014 Protocol requires States to protect victims of forced labor and provide effective remedies. Thus, this progressive

<sup>127</sup> International Labor Office, ‘The rules of the game: an introduction to the standards-related work of the International Labor Organization’ (4th ed) (Geneva: ILO 2019) 22.

<sup>128</sup> Beth Lyon, ‘The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the Brown Collar Migration Paradigm’ (2009) Villanova Law/Public Policy Research Paper No 2009-20, 406 < <http://ssrn.com/abstract=1428514> > accessed 18 November 2019.

<sup>129</sup> Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>130</sup> ILO (n 7) Recommendation 203.

ILO treaty guides Member States to produce human rights-centered policies to prevent and fight forced labor.

The Protocol entered into force for Russia in January 2020. Kazakhstan has not ratified it yet. While the US supported the drafting of the Protocol and voted in favor of its adoption, it abstained from the ratification of Convention 29 and therefore will not ratify the Protocol either. Russia is therefore currently subject to more robust human rights standards regarding the prevention of forced labor and provision of remedies for migrant workers experiencing this, than Kazakhstan and the US are.

### c) *The ICRMW*

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) is the most comprehensive UN treaty recognizing all migrant workers' human rights in both regular and irregular situations.<sup>131</sup> Article 11 of this treaty prohibits forced labor but does not create additional obligations to protect victims and provide them remedies. However, the treaty has provisions that oblige the Member States to minimize risks of forced labor. For example, Article 25 of the ICRMW guarantees migrant workers, regardless of their legal status, equal treatment in employment in destination countries. This means they must not be treated less favorably than citizens in domestic law. Even under private employment contracts, any violation of the principle of equal treatment is prohibited by the Convention.

None of the focus jurisdictions have ratified the ICRMW, which is not surprising. Most migrant-receiving countries prefer not to sign this document. Interestingly, the US was involved in the drafting of the ICRMW and was influential in its development.<sup>132</sup> The question

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<sup>131</sup> UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

<sup>132</sup> Beth Lyon, (n 128).

of ratification passed through a few US multilateral treaty-making process stages, but nevertheless, the US refused to join this treaty as binding international documents are perceived as the ‘loss’ of sovereignty for the US.<sup>133</sup> Similarly, in 2002 Russia established a special Governmental Expert Group to study the possibility of joining ICRMW and migrant-related ILO Convention 97 and 143, but decided against joining, finding it to be “inappropriate at present.”<sup>134</sup>

Kazakhstan’s Government in 2003 discussed the possibility of accession to the ICRMW. The Government concluded that ratification is not possible for economic and social reasons, and the complexity of political and legal consequences that can arise from ratification. Moreover, Kazakhstan believed it was necessary to protect the national labor market from foreign labor migrants.<sup>135</sup>

UN mechanisms regularly recommend Kazakhstan, Russia, and the US should ratify the ICRMW to strengthen migrant workers’ protection and harmonize its national legislation accordingly.<sup>136</sup> However, these recommendations were not implemented for the reasons above, and because the countries claim that the rights enshrined in the ICRMW are already protected in other international or regional instruments.<sup>137</sup>

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<sup>133</sup> *ibid.*

<sup>134</sup> Zhanna Zayonchkovskaya, ‘The Protection of the Rights of Migrants Workers in the Countries of Central and Eastern Europe and the CIS and Perspectives of Joining the 1990 UN Convention’ (UNESCO, 2004) 18 <<https://unesdoc.unesco.org/ark:/48223/pf0000139533> > accessed 24 November 2019.

<sup>135</sup> *ibid.*

<sup>136</sup> Human Rights Council, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ (A/HRC/4/19/Add 3, 2007) paragraph 89; ‘Report of the Special Rapporteur on the human rights of migrants’ (A/HRC/7/12/Add 2, 2008) paragraph 126; ‘Report of the Special Rapporteur on trafficking in persons, especially women and children on her mission to the United States of America’ (A/HRC/35/37/Add 2, 2017) paragraph 88 (a); ‘Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences’ (A/HRC/24/43/Add 1, 2013,) paragraph 127; ‘Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences’ (A/HRC/27/53/Add 2, 2014) paragraph 63.

<sup>137</sup> Touzenis and Sironi, ‘Current Challenges in the Implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’ (Directorate-General for External Policies of the Union Policy Department 2013) 7.

*d) The Global Compact for Safe, Orderly, and Regular Migration*

The Global Compact for Safe, Orderly, and Regular Migration (GCM) is a novelty in international law, aimed at the protection of migrant workers.<sup>138</sup> This non-binding agreement was prepared under the auspice of the UN and is considered soft law having “para-law”-functions.<sup>139</sup> In short, the Global Compact comprises 23 objectives towards better management of migration at local, national, regional, and global levels. The GCM’s Goal 6 specifies the elimination of forced labor of migrants. It states countries should ratify international instruments related to labor migration, decent work, and countering forced labor. It also requires the establishment of control mechanisms in employment and the implementation of national laws that sanction forced labor cases.<sup>140</sup>

Due to its soft law nature, the CGM received support from many UN Member States, yet the US showed particular resistance to voting for this document. The US considered that the GCM is not compatible with its sovereignty, and decisions on immigration policies “must always be made by Americans and Americans alone.”<sup>141</sup> Against this background, Russia and Kazakhstan voted for the adoption of the GCM. Both jurisdictions stated the GCM was neither legally binding nor could it impose legal or financial obligations on the acceding countries.<sup>142</sup> Of course, this seems contrary to what we might expect. Regimes with authoritarian tendencies support the international document (even if it does not create binding commitments) and have

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<sup>138</sup> UN General Assembly, ‘Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration’ (Marrakech, Morocco, 10 and 11 December 2018, A/CONF 231/3).

<sup>139</sup> Anne Peters ‘The Global Compact for Migration: to sign or not to sign?’ Sarah Cole, ‘Virtual Friend Fires Employee’ (Blog of the European Journal of International Law 21 November 2018). <<https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/>> accessed 19 November 2019.

<sup>140</sup> *ibid.*, paragraph 22 (a-e).

<sup>141</sup> Press release: “United States Ends Participation in Global Compact on Migration” issued by the US Mission to the United Nations on 02.12.2017 <[https://usun.usmission.gov/united-states-ends-participation-in-global-compact-on-migration/?\\_ga=2.129740300.1466206483.1577940075-430091369.1556797051](https://usun.usmission.gov/united-states-ends-participation-in-global-compact-on-migration/?_ga=2.129740300.1466206483.1577940075-430091369.1556797051)> accessed 19 November 2019.

<sup>142</sup> Intergovernmental Conference on the Global Compact For Migration, 5th–8th Plenary Meetings ‘Speakers Call for Robust Implementation of Landmark Global Compact to Protect Migrants Worldwide, as Intergovernmental Conference Concludes in Marrakech’ (DEV/3378 11.12.2018) <<https://www.un.org/press/en/2018/dev3378.doc.htm>> accessed 19 November 2019.

made a non-binding commitment to regularize migration. At the same time, a State with an advanced democracy effectively blocked the dissemination of the GCM. The US approach rightly generated criticism that it was antithesis to a world power promoting democracy worldwide and evaluating other countries' measures against human exploitation. While Russia and Kazakhstan possibly supported this soft law without any real intention to follow it, the US approach presents further motivation for non-enforcement of basic standards and could be another argument for political criticism of the West.

ii. *The influence of regional systems on the protection of migrant workers from forced labor*

a) *Russia and the Council of Europe*

The Russian Federation was admitted to the Council of Europe (CoE) in 1996 and ratified the ECHR in 1998. The ECHR sets strict standards for protecting human rights and fundamental freedoms and requires that no one “shall be held in slavery or servitude and prohibits forced or compulsory labor.”<sup>143</sup>

The ECtHR holds this right out to be one of the fundamental values of democratic societies. Although the ECtHR has a less developed case law on Article 4, it has still established essential standards. In *CN v. the United Kingdom* and *Siliadin v. France*, the Court required Member States to “penalize and prosecute effectively” any acts of slavery, servitude, or forced labor.<sup>144</sup> In *Rantsev v. Cyprus and Russia*, the ECtHR stated that measures aimed at the prevention, protection, and punishment of the acts prohibited in Article 4 ECHR should be considered when assessing its effectiveness.<sup>145</sup> In *Chowdury and Others v. Greece*, the Court

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<sup>143</sup> Article 4 of ECHR.

<sup>144</sup> *CN v the United Kingdom*, Judgment from 13 February 2013, Application No 4239/08 paragraph 66; *Siliadin v France*, Judgment from 26 October 2005 Application No 73316/0 paragraph 112; *CN and V v France*, Judgment from 11 January 2013, Application No 67724/09, paragraph 105.

<sup>145</sup> *Rantsev v Cyprus and Russia*, Judgment from 10 May 2010, Application No 25965/04, paragraph 285.

observed that States' positive obligations under Article 4 should be interpreted in light of the obligation to prevent, protect, investigate, and suppress any act intended to subject a person to exploitation.<sup>146</sup>

Under the Constitution of the Russian Federation, the ECHR has primacy over statutory law.<sup>147</sup> In 2003, the Plenum of the Russian Federation Supreme Court adopted a Resolution on the application of universally recognized principles and norms of international law and international treaties and courts,<sup>148</sup> recognizing the binding jurisdiction of the ECtHR.<sup>149</sup> In 2013, the Plenum of the Supreme Court of the Russian Federation issued a new Resolution which emphasized the particular importance of the ECHR, but providing that where Russian legislation provides a higher level of protection of rights, then those domestic norms are to be applied.<sup>150</sup>

Since 2014, however, Russia's attitude towards ECtHR decisions has changed.<sup>151</sup> As a result, Russia adopted amendments to the Law on the Constitutional Court of the Russian Federation, which empowered the Constitutional Court to prevent the implementation of interstate body decisions. The Constitutional Court also gained the power to prescribe the possibility of enforcement and execution, in whole or in part, of the decisions of international

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<sup>146</sup> *Chowdury and Others v Greece*, Judgment from 30 March 2017, Application No 21884/15, paragraph 104.

<sup>147</sup> The Russian Federation, Constitution of the Russian Federation, Article 15 (4).

<sup>148</sup> The Plenum of the Russian Federation Supreme Court is a panel of all judges of the Supreme Court of Russia. The Plenum does not administer justice but ensures the correct and uniform application of laws by the courts and provides clarifications and interpretations of the rule of law by adopting resolutions. The Resolutions are recommendatory in nature but are widely used by judges.

<sup>149</sup> The Russian Federation, Plenum of the Russian Federation Supreme Court adopted from October 10, 2003 under No 5 <<https://pravo.hse.ru/intprilaw/doc/0104>> accessed 14 November 2019.

<sup>150</sup> The Russian Federation, Plenum of the Russian Federation Supreme Court adopted from June 27, 2013 No 21 <<https://base.garant.ru/70404382/>> accessed 14 November 2019.

<sup>151</sup> The so-called confrontation between the ECtHR and Russia (or the Constitutional Court of Russia) started after the *AO Neftyanaya Kompaniya Yukos v Russia*. Tom Casier, 'A Classic Dilemma: Russia's Threat to Withdraw from the Council of Europe' (21 February 2018). <[https://eu.boell.org/sites/default/files/uploads/2018/02/russian\\_dilemma\\_0.pdf](https://eu.boell.org/sites/default/files/uploads/2018/02/russian_dilemma_0.pdf)> accessed 14 November 2019.

bodies.<sup>152</sup> These changes have not affected the number of applications from Russia to ECtHR, which is still significantly high, but may affect the enforcement of their outcomes.

It is essential to mention also the European Social Charter (revised) that promotes decent work and the eradication of forced labor,<sup>153</sup> which came into force in Russia in 2009. The treaty has no explicit provisions on the prohibition of forced labor or migrant workers' protection from labor exploitation and human rights violations, however, under Article 1(2), everyone has the right to "earn his living in an occupation freely entered upon."<sup>154</sup> According to the European Committee of Social Rights (ECSR - the supervisory body of the Charter), this provision effectively prohibits discrimination and forced labor.<sup>155</sup> Yet the forced labor of migrant workers in the Russian Federation was raised in only one conclusion, putting several questions to the Russian government.<sup>156</sup>

*b) The US and the Inter-American system of human rights*

The US falls under the jurisdiction of the Inter-American system of human rights. The 1948 American Declaration on the Rights and Duties of Man (ADHR) guarantees freedom from discrimination. The 1969 American Convention on Human Rights (ACHR) in Article 6 prohibits slavery, involuntary servitude in all forms, slave trade, and traffic in women. Although a Member State of the Organization of American States (OAS), the US is not a party to the ACHR, the OAS' main human rights treaty. Neither has it ratified any other OAS

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<sup>152</sup> Federal Constitutional Law of Russian Federation 'On the Constitutional Court of the Russian Federation' from July 21, 1994, No. 1-FKZ (as amended on July 29, 2018) 'On the Constitutional Court of the Russian Federation' Articles 104, 1 -104,4.

<sup>153</sup> The European Social Charter was adopted in 1961, and the Revised Social Charter in 1996. Russia is a State Party to the 1996 Revised Charter.

<sup>154</sup> European Social Charter, 'The right to work' (1961) Article 1(2).

<sup>155</sup> Digest of the case law of the European Committee of Social Rights (2018), 57 <<https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>> accessed 18 December 2019.

<sup>156</sup> European Committee of Social Rights, Conclusions 2020 - Russian Federation - Article 1-2 (2020/def/RUS/1/2/EN) <<http://hudoc.esc.coe.int/eng/?i=2020/def/RUS/1/2/EN>> accessed 15 May 2021.



regional human rights treaties. Rivera mentioned that due to “American exceptionalism,”<sup>157</sup> – the perception that their domestic laws provide the same or better protection - the US does not fully participate and cannot be entirely held accountable by most Inter-American institutions.

Nevertheless, under the OAS Charter and ADHR jurisdiction, the Inter-American Commission on Human Rights (IACmHR) has authority to consider human rights complaints against the US, even if merely tokenistic. It is the only international forum in which individuals or non-governmental organizations acting on behalf of individuals may complain against the US.<sup>158</sup> In addition, the Inter-American Court of Human Rights (IACtHR) can still issue Advisory Opinions (AO) of which the US generally follows.<sup>159</sup> For example, AO No.18 represents an essential milestone in developing migrant workers’ protection at the regional level, applicable to the US. In this AO, the IACtHR established that equality and non-discrimination are a *jus cogens* principle with *erga omnes* effect for OAS States.<sup>160</sup> The Court further elaborated that this principle applies to migrants, mostly those undocumented, because of their vulnerability.<sup>161</sup> The US as an OAS Member State must guarantee this principle over all migrant workers as the “regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination.”<sup>162</sup>

In AO No.18, the IACtHR also indicated that States should not tolerate discriminatory situations that prejudice migrants. Any differential treatment between documented migrants

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<sup>157</sup> Francisco J Rivera Juaristi, ‘US Exceptionalism and the Strengthening Process of the Inter-American Human Rights System’ Human Rights Brief 20, no 2 (2013)4-5. Here, the authors refer to the term “US exceptionalism” using the Stephen M Walt definition: “the belief that, unlike other states, the United States does not need to ratify international human rights treaties because its domestic legal system provides the same or better protections” <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1838&context=hrbrief>> accessed 22 November 2019.

<sup>158</sup> Caroline Bettinger-López, ‘The Inter-American Human Rights System: A Primer’ (2008), 583 Clearinghouse Journal of Poverty Law and Policy < <https://core.ac.uk/download/pdf/214395358.pdf>> accessed 17 October 2019.

<sup>159</sup> Inter-American Court of Human Rights, ‘Juridical Condition and Rights of Undocumented Migrants’ Requested by The United Mexican States (2003) Advisory Opinion OC-18/03.

<sup>160</sup> *ibid*, paragraph 97-110.

<sup>161</sup> *ibid*, paragraph 111-119.

<sup>162</sup> *ibid*, paragraph 118.

and citizens and undocumented migrants must be ‘reasonable, objective, and proportionate.’<sup>163</sup> The Court also clarified the link between equality and non-discrimination of migrants and their labor rights. Once a migrant worker establishes working relations with the employer, regardless of his/her migratory status, each person must have all the ‘appropriate means’ to exercise their labor rights.<sup>164</sup> Any tolerance of discrimination of migrants in the public or private sector or recklessness to the same shall result in the States’ international responsibility.<sup>165</sup> The Court has also declared that if international and domestic norms conflict, States must resolve the situation by applying the norms which better protect migrant workers.<sup>166</sup> Therefore, while the US always declares its constitution prevails over international standards, this AO requires otherwise with regards to the nondiscrimination of migrant workers.

Thus, Advisory Opinions of this regional mechanism serve as a legal source for the US outside the scope of the universal international instruments reviewed in the previous chapter, and the Inter-American System of Human Rights could be considered significant from the perspective of migrant workers’ protection from human exploitation. This regional system, albeit limited, still has the authority to effect US domestic law.<sup>167</sup> In cases where regional organizations made obligatory statements (such as Advisory Opinion No.18 mentioned above), the US took steps to observe those obligations. This is how the US differs from Russia; while the US refrains from ratifying treaties that it finds questionable due to their unacceptable standards, either by way of being too low or too high, Russia ratified the ECHR and other regional treaties without any real intention or inquiry into whether and how it might comply

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<sup>163</sup> *ibid*, paragraph 168.

<sup>164</sup> *ibid*, paragraph 151.

<sup>165</sup> Laurence Burgorgue-Larsen and Amaya Ubada de Torres, *The Inter-American Court of Human Rights: Case-Law and Commentary* (Rosalind Greenstein (tr), OUP 2011) 467.

<sup>166</sup> Inter-American Court of Human Rights (n 39) paragraph 156.

<sup>167</sup> Bailliet CM, ‘The Strategic Prudence of the Inter-American Court of Human Rights - Rejection of Requests for an Advisory Opinion’ (2018) 15 *Revista de Direito Internacional* p 258  
<<https://www.publicacoes.uniceub.br/rdi/article/view/5085>> accessed 14 November 2019.

with the accepted norms. The current situation of forced labor demonstrates that Russia hardly complies with their obligations under the ECHR.

Kazakhstan does not have any regional courts, and it is impossible to compare this jurisdiction with the other two in respect of compliance with treaty norms. However, Kazakhstan, like Russia, is a member of the Commonwealth of the Independent States (CIS), and their regional treaties provide a set of human rights obligations that will be discussed in the next subchapter.

*c) Russia and Kazakhstan, and CIS mechanisms*

The CIS's human rights legal framework includes the 1993 Declaration of the CIS Member States on International Obligations in the Field of Human Rights and Fundamental Freedoms (Declaration of 1993) and the 1995 CIS Convention on Human Rights and Fundamental Freedoms (Convention of 1995). The CIS Convention of 1995 only came into force for Russia, Belarus, Tajikistan, and Kyrgyzstan. Kazakhstan never expressed a will to join this Convention.

The Convention provides a set of human rights obligations, including freedom from slavery, servitude, and forced labor.<sup>168</sup> Protection mechanisms were also envisaged in the document, but never developed. Interestingly, twenty years ago, the CoE Parliamentary Assembly considered the 1995 Convention and its mechanism to have potential to “jeopardise” the right of individuals to submit applications to the ECtHR.<sup>169</sup> Nevertheless, these concerns were premature, and the CIS mechanisms remain ineffective.

<sup>168</sup> CIS Convention on Human Rights and fundamental Freedoms, (1996) Article 4, 3(e).

<sup>169</sup> CoE Parliamentary Assembly, Resolution 1249 (2001), Co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16916&lang=en>> accessed 14 November 2019.

There is also a need to mention the CIS Convention on the Legal Status of Migrant Workers and Members of their Families (Convention of 2008). Kazakhstan is a party to this treaty and has been since 2010. Russia has also signed the treaty but did not ratify it. Article 8 of this treaty requires States to prevent cases of slavery, forced labor, torture, and cruel and degrading treatment or punishment, of migrant workers and members of their families. Unfortunately, this treaty applies only to migrants with documented status.

It is also important to note that the CIS regime provides for the unification of regional legislation.<sup>170</sup> In 2008, the CIS's Interparliamentary Assembly (CIS IA) proposed two model laws on combating trafficking in persons, including forced labor, and for assistance to victims. However, these laws have never been adopted in Russia or Kazakhstan.

### *Conclusion*

The US has ratified the fewest international instruments on eliminating forced labor and migrants' rights protection. Accordingly, the country has lower standards, enables fewer mechanisms for individual complaints, and is less able to be held accountable. However, as shown in the next chapters, the US's domestic human rights protection system may compensate for this loss. Nevertheless, the US perception of international treaties (even those which are soft law) as a threat to its sovereignty is certainly a threat to the universal concept of human rights, and to its standing as a leader in the protection of human rights. With this, the US undermines its credibility and undoubtedly sets a precedent that other States can repeat.

Under universal jurisdiction, Russia and Kazakhstan have ratified more international documents related to eliminating forced labor than the US. However, it is clear that ratification does not result in better protection; Russia and Kazakhstan fail to fulfill these obligations to

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<sup>170</sup> Interparliamentary Assembly of CIS, Regulations on the development of model legislative acts and recommendations of the Interparliamentary Assembly of Member States of the CIS (dated April 14, 2005), Article 1, 1.

protect migrant workers from forced labor, no matter how numerous, as demonstrated in this study. Taking into account the ILO architecture and its instruments, and particularly the Protocol of 2014, one can assume that the failure of these jurisdictions to revise their domestic policy and legislation demonstrates the weakness of international and regional treaties and mechanisms.

While comparing jurisdictions' regional obligations, certainly Russia and the US are under robust regional mechanisms. Although the Inter-American System of Human Rights has limited authority for the US, its mechanisms are unique, unlike any universal human rights mechanisms. Moreover, the regional system's migrant-centered approach widens migrant workers' protection to be inclusive of all legal status.' The CoE and ECtHR have a broad jurisdiction over Russia, and this system can effectively protect human rights in general and migrant workers from human rights violations, however, there is great risk that Russia may reduce the influence of this system. Kazakhstan is the only State among the considered jurisdictions that lacks any effective regional human rights mechanism to protect migrant workers from exploitation and forced labor. As a regional regime, the CIS mechanisms is not efficient since human rights are not a priority for its Member States.

In the sense that the US treats its international and regional memberships merely symbolically and not as duties; that Russia fails to enforce even the most robust of international and regional obligations; and that Kazakhstan refuses to be party to human rights-focused systems, global and regional systems are ineffective options to protect migrant workers from forced labor, at least on their own. As such, I will now consider the domestic protection afforded to migrant workers in each jurisdiction.

## **IV. Labor Migration Policies in the Selected Jurisdictions: A**

### **Comparative Enquiry**

This chapter will provide an overview of migration policies in the three countries and their implication on forced labor practices. It is important to note that ‘migration policy’ is a notion that is not clearly defined in international law. However, for this research, the term is understood to include State programs, laws, statutes, regulations, interstate agreements, multilateral forums, and other processes through which the political will to regulate migration is expressed.

It is essential to be aware that the US’s migration policy has evolved over many years, while Russia and Kazakhstan have no more than 20 years of experience in this field. However, this chapter does not explore the evolution and context of whole policies covering the influx of migrants to the selected jurisdictions. The chapter considered only the essential stages in the domestic policy development, which are capable of demonstrating general tendencies in regulating labor migration.

The policy discussion focused on two main areas of labor migration regulation. First, the access of low-skilled migrant workers labor market in the selected jurisdictions, and second, the role of free trade agreements in decreasing migrant workers’ exploitation. Labor migration is a central aspect of cooperation in free trade agreements to which the selected jurisdictions have joined. The thesis will, therefore, here compare the EAEU (to which Russia and Kazakhstan are part) with the US's experience in North American integration organizations and assess how such agreements can secure protection of migrant workers from forced labor.

#### *i. A rights-based approach to migration policies: main aspects*

Forced labor of migrant workers in a private economy is a complex issue. A “one-size-fits-all” measure does not exist and could not work. However, some basic postulates are

recognized by the international community, though not accepted by many migrant-receiving countries.

The ILO recommends developing comprehensive policies for the prevention of forced labor. Such policies must respect and promote fundamental principles and rights at work for all workers, no matter their legal status.<sup>171</sup> A comprehensive approach also envisages that migration policies would consider the risks of forced labor as faced by specific groups of migrants, including those in an irregular situation. The ILO believes such policies must address the root causes of workers' vulnerability to forced labor.<sup>172</sup>

As such, a comprehensive State policy to eradicate forced labor must also have in its design measures to reduce migrant workers' risk of getting trapped in forced labor situations. In this way, labor policies and policies aimed at regulating labor migration need to be connected and coherent. Additionally, there are some essential aspects that migration policies in countries receiving migrants should address:

- Admission policies for migrant workers for the purpose of employment that promote better opportunities for legal migration.
- Access to jobs and recognition of migrants' qualifications.
- Protection of migrant (and native) workers in the employment context.
- Regularization measures to address irregular migration.
- Preventing discrimination and facilitating integration.
- Migrant workers' social protection.
- Promoting relationships with origin countries to promote migration development.<sup>173</sup>

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<sup>171</sup> ILO, (n 7) Recommendation 203.

<sup>172</sup> *ibid.*

<sup>173</sup> ILO, 'International labor migration. A rights-based approach' (ILO, 2010) 163-178.

UN instruments consider that a human rights-based approach in the formulation of migration policies should include measures to promote ethical recruitment practices, implementation of labor standards for all migrant workers, and more effective complementing of labor supply with demand.<sup>174</sup>

The importance of a human rights approach was also an aspect that the IACtHR raised in its Advisory Opinion OC-18/03.<sup>175</sup> The Court emphasized that States may take different measures regarding granting or denying migrants access to the domestic labor market and work permits, however, three conditions should be satisfied in all situations and by all Member States:

- States must establish appropriate mechanisms to ensure that any limitations are non-discriminatory.
- States should not encourage or tolerate the employment of undocumented migrant workers.
- States should not allow vulnerabilities of migrants to be used arbitrarily by employers to obtain cheap labor or to deny or limit the enjoyment or exercise of labor rights.<sup>176</sup>

All these statements are, at the very least, of persuasive authority to the focus States, if not binding (where the State is a Party or subject to the jurisdiction of the text or body), and as such, these are important baseline standards for comparing State compliance. In the following subchapters, some of the abovementioned standards are considered within each of the selected jurisdictions.

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<sup>174</sup> UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau (A/HRC/26/35, 2014) paragraph 70.

<sup>175</sup> Inter-American Court of Human Rights, Advisory Opinion OC-18/03 ‘Juridical Condition and Rights of Undocumented Migrants’ Requested by The United Mexican States (17 September 2003).

<sup>176</sup> *ibid.*



ii. *Understanding the context of labor migration regulation*

a) *The US – where is the current policy headed?*

Exploitation of migrant workers became widespread in the US during World War II. Rapid economic development, accompanied by the shortage of labor, especially in sectors that do not require qualifications, caused an influx of migrants seeking jobs, particularly from Mexico. Simultaneously, demand for agricultural products increased and farmers lobbied the Government to allow Mexican workers to fill this gap.<sup>177</sup> As a result, in 1942, a bilateral agreement between the US and Mexico was signed, creating the *bracero* program. The *bracero* program determined the migration policy between the US and Mexico for almost two decades, and about 5 million migrant workers from Mexico mobilized in the US.<sup>178</sup> This guest worker program remains controversial as the program suffered from excessive expenses, paperwork, bureaucracy, and, more importantly, employers often breached contracts.<sup>179</sup>

The next critical period of US history of regulation of labor migration started in the 1950s. The Immigration and Nationality Act of 1952, among other initiatives, was marked by the formal creation of the H-1 program for temporary workers of distinguished merit or ability and the H-2 program for other temporary workers. In 1986, the Immigration Reform and Control Act was adopted (IRCA) which subdivided H-2 visas into two subcategories:

- the H-2A for seasonal agricultural workers; and
- the H-2B for skilled and unskilled workers.

The IRCA focused on solving the problem of illegal labor immigration, making employers liable for knowingly hiring undocumented workers.<sup>180</sup> This led to tightened

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<sup>177</sup> Kosack EL, 'Mexican Migration to the United States, 1920 to 1965, Guest Workers, Selection, and Economic Development in Mexico', (Economics Graduate Theses & Dissertations 2015), 58.

<sup>178</sup> Jorge Durand, 'The Bracero Program (1942-1964) a Critical Appraisal' (2007) *Migración Y Desarrollo*, 31-32 <<http://rimd.reduaz.mx/revista/rev9ing/e2.pdf>> accessed 13 December 2019.

<sup>179</sup> *ibid.*

<sup>180</sup> 18 USC § 1324a(a)(1)(A) (2000) According to the established system, hiring undocumented workers is unlawful and subject to sanctions. Employers who hired undocumented migrants were subject to fines of up to \$11,000 per each unauthorized hire.

enforcement which, according to Hanson, was increased without first creating mechanisms for the regular influx of low-skilled laborers. As a result, the influx of undocumented migrants did not decrease, as hoped.<sup>181</sup> The IRCA also granted amnesty to undocumented immigrants who met specific requirements but did not effectively resolve the root problem of undocumented migration.<sup>182</sup> The IRCA therefore failed to make any policy changes towards protection of migrant workers' rights.

In 2000, discussion of reforming the US immigration policy began anew. The candidate George W. Bush promised a comprehensive reform and included in his agenda a more rights-centered guest worker program to allow more migrant workers to work and reside legally. However, the September 11, 2001 attack (9/11) drastically changed the dialogue on migration policy, not only in the US. During his second term, Bush once again sought to reform the immigration policy. In particular, he promised to determine the number of visas under the temporary worker program based on the actual number of available jobs, and to withdraw the rule that workers must be tied to a particular job and employer. Naturally, in the context of the new protectionist shift following 9/11, this initiative faced strong opposition, including from his own party members, and the reform was not enacted.<sup>183</sup>

The most recent chapter in US immigration history started in 2016 with the anti-immigration rhetoric central to Trump's pre-election promises. Trump's approach to immigration policy significantly differs from that of his predecessors and is considered more regressive from a human-rights perspective. He signed at least nine new legislative initiatives to implement his election promises, which enhanced emigration enforcement and increased

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<sup>181</sup> Hanson GH, 'The Economic Logic of Illegal Immigration', 34.

<sup>182</sup> Pia M Orrenius and Madeline Zavodny, 'Do Amnesty Programs Encourage Illegal Immigration? Evidence from IRCA' (Federal Reserve Bank, 2001) <<https://www.dallasfed.org/~media/documents/research/papers/2001/wp0103.pdf>> accessed 18 September 2019.

<sup>183</sup> Ramón Gutiérrez, 'George W Bush and Mexican Immigration Policy' (2007) 113 (3) *Revue française d'études américaines* pp 70-76 <<https://www.cairn.info/revue-francaise-d-etudes-americaines-2007-3-page-70.htm>> accessed 29 December 2019.

immigration obstacles, from building (part of) a physical wall to the psychological fear of detention or deportation.<sup>184</sup> The most frustrating policy change for migrant rights defenders was a decreased T as well as U nonimmigrant visas.<sup>185</sup> Denials for these types of visas discouraged victims from reporting exploitation.<sup>186</sup> This coercive approach silenced migrant workers suffering exploitation and ‘unraveled’ all previous US efforts to combat human trafficking.<sup>187</sup>

*b) Russia - liberalization of policy or production of ‘illegality’?*

While the problem in the US is seen to be illegal border crossing, most migrant workers enter Russia legally from visa-free post-soviet countries, i.e., migrants crossing borders lawfully. However, having legal status upon entry, migrants nevertheless become undocumented soon after due to Russia’s complex system of access to employment.

Russia’s main aims for its migration policy were counteracting the illegal migration, fulfilling labor market demand for migrant workers, and solving demographic challenges.<sup>188</sup> To achieve this, Russia adopted several migration policies (*migratsionnaya politika*) and frequently changed its legislation.

In the early 2000s, Russia had an ‘overly-bureaucratized and artificially complicated’ system that allowed migrant workers to enter the labor market through the ‘quota’ system.<sup>189</sup>

<sup>184</sup> Sarah Pierce, Jessica Bolter and Andrew Selee, ‘US Immigration Policy Under Trump: Deep Changes and Lasting Impacts’ 29 (MPI, July 2018) <<https://www.migrationpolicy.org/research/us-immigration-policy-trump-deep-changes-impacts>> accessed 13 November 2019.

<sup>185</sup> T-visa holders are individuals who are present in the US because of human trafficking; U-visa holders have visited the US for different purposes and then have been subjected to human trafficking or another qualifying crime.

<sup>186</sup> Yael Schacher, ‘Abused, Blamed, and Refused’ (May 2019), 6 <<https://www.refugeesinternational.org/reports/2019/5/21/abused-blamed-and-refused-protection-denied-to-women-and-children-trafficked-over-the-us-southern-border>> accessed 13 November 2019.

<sup>187</sup> Denise Brennan, ‘Want to fight trafficking? Fight for immigration reform’ (*Thomson Reuters Foundation*, 23 April 2017) <<http://news.trust.org/item/20170421123737-wi0be>> accessed 13 November 2019.

<sup>188</sup> Vladimir Mukomel, ‘Labor Mobility of Migrants from CIS Countries in Russia’ (Central and Eastern European Migration Review, 2013) 2(2): 21-38) 18.

<sup>189</sup> Irina Ivakhnyuk, ‘Russian Migration Policy and Its Impact on Human Development’ (2009) UNDP Human Development Research Paper 2009/14 <<http://hdr.undp.org/en/content/russian-migration-policy-and-its-impact-human-development>> accessed 18 November 2019.

The quota system created quantitative restrictions on entering foreign labor designed to match current economic needs. However, as summarized by Ivakhnyuk, this system pushed both migrants and employers outside the law and stimulated illegal employment practices and exploitation of migrant workers.

A decade ago, Russia changed the quota system to a ‘patent’ system for migrant workers from visa-free regimes.<sup>190</sup> The law prescribes that foreign citizens who arrived in the Russian Federation in a manner that does not require a visa need to obtain a patent to work. A patent holder can work both for private and legal persons and work according to the profession specified in the patent. It was anticipated that the new system would reduce the illegal employment of migrant workers and provide better access to the labor market to those coming from visa-free countries. However, the reform was flawed in its practical implementation. Receiving a patent remains a challenging and costly process. For instance, migrant workers must pass Russian language, history, and law tests to obtain patents. As Malakhov and Simon say, these requirements for temporary and seasonal migrant workers are excessive.<sup>191</sup> Perhaps these test requirements are appropriate for migrants seeking to obtain a permanent residence in Russia, however, most migrant workers from Central Asia who make up the majority of migrants entering Russia, only wish to stay for a short period to earn money before returning to their home country. The cost of obtaining a patent and its renewal is therefore another obstacle to legal employment in Russia for common Tajik and Uzbek migrant workers.<sup>192</sup> These migrants must often opt against renewal and work illegally without a patent, which increases their vulnerability to exploitation and forced labor.

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<sup>190</sup> Federal Law N 115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation" (dated 25.07.2002, ed. Dated 15.10.2020)

<sup>191</sup> Vladimir Malakhov and Mark Simon, ‘*Миграционная Политика в Условиях Экономических Турбулентностей: Опыт Европейского Союза и Перспективы России*’ (Migration Policy in the Conditions of Economic Turbulence: The Experience of the European Union and the Prospects of Russia) (June 5, 2017) <<https://ssrn.com/abstract=2980789>> accessed 16 November 2019.

<sup>192</sup> Kyrgyzstani workers do not need a patent to work because Kyrgyzstan is a member of the EAEU, and its citizens have simplified employment rules.

Knowledge of the legislation of destination countries is traditionally considered to reduce the likelihood of human rights violations. This hypothesis is unlikely to apply to Russia's existing system. Corruption in Russian migration governing institutions (Reeves)<sup>193</sup> and laws designed to block legal access of migrants to the Russian labor market (Schenk)<sup>194</sup> produces impossible compliance policies for migrant workers. Poletaev correctly states that the significant scale of informal employment is a direct result of the existing substantial informal economy and unnecessarily complicated administrative and bureaucratic procedures.<sup>195</sup> The current migration policy in Russia is not human-rights focused but rather number-focused, and its governance opens up opportunities for labor exploitation in Russia, including human trafficking, and forced and slave labor.

*c) Kazakhstan – 'unskilled' and unwanted*

Access to the labor market for low-skilled migrants is more complicated in Kazakhstan than it is in Russia. Their labor migration regulation system has always been excessively burdensome for employers. Perhaps this is because, unlike Russia, Kazakhstan does not recognize that its private economy relies on low-skilled migrant workers.

Kazakhstan's first Concept of a Migration Policy contains an absurd description of 'unskilled' migrant workers, presenting them as a group with high mobility, "*prepared to take action to achieve their goals*" (emphasis added).<sup>196</sup> The document did not clarify migrants' 'goals,' but this language shows an aversity towards unskilled migrant workers, and this

<sup>193</sup> Madeleine Reeves, 'Clean fake: Authenticating documents and persons in migrant Moscow' (American Ethnologist, 2013) 40(3), 508-524.

<sup>194</sup> Caress Schenk, (n 10) 101; Schenk 'Why control immigration? Strategic uses of migration management in Russia (University of Toronto Press, 2018).

<sup>195</sup> Dmitry Poletaev, 'Migration policy of Russia after the dissolution of the Federal Migration Service' (Analytical brief, 2019) <<https://www.pragueprocess.eu/ru/migration-observatory/publications/document?id=201>> accessed 16 December 2019.

<sup>196</sup> The Concept of a Migration Policy of the Republic of Kazakhstan (2000) paragraph 30. The Concept was adopted by the Decree of the Government of the Republic of Kazakhstan 'О Концепции миграционной политики Республики Казахстан' (About the Concept of a migration policy of the Republic of Kazakhstan) issued on September 5, 2000 under N 1346.

attitude has not substantially changed over the last decade. Available studies show that Kazakhstan's migration policy was initially aimed at enhancing strict controls over foreign labor employment, especially the hiring of low-skilled migrants, to protect the domestic labor market. It led to complex and multi-level procedures governing the legalization of migrant workers, and the responsibility to obtain the required work permit for migrant workers lay with employers.<sup>197</sup>

As international practice shows, the so-called *laissez-faire* model, requiring employers to demonstrate need for workers not obtainable domestically, is quite widespread in many migrant-receiving countries. The US has a similar model, and employers who want to attract migrant workers also need to attest that workers are required, no locals want or are willing to fulfill the specific work, and the wage that will be paid. However, in the US, migrant workers are usually informed of the possibility of filing a complaint against the employer, and there are inspections when alleged noncompliance occurs. Kazakhstan has hardly developed such a system, neither does it seem to have any intention to create one. In the mid-2000s, Kazakh employers needed to obtain a license to employ foreign workers, a work permit for hiring a migrant worker, and proof that citizens were not competing for said workplace. After fulfilling these requirements, and if the 'quota' allowed, a work permit *could* be issued - migratory authorities had broad discretionary power. Migrants themselves were also excluded from the process of receiving a work permit,<sup>198</sup> yet it was them who suffered the legal consequences (fines and deportations) if the rules were not complied with by employers. This system had two knock-on effects. First, employers hired migrants to work without obtaining the necessary permits and licenses, which in turn increased vulnerabilities of migrant workers to exploitation and forced labor. In fact, the number of undocumented migrants increased. Second, the barriers

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<sup>197</sup> Organization for Security and Co-operation in Europe (OSCE), 'Survey Report on Labor Migration to Kazakhstan 2006-2007' (2010) p 33-38 < <https://www.osce.org/odihr/41591> > accessed 15 November 2019.

<sup>198</sup> *ibid.*

led to disruptions in the domestic labor market's functioning because of the shadow labor market's increased growth.

In March 2006, the then-President of the Republic of Kazakhstan, Nazarbayev, in his annual presidential message, announced the ambitions of Kazakhstan to enter the list of the 50 most economically competitive countries in the world and, in this regard, raised labor migration issues.<sup>199</sup> He pointed out that a modern concept of a migration policy is needed given Kazakhstan has a favorable socio-economic arena for foreign labor. The necessity of one-time 'amnesty' for undocumented migrants to legalize their status was also announced.<sup>200</sup> However, the amnesty did not bring long-term positive consequences. Migrant workers remained unprotected from labor-related abuse. Many migrant-receiving countries believe that amnesties are a positive step in reducing undocumented migrants. But in fact, its implication is controversial, as was also seen in the US. Amnesty is a half-step, which subsequently creates other, different problems. The core of the controversy is that amnesty does not change the situation of migrants if the system that facilitates their illegal status' remains unchanged. Rather, it turns into a cycle of problem and quick fix, rather than prevention.

Kazakhstan's 2010 chairmanship of the Organization for Security and Co-operation in Europe (OSCE) and its non-permanent membership on the UN Security Council in 2018 pushed the Government to pass a few administrative amendments to labor migration legislation to comply with international standards.<sup>201</sup> But Kazakhstan only improved procedures of

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<sup>199</sup> Republic of Kazakhstan, 'Послание Президента Республики Казахстан Н.А. Назарбаева народу Казахстана' (Message from President of the Republic of Kazakhstan, Nursultan Nazarbayev, to the People of Kazakhstan) (*Republic of Kazakhstan*, 1 March 2019). <[http://www.akorda.kz/ru/addresses/addresses\\_of\\_president/poslanie-prezidenta-respubliki-kazahstan-na-nazarbaeva-narodu-kazahstana-mart-2006-g](http://www.akorda.kz/ru/addresses/addresses_of_president/poslanie-prezidenta-respubliki-kazahstan-na-nazarbaeva-narodu-kazahstana-mart-2006-g)> accessed 21 November 2019.

<sup>200</sup> According to UNDP only about 25,000 migrant workers had legal status and about 300,000 foreign workers were of illegal status. UNDP, 'Labor Migration, Remittances, and Human Development in Central Asia' (2015 UNDP's Central Asia human development paper) 48.

<sup>201</sup> Khamza Sharifzoda, 'Why Is Kazakhstan a Growing Destination for Central Asian Migrant Workers? If trends hold, Moscow may have to compete with Nur-Sultan in attracting Central Asian migrants in the future'. *The Diplomat* (13 June 2019) <<https://thediplomat.com/2019/06/why-is-kazakhstan-a-growing-destination-for-central-asian-migrant-workers/>> accessed 19 November 2019.

obtaining legal status for high-skilled migrant workers and simplified hiring procedures for seasonal workers.<sup>202</sup> The labor migration system as a whole has not undergone significant changes. Unskilled workers from Uzbekistan and Kyrgyzstan, who work in the agricultural sector and construction, remain unprotected, wholly deprived of rights, and are subjected to forced labor, slave labor, and ill-treatment.<sup>203</sup>

Kazakhstan continues to adhere to the policy of supporting only short-term labor migration. This policy is based on the priority of the replacement of foreign workers with nationals.<sup>204</sup> Because Kazakhstan sees labor migration only as a temporary phenomenon, it uses quotas and permits as were seen in earlier Russian policies, restricts low-skilled workers' access to the labor market, and “binds” workers to one employer.<sup>205</sup> Such a policy provides a burdensome registration process for foreign workers and pushes migrants to adopt undocumented status.<sup>206</sup>

iii. *Multilateral free-trade agreements: a new milestone in protecting migrants?*

a) *International institutions' view on free trade agreements*

The proliferation of multilateral and bilateral trade agreements containing provisions relating to workers' rights is the newest tendency in the globalized world. The ILO considers that trade agreements that promote labor standards could be the needed impetus to address forced labor and motivate States to adopt domestic strategies against forced labor.<sup>207</sup>

<sup>202</sup> Law of the Republic of Kazakhstan dated April 6, 2016 No. 482-V "On employment of the population" (with amendments and additions as of January 16, 2021) Articles 35-37.

<sup>203</sup> Comments of Kazakhstani Human Rights NGOs on Kazakhstan's Second Periodic Report on the Implementation of the International Covenant on Civil and Political Rights (Almaty, May 2016) 37-39.

<sup>204</sup> *ibid.*

<sup>205</sup> Law of the Republic of Kazakhstan on migration of the population dated July 22, 2011 No. 477-IV, Article 24.

<sup>206</sup> International Federation for Human Rights (FIDH), ADC Memorial, ILI, 'Invisible and exploited in Kazakhstan: the plight of Kyrgyz migrant workers and members of their families' (2018) 27-28 <[https://www.fidh.org/IMG/pdf/kyrgyz\\_migrant\\_workers\\_in\\_kazakhstan.pdf](https://www.fidh.org/IMG/pdf/kyrgyz_migrant_workers_in_kazakhstan.pdf)> accessed 15 September 2019.

<sup>207</sup> ILO, *A global alliance against forced labor* (n 30) 64-65.



The US has reiterated labor standards of the ILO Declaration on Fundamental Principles and Rights at Work in the trade agreements it initiated. For the countries considering an agreement with the US, and especially those who sending workers, it is arguably a ‘selling point.’ Migrant-sending countries will likely want to join such agreements.

At the same time, UN experts are not enthusiastic about the potential of trade agreements and put forward the possible risks trade agreements could pose. One argument is that trade agreements may result in the fragmentation of human rights standards internationally.<sup>208</sup> The UN considers that trade agreements regulating mobility, social and labor protection of workers, could be positive but only if explicit references to international human rights in all new and renegotiated trade agreements are included. States must ensure that trade agreements do not undermine existing social and mobility protections granted through their universal commitments.<sup>209</sup>

This study agrees with this assertion and will therefore analyze how fundamental principles and labor standards are included in the trade agreements which the selected jurisdictions a party to, and whether they have affected the reduction of exploitation and forced labor of migrant workers. It is prudent to note that, for the purpose of aligning the comparison, the US is an experienced partner to agreements while Russia and Kazakhstan are newcomers in this regard.

*b) The EAEU and USMCA: which promises more protection?*

In the post-soviet region, Armenia, Belarus, the Russian Federation, Kazakhstan, and Kyrgyzstan are members of the EAEU.<sup>210</sup> It is no secret that the EAEU’s Member States, while

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<sup>208</sup> Report of the Special Rapporteur on the human rights of migrants on the impact of bilateral and multilateral trade agreements on the human rights of migrants no. A/HRC/32/40 of 04.05.2016, Human Rights Council, paragraph 8, 39.

<sup>209</sup> *ibid*, paragraph 92.

<sup>210</sup> Treaty on the Eurasian Economic Union (Signed in Astana on 05/29/2014) (as revised on 10/01/2019).

pursuing a common economic agenda, each pursue their own geopolitical goals, particularly Russia. Western scholars are critical of this alliance, perceiving the EAEU creation to be a Russian initiative to form a “continental bloc” for a multipolar world.<sup>211</sup> In contrast, Russian scholars perceive the EAEU as a new promising “interstate construction” in the post-Soviet space.<sup>212</sup> For Central Asian countries sending their migrant workers to Kazakhstan and Russia, joining the EAEU is primarily justified as improving their citizens' situation in these countries. It was a decisive argument for Kyrgyzstan's proponents, who promoted the State's accession to the union in 2015. Uzbekistan and Tajikistan have not yet joined, although their migrant workers expect this to happen soon. However, the question remains open as to what extent accession to the EAEU will substantially change the situation and reduce labor rights violations and abuse against migrant workers.

The US was part of the most widely known integration project in North America - the North American Free Trade Agreement (NAFTA). NAFTA was signed in 1994 between the US, Canada, and Mexico, but in 2018, countries agreed to replace NAFTA with the United States-Mexico-Canada Agreement (USMCA).<sup>213</sup> The USMCA affirms State Parties' commitments to their obligations as ILO members to the ILO Declaration on Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization (2008). Unlike its predecessor, the USMCA explicitly recognizes the vulnerability of migrant workers to abuse in labor relations.<sup>214</sup> More generally, the USMCA provides that states will cooperate to promote

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<sup>211</sup> Stephen Blank, ‘The Intellectual Origins of the Eurasian Union Project’ in Frederic Starr and Svante Cornell (eds), *Putin's grand strategy: the Eurasian Union and its discontents* (Central Asia-Caucasus Institute & Silk Road Studies Program--A Joint Transatlantic Research and Policy Center, Johns Hopkins University, School of Advanced International Studies (SAIS) 2014).

<sup>212</sup> Kasyanov and Torkunova, ‘Securing Human Rights on the Post-Soviet Space. MGIMO Review of International Relations’ (2015) 5(44): 56-62 (In Russian).

<sup>213</sup> Office of the US Trade Representative, Agreement between the United States of America, the United Mexican States, and Canada (7/1/20 Text) <<https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf>> accessed 14 November 2020.

<sup>214</sup> *ibid*, Article 23 8: Migrant Workers.

equality, eliminate employment discrimination, and protect migrant workers and/or temporary workers.<sup>215</sup>

The EAEU Treaty does not directly refer to ILO instruments in its provisions. Neither does it mention migrant workers as a specific group in need of special protection. The EAEU Treaty's Preamble affirms its commitment to the UN Charter's purposes and principles and “other generally recognized principles and norms of international law.”<sup>216</sup>

The EAEU treaty also contains a chapter on labor migration consisting of 3 articles. Article 96 envisages harmonizing common approaches in labor migration through the exchange of information and legal acts, prevention of the dissemination of inaccurate data, training of civil servants, and cooperation under advisory bodies.<sup>217</sup> Unlike the USMCA, the EAEU Treaty provides more on the administrative collaboration of Member States than on creating specific regional partnerships in order to reduce the risks of violation of labor rights of migrants.

The EAEU treaty does not contain provisions guaranteeing the protection of migrants from exploitation, unlike the USMCA. Article 23.8 USMCA recognizes the vulnerability of migrant workers as a result of the gaps in labor protections and requires Member States to ensure that migrant workers are protected under general labor laws, whether they are nationals or not.<sup>218</sup> The EAEU, however, provides that workers are not required to obtain a work permit and that restrictions established to protect the national labor market will not apply to foreign workers from Member States. Migrant workers of Member States are also provided with an adequate period to legalize their status, and in the case of contract termination, they have the right to stay in the State Party territory and find a new job.<sup>219</sup> But what is concerning is that all these guarantees apply only to documented migrant workers. In contrast, the USMCA

<sup>215</sup> *ibid*, Article 23 12 (5 1 (ii) Cooperation.

<sup>216</sup> Eurasian Economic Union Treaty (n 210) Preamble.

<sup>217</sup> *ibid*, Chapter 26, Article 96.

<sup>218</sup> Office of the US Trade Representative, (n 213).

<sup>219</sup> Eurasian Economic Union Treaty (n 210), Article 97-98.

protections do not depend on migrants' legal status in their territory. Therefore, although Russia and Kazakhstan provide special protections for migrant workers under the EAEU, these guarantees are for fewer migrant workers.

A crucial preventive measure is an effective pre-departure orientation system that facilitates fair recruitment to protect migrants from exploitive and abusive employers. The EAEU provides a basis for the organized recruitment of migrant workers.<sup>220</sup> But the USMCA does not mention this. However, in the relevant region – Russia and Central Asia - not a single country sending or receiving migrant workers has built an effective labor migration system. In this regard, although the EAEU Treaty creates a basis for fair and organized recruitment of migrant workers in the region where both migrant-sending and migrant-receiving countries have shared responsibility, it is futile without Member States having the political will to change their domestic system.

Among Central Asian migrant workers, only workers from Kyrgyzstan are able to act as a ‘test’ of how the EAEU Treaty works in reality. Sagynbekova points out that accession generally improved the legal status of Kyrgyz migrant workers in Russia. However, employers continued to employ Kyrgyz migrants without labor contracts.<sup>221</sup> Poletaev and Zlobina supported this claim and underlined that shadow employment in Kazakhstan and Russia is still preferable for employers.<sup>222</sup> According to Poletaev and Zlobina, labor contracts with migrant

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<sup>220</sup> *ibid*, Article 96.

<sup>221</sup> Lira Sagynbekova, ‘International Labour Migration in the Context of the Eurasian Economic Union: Issues and Challenges of Kyrgyz Migrants in Russia’ (University of Central Asia, Working Paper No 39, 2017) 22-23 < <https://www.ucentralasia.org/Content/downloads/UCA-IPPA-WP-39%20International%20Labour%20Migration%20in.pdf> > accessed 24 October 2019.

<sup>222</sup> Dmitry Poletaev, Tatiana Zlobina, ‘Monitoring of the implementation of the rights of migrant workers from the Kyrgyz Republic in the Russian Federation and the Republic of Kazakhstan in accordance with the terms of accession of the Kyrgyz Republic to the EAEU Protocol’ (2018) Tien Shan Analytical Center American University of Central Asia Research Paper, 60-68 <[https://auca.kg/uploads/tspc%20images/Monitoring%20of%20implementation%20of%20the%20labor%20migrants%E2%80%99rights%20from%20Kyrgyzstan%20in%20Russia%20and%20Kazakhstan%20in%20EAEU\\_TSPC\\_2017-2018.pdf](https://auca.kg/uploads/tspc%20images/Monitoring%20of%20implementation%20of%20the%20labor%20migrants%E2%80%99rights%20from%20Kyrgyzstan%20in%20Russia%20and%20Kazakhstan%20in%20EAEU_TSPC_2017-2018.pdf)> accessed 17 November 2019.

workers entail additional costs for the employer, who often wants to receive cheap migrant labor.

On the other hand, Kyrgyz migrant workers in Russia (who are protected by the provisions of the EAEU) sometimes prefer to work without labor contracts because they do not consider an employment contract to be a means of protection against unfair employer actions.<sup>223</sup> Thus, although protection mechanisms are still in place within the EAEU, they are not used.

NGOs also emphasize that despite preferences guaranteed under the EAEU, obtaining legal status in Kazakhstan is still problematic for Kyrgyz migrants because of widespread corruption in the migration police.<sup>224</sup> However, these issues do not receive Russian or Kazakh authorities' attention, and Kyrgyzstan has not utilized the dispute settlement arrangements under the trade agreement to protect its citizens.

When criticizing the EAEU Treaty, one must remember that the US, with its greater experience within the implementation of trade agreements, also failed to achieve substantial labor rights protection changes. Scholars and NGOs critically assessed the situation during the NAFTA period,<sup>225</sup> and are concerned that the new USMCA also failed to provide adequate protection of the participating countries' citizens' labor rights.<sup>226</sup> Experience therefore means little while human-rights are not a priority approach. The US has the will to make symbolic gestures in the USMCA with little practical effect, while Russia and Kazakhstan lack the political will to make any real domestic changes to give effect to EAEU obligations.

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<sup>223</sup> *ibid.*

<sup>224</sup> International Federation for Human Rights, ADC Memorial, ILI, 'Invisible and exploited in Kazakhstan: the plight of Kyrgyz migrant workers and members of their families' (FIDH, 2018) 18 <[https://www.fidh.org/IMG/pdf/kyrgyz\\_migrant\\_workers\\_in\\_kazakhstan.pdf](https://www.fidh.org/IMG/pdf/kyrgyz_migrant_workers_in_kazakhstan.pdf)> accessed 15 September 2019.

<sup>225</sup> AFL-CIO, 'A Gold Standard for Workers? The State of Labor Rights in Trans-Pacific Partnership Countries' (AFL-CIO, 2017) <<https://www.unifor.org/sites/default/files/attachments/tpplaborrightsreport.pdf>> accessed 15 September 2019.

<sup>226</sup> Franz Christian Ebert, Pedro A Villarreal, 'The Renegotiated "NAFTA": What Is in It for Labor Rights?' (EJIL: Talk, October 18, 2018) <<https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/>> accessed 15 September 2019.

iv. *Development of the migration agenda – observations from a rights-based perspective*

This study does not seek to make an in-depth analysis of the political processes affecting migration policies but will consider these in order to better understand the context of policy development and its consequences for a migrant worker. This subsection will consider the differences between the three jurisdictions' systems of policy-adoption.

President Bush promised to enhance migrant workers' protection by liberalizing temporary worker programs in his re-election campaign. These plans remained unimplemented as other political parties did not support them. Trump was a president who had many plans to reform the migration policy, but many of his decisions were scrutinized by the judiciary and therefore never realized. Thus, due to the existing balance between all government branches, presidential decisions in the US are reviewed and often difficult or delayed in implementation. Of course, policy decisions relating to labor migration, especially the current guest workers program, are influenced by powerful corporate lobby groups whose business interests influence lawmakers.<sup>227</sup> However, an effective and politically balanced oversight system does not allow the President's administration or Congress to be the sole or even final decision-maker.

Russia and Kazakhstan, on the other hand, have superficial oversight in their system and usually one government branch (executive) will make the decision. There is no evidence of the judiciary in these jurisdictions having questioned decisions relating to the formulation of its country's migration policy as determined by the executive branch. In this regard, there is also little judicial oversight of the decision-making in these countries.

Theories on the regulation of labor migration in Russia can be divided into three categories, according to Malakhov; modernizers, conservatives, and cultural

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<sup>227</sup> Daniel Costa, 'The H-2B temporary foreign worker program. Examining the effects on Americans' job opportunities and wages' (*EPI*, 8 June 2016) < <https://www.epi.org/publication/the-h-2b-temporary-foreign-worker-program-examining-the-effects-on-americans-job-opportunities-and-wages/> > accessed 28 November 2019.

fundamentalists.<sup>228</sup> The modernizers believe that Russia is more attractive to unskilled workers, and their labor stifles Russia's economy and technological innovation. Conservatives see migrant workers primarily as a threat to national security. They believe migrant workers from Central Asia drive crime growth, widespread infectious diseases (like HIV and tuberculosis), and their presence has led to ethnic conflicts. Supporters of cultural fundamentalism are concerned with preserving "cultural purity" and believe that the influx of migrants threatens cultural cohesion.<sup>229</sup> These positions potentially influence the rhetoric on regulating labor migration in Russia, scholars believe. None of them are pro-migrated labor. Russia also has 'humanistic' supporters that include mostly nongovernmental organizations. Nevertheless, this group is underrepresented in policy debates, and generally, their messages hardly receive positive reactions from politicians and society.<sup>230</sup>

Conceivably, such internal debate exists also in the US. However, in the US, besides the check and balance system, a vibrant and robust civil society can address controversial discussions and may influence decision-making. Ivakhnyuk supports the view that Russia's political system and decision-making process are very different from the US's. In her view, in Russia, the formulation of immigration policy is dictated by the President. Even if the key political parties positively or negatively express their attitudes towards migration trends, these are no more than populist performances with minimal influence on the decision-making process.<sup>231</sup> This thesis supports this statement – indeed, it is already established in legislation. For instance, the Concept of State Migration Policy of the Russian Federation for 2019 - 2025 provides the President with the power to independently determine migration policies.<sup>232</sup> The document establishes that the President must determine migration policy principles (para. 30)

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<sup>228</sup> Malakhov, (n 191) 35-37.

<sup>229</sup> *ibid.*

<sup>230</sup> Ivakhnyuk, (n 189).

<sup>231</sup> *ibid.*

<sup>232</sup> The Concept of State Migration Policy of the Russian Federation for 2019–2025 was approved by the President of Russia (October 31, 2018) under Decree No 622.

and that the Concept can be amended by a Presidential decision (para. 35).<sup>233</sup> This executive-authority approach creates a risk of rapid changing policies dependant on the will and whim of one person, and this may lack a rights-based approach. Only an independent judiciary and strong civil society could stand to oppose it. However, Russia lacks both.

Kazakhstan's position is similar to Russia - the President voices the policy, which is then implemented by lawmakers in the form of amendments or changes to the laws. These laws are hardly ever contested by the judiciary, even if they violate international obligations. Civil society is also suppressed, which last human rights reports show.<sup>234</sup> There is a lack of academic research studying the relationship between policymaking on labor migration and its effects on migrant vulnerability, including to exploitation and forced labor. It is possibly not of academic interest given the influx of migration has not reached the levels seen in the US and Russia. Nevertheless, the level of exploitation and forced labor of migrant workers from Central Asia in Kazakhstan is high, as proven by numerous human rights reports, UN expert visits, and their communication with the Government. The author of this work considers there to be a clear connection between the ineffective and restrictive labor migration policy in Kazakhstan and migrant vulnerability to exploitation and forced labor, and that this requires academic attention to help understand and change such a policy.

### *Conclusion*

Policy-development (including of labor migration) in the selected jurisdictions has unambiguous similarities and differences. The similarities are predominantly found in policy aims, including reducing illegal migration and creating burdensome rules for migrants to access the labor market, as well as securitization and protectionist approaches. These all have a knock-

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<sup>233</sup> Russia Federation, *Executive Order on Russia's state migration policy concept for 2019–2025* (31 October 2018) paras 30, 35 <<http://en.kremlin.ru/events/president/news/58986>> accessed 13 November 2019.

<sup>234</sup> Human Rights Watch, 'World report 2020' (HRW, 2020) <<https://www.hrw.org/world-report/2020/country-chapters/kazakhstan#>> accessed 13 January 2020.



on effect of increasing migrant vulnerability. The differences observed tend to exist in the decision-making processes to give effect to such mutual aims.

To conclude the discussion above, I will highlight the three main policy aspects directly impacting migrants' vulnerability to forced labor. The first point is that strict, burdensome, and costly rules to access the labor market - which make humans "illegal" – is a fertile starting point for the exploitation and forced labor of migrant workers. The ILO states that migrant workers can fall into an irregular situation in different ways: a) they may enter a country illegally, either by avoiding border controls wholly or by entering with false documents; b) they may enter a country legally but overstay their visas and thus become of illegal status; c) they may have entered on a non-working visa before starting work; d) they may be permitted to work, but due to non-compliance with the regulatory system, lose their documented status; or e) temporary workers may stay beyond their allocated time.<sup>235</sup> This list is non-exhaustive, but the rationale is straightforward - strict immigration policies are the cause of such situations. Migrants with irregular status cannot stand up for or protect their labor rights. Instead, they often suffer exploitative working conditions.

Although all three countries do not prefer low-skilled migrant workers, Russia and the US accepted that their domestic labor markets demand them, and restrictive rules appear to have changed. However, the US Government has not substantially changed the H-visa system that continues to tie employment permits to a single, permanent employer. The main criticism of this program is that it is inflexible, poorly controlled in many ways, and excessively regulated in others.

In Russia, migrants from countries with a visa-free regime have the right to obtain a patent on their own, not tied to the employer. However, complicated and costly procedures for

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<sup>235</sup> ILO, Towards a fair deal for migrant workers in the global economy: International Labour Conference, 92nd session 2004; sixth item on the agenda (ILO, 2004)  
<<https://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>> accessed 20 November 2019.

legalization and obtaining patents push migrants into situations where they are forced to work without documentation.

Kazakhstan remains the strictest in its policy formation in hiring low-skilled migrant workers. The existing system does not respond to the needs of employers or the offerings of migrants. Thus, both employers and migrant workers have to seek alternative ways which are not legal and put migrants in a vulnerable, so-called ‘illegal,’ position.

In all situations, the cumulative effect is the encouragement of employers to hire undocumented migrants, many of whom also seek to avoid the burdensome fees and paperwork. Moreover, migrants who are afraid to defend their labor rights might be forced to accept exploitative circumstances and abuse because the employer controls their visa status, particularly given the repercussion of deportation if they were to lose their visa, or because their undocumented ‘illegal’ status puts them at risk of the same.

The second point is that trade agreements can protect migrants from exploitation and forced labor, but they cannot replace international human rights treaties that enshrine guarantees for the labor rights of migrant workers. The research showed that such agreements in the EAEU hardly follow a rights-based approach. The EAEU Treaty’s guarantees are accessible for documented migrant workers only and therefore violates minimum standards provided for *all* migrant workers. International institutions have repeatedly reiterated that the legal or illegal status should not be a prerequisite to protect migrants’ human rights.

Based on the US experience, it can be concluded that trade agreements, even having progressive provisions, will not work if dispute settlement mechanisms are not utilized. This thesis considers that dispute settlement mechanisms for labor rights violations should be accessible for individuals,<sup>236</sup> and that they could be essential for Central Asian migrant workers who lack a solid regional human rights tribunal.

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<sup>236</sup> Franz Christian Ebert, Pedro A Villarreal (n 226).

Finally, this research demonstrated a connection between the labor migration policy-making and migrant workers' forced labor and exploitation, deriving from other root problems relating to good governance and the rule of law in the selected jurisdictions.

Kazakhstan and Russia frequently use the words “illegal migrant,” “unlawful migrant,” and “fight against illegal migration,” in their policy documents regulating labor migration, which is another indication of the general nature of their policies. The management of labor migration is generally, if not solely, by the executive branch, and enforcement of its policies reflects a police function where migrants are *a priori* guilty for being “illegal.”

In many ways, all three jurisdictions have similar prerequisites that directly or indirectly effect the emergence of forced labor, particularly of unskilled migrant workers. This similarity is demonstrated by the systems' inflexibility and excessive bureaucratization. In conclusion, neglecting a human-rights approach to labor migration policies not only fails to address the problem of forced labor, but in fact opens the door for unscrupulous employers to exploit migrant workers. At the same time, the US's decision-making process, which does include scrutiny of the executive branch, provides hope that migrant workers could be protected.

## V. Regulatory Approaches to the Prohibition and Prosecution of Forced Labor in the Focus Jurisdictions

This chapter compares the nuances of criminal prosecution of forced labor in the selected jurisdictions to prove that forced labor criminalization corresponds with higher State accountability for acts of human exploitation.

Protection from forced labor requires the legislature to distinguish between the criminalization of slavery, forced labor, and trafficking. Skrivankova underlined that most countries' legislation is too narrow and punishes forced labor only as a consequence of trafficking.<sup>237</sup> As mentioned, recognition of forced labor exclusively under trafficking cases implies that it is punishable only when the trafficking can be proven. There are also countries where forced labor is not prosecuted as a criminal offense unless it forms part of a criminally recognized act of slavery which has its own specific definition.

The US criminalizes forced labor in and of itself, which means forced labor is not only considered an outcome of trafficking or other types of human exploitation. On the contrary, Russia and Kazakhstan do not establish forced labor as a crime in itself. In this chapter, I will first explain the standards for prosecution of forced labor of migrant workers, then compare the criminal legislation in the three countries and consider the practical implications of the gaps identified.

### *i. Established International Standards on the Prosecution of Forced Labor*

As mentioned above, in many States, forced labor is criminalized within the ambit of trafficking, and there is no “standalone” forced labor offence.<sup>238</sup> This approach excludes forced

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<sup>237</sup> Klara Skrivankova (n 8) 8.

<sup>238</sup> *ibid.*

labor victims from being recognized as victims of a crime if they are not also victims of trafficking, and further, from receiving adequate protection and assistance.

The ILO Declaration on Fundamental Principles and Rights at Work declares that all Member States should eliminate all forms of forced or compulsory labor regardless of whether they have ratified the Conventions.<sup>239</sup> This obligation arises from the very fact of membership of the ILO. ILO Convention 29 (1930), in its Article 25, states that forced labor shall be punishable as a penal offence. Despite Conventional obligations, most ILO Member States are yet to create the specific crime of forced labor in domestic criminal law.<sup>240</sup> Instead, Member States tend to include the prohibition of forced labor in labor laws. In many countries, forced labor is prohibited by constitutional provisions, and in countries where the constitution has direct application, this might be strict enough for enforcement.<sup>241</sup>

The ILO did not precisely require the criminalization of forced labor as a separate crime. It instead required adequate penalization of forced labor and underscored that prosecution “is more likely to be included in the penal or criminal code.”<sup>242</sup> In overview of previous ILO publications, the ILO recognizes State authority to decide how to transcribe this principle of the prohibition of forced labor into their domestic law but finds criminalization to be the most suitable approach. For those that do not, enforcement is practically non-existent.

The ILO is evolving its view on sanctioning forced labor and more forcefully prescribes its criminal prosecution. It is worth noting that the ILO Protocol of 2014 strengthens the implementation of Article 25 of Convention 29. It establishes that the Member States are obliged to suppress forced labor by taking ‘effective’ measures to prevent and eliminate its use,

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<sup>239</sup> International Labor Conference, ‘ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up’ (Eighty-sixth Session, Geneva, 18 June 1998; annex revised 15 June 2010).

<sup>240</sup> ILO (ed), Human Trafficking and Forced Labor Exploitation: Guidance for Legislation and Law Enforcement: Special Action Programme to Combat Forced Labor (International Labor Office 2005) 18.

<sup>241</sup> *ibid.*

<sup>242</sup> *ibid.*

protect victims, and ‘sanction’ the perpetrators.<sup>243</sup> The ILO Recommendation on supplementary measures for the effective suppression of forced labor (Recommendation 203) also emphasized that effective enforcement of national laws and regulations against forced labor requires the imposition of penalties and the confiscation of profits obtained as a result of forced labor.<sup>244</sup> Additionally, Recommendation 203 mandates that the Member States must ensure that legal persons can be held liable for violating the prohibition of forced labor.<sup>245</sup>

ii. *Regional Courts: on the criminalization of forced labor*

Regional courts are also attentive to the criminalization of forced labor or establishing an adequate legal and administrative framework to prevent this type of human exploitation. In cases Article 4 ECHR cases (prohibition of slavery and forced labor), the ECtHR stated that in order to comply with their positive obligation, States must penalize and effectively prosecute the practices referred to in the Article.<sup>246</sup> In *Chowdury and Others v. Greece*, the ECtHR established that the Member States are “required to put in place a legislative and administrative framework to prohibit and punish forced or compulsory labor.”<sup>247</sup> Generally, the existence of a relevant legal or regulatory framework for prohibiting and punishing the acts listed in Article 4 is a threshold for ECtHR to assess Member State compliance.

The IACtHR in *Workers of the Hacienda Brasil Verde v Brazil* reaffirmed a State’s obligation to diligently adopt positive measures enforcing Article 1 of the ACHR.<sup>248</sup> Article 1 establishes a State’s commitment to respect all rights recognized in the Treaty. The IACtHR also interpreted this obligation to be applicable to slavery, servitude, and forced labor, on the

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<sup>243</sup> *ibid*, Article 1.

<sup>244</sup> ILO, Recommendation (n 7).

<sup>245</sup> *ibid*.

<sup>246</sup> *Siliadin v France* (n 33) paragraphs 89, 112.

<sup>247</sup> *Chowdury and Others v Greece*, Judgment from 30 March 2017, Application No 21884/15 paragraph 105.

<sup>248</sup> Inter-American Court of Human Rights: *Workers of the Hacienda Brasil Verde v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Series C No 318, 20 October 2016’ (2017) 3 International Labor Rights Case Law journal 357 <[https://brill.com/view/journals/ilrc/3/3/article-p357\\_357.xml](https://brill.com/view/journals/ilrc/3/3/article-p357_357.xml)> accessed 18 November 2019.

one hand, and trafficking, on the other, are identical.<sup>249</sup> This approach is innovative because many countries in their national legislation usually envisage specific protection, assistance, and support services only for human trafficking victims. Victims of forced labor who were not involved in human trafficking, but who still experienced exploitation, were excluded from the protection and assistance that human trafficking victims received. The IACtHR in *Workers of the Hacienda Brasil Verde v Brazil* also considered that prosecution must be proportionate to the seriousness of the violation. It is up to the State to define the minimum and maximum punishments within its criminal law on this scale.<sup>250</sup>

This brief overview of international standards demonstrates that ILO instruments and regional courts recognize forced labor criminalization as a key measure to enforce State commitments to eradicate forced labor.

### iii. National legal frameworks against forced labor

This subsection determines how the international legal standards reviewed in chapters I and III are implemented in the selected jurisdictions' national legal frameworks. While comparing jurisdiction in this subsection, the US acted as a model with a promising criminal prosecution of forced labor.

#### a) The US

From the human rights perspective, rights guaranteed in the Constitution need to be justiciable. The 13th Amendment of the Constitution prohibits slavery and involuntary servitude in any place subject to US jurisdiction and grants Congress the ability to enact laws

<sup>249</sup> Valentina Milano, 'Human Trafficking by Regional Human Rights Courts: An Analysis in Light of Hacienda Brasil Verde, the First Inter-American Court's Ruling in This Area' (Revista Electrónica de Estudios Internacionales, 2018) 1 <<http://www.reei.org/index.php/revista/num36/notas/human-trafficking-by-regional-human-rights-courts-an-analysis-in-light-of-hacienda-brasil-verde-the-first-inter-american-courts-ruling-in-this-area>> accessed 18 November 2019.

<sup>250</sup> Inter-American Court of Human Rights: *Workers of the Hacienda Brasil Verde v Brazil*, paragraph 462.

for its effect.<sup>251</sup> The US established a strict constitutional framework that prohibits the most severe forms of exploitation and empowers the legislator to enact laws covering territories under US jurisdictional control.

At the national level, the prohibition of forced labor in the US is enacted under the Trafficking Victims Protection Act of 2000 (TVPA),<sup>252</sup> which provided “the tools to combat trafficking in persons both worldwide and domestically.”<sup>253</sup> All offences indicated in the TVPA are codified under the 18 US Code prohibiting peonage, slavery, forced labor, and trafficking in persons in separate sections. Following the sections on peonage and slavery, Section 1589 of the US Code criminalizes forced labor. Although there is no definition of forced labor in US legislation, its indicators are included criminal legislation. There, forced labor is defined as providing or obtaining labor by ‘threats of, or the use of actual serious harm or physical restraint’ either to the victim or another person.<sup>254</sup> If the victim believes that s/he would suffer serious harm or restraint, this is a means of coercion. Also, being threatened with the use of the legal process, is an indicator of forced labor. The legal process covers the use or threatened use of laws or legal procedures, whether administrative, civil, or criminal, to exert pressure on another person.<sup>255</sup> This indicator of forced labor is relevant mainly to undocumented migrant workers. As previously mentioned, employers usually use this means of coercion against migrant workers - threatening to inform police or immigration officers about their undocumented status.

It is impossible not to agree with Skrivankova that, in general, the US Code lists several of the most crucial indicators listed in ILO commentaries and handbooks.<sup>256</sup> Defining forced

<sup>251</sup> The US Constitution 13th amendment, 31 January 1865.

<sup>252</sup> Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106- 386, 2000.

<sup>253</sup> US Department of States, ‘International and Domestic Law Office to Monitor and Combat Trafficking in Persons’ <<https://www.state.gov/international-and-domestic-law/>> accessed 19 December 2019.

<sup>254</sup> The US Code Title 18 Part I Chapter 77 § 1589 Forced labor, <<https://www.law.cornell.edu/uscode/text/18/1589>> accessed 19 December 2019.

<sup>255</sup> *ibid.*

<sup>256</sup> Skrivankova (n 8).



labor is a positive aspect of the US legislation that increases victims' protection and enables prosecution of encompassed forced labor cases. Moreover, the US strictly sanctions the crime of forced labor at the same level as the crime of trafficking in person. The perpetrator of forced labor can be fined or imprisoned for 20 years, or both. In situations with aggravated characteristics (death of the victim or attempt to kill, kidnapping or an attempt to kidnap, sexual abuse or attempts to), the defendant shall be fined, imprisoned for any term of years up to life imprisonment, or both.<sup>257</sup>

Criminalization in the US is therefore well defined, specific to forced labor, effectively prosecuted, and its punishment corresponds to its seriousness. This creates a framework of protection for migrants suffering forced labor in the US in line with ILO standards and is the reason that it will be used as a model system when considering Russia and Kazakhstan.

*b) The Russian Federation*

The Constitution of the Russian Federation establishes that labor is free and forced labor shall be banned.<sup>258</sup> One can say that Russia also uses positive prohibitory 'human rights' language against forced labor.

Russia defines forced labor under the Labor Code and prohibits its use. However, the definition provided in Article 4 of the Labor Code does not fully comply with those in ILO Convention 29 (1930).

Article 4 of the Labor Code	Article 2 of ILO Convention 29 (1930)
Forced labor shall be a performance of <i>work</i> under duress by menaces of applying <i>some penalty (violent act)</i> :	Forced or compulsory labor shall mean <i>all work or service</i> which is exacted from <i>any person</i> under the menace of <i>any penalty</i> and

<sup>257</sup> 18 U.S. Code § 1589 on Forced labor.

<sup>258</sup> The Russian Federation Constitution, Article 37 (the Russian Federation, 1993).

1. to maintain labor discipline; 2. as a disciplinary step for participating in a strike; 3. as a means of mobilizing and using the labor force for economic development; 4. as a penalty for holding or expressing political beliefs contrary to the established political, social, or economic system; and/or 5. as a discriminatory measure on the grounds of race, social, national, or religious status. (emphases added).	for which the said <i>person has not offered himself voluntarily</i> (emphases added).
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As discussed previously, forced labor has four indicators: 1) it covers all work and services (which means work and employment, in any industry or sector, legal or illegal); 2) any person could be a subject of forced labor (which means it refers to children and adults regardless of nationality, citizenship); 3) any penalty – this could be a means of coercion; and 4) the absence of voluntariness. The definition provided in Russia’s Labor Code is in all parts narrow. For instance, there is no mentioning of ‘any person,’ ‘all work,’ and it omits the indicator of ‘involuntariness.’ The Russian legislation also includes only five forms of penalty enshrined in Article 1 of ILO Convention 105 on the Abolition of Forced Labour (1957).

More problematic is that forced labor is not criminally prosecuted and falls only in the remit of civil law. Russia prosecutes only trafficking in persons and the use of slave labor criminally. In 2002, members of Russia’s State Duma introduced a Bill on forced labor’s separate criminalization, however, the initiative was rejected.<sup>259</sup> Legislators considered that the

<sup>259</sup> The Russian Federation, Explanatory note to the draft federal law “On Amending the Criminal Code of the Russian Federation” <<https://sozd.duma.gov.ru/bill/183011-3>> accessed 18 December 2019.

proposed new Article would compete with the existing Article 127.2 of the Criminal Code on the “Use of slave labor.”<sup>260</sup> But this argument is controversial; forced labor and slavery, although interconnected, are not identical. Article 127.2 of the Criminal Code does not cover all four of the elements of forced labor enshrined in Article 2 of ILO Convention No.29. Likewise, slavery has different indicators as the most severe human exploitation act.

There are two gaps in Article 127.2. First, the definition is narrower than the concept of slavery, but different to the concept of forced labor. This means that this Article does not fully cover slavery, neither does it protect persons from forced labor.

Article 127.2 of the Criminal Code of the Russian Federation	Article 1 of the Slavery Convention (1926)	Article 2 of ILO Convention №29
<i>Using the labor of a person in respect of which authority is exercised which is akin to ownership, where the person cannot refuse to carry out works (services) for reasons independent of him... (emphases added).</i> <sup>261</sup>	Slavery is the <i>status or condition</i> of a person over whom <i>any or all of the powers</i> attaching to the right of <i>ownership</i> are exercised (emphases added). <sup>262</sup>	For the purposes of this Convention, the term ‘forced or compulsory labor’ shall mean all work or service which is exacted from any person under the <i>menace of any penalty</i> and for which the said person <i>has not offered</i>

<sup>260</sup> The Federal Assembly Parliament of the Russian Federation, ‘Conclusion of the State Duma Committee on Civil, Criminal, Arbitration and Procedural legislation to the draft Federal Law No 183011-3 ‘On Amendments and Additions to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation’ introduced by the deputies of the State Duma Gainullina, Ivanov, Isaev and others’ (0527183011-3.163 from 31 May 2004).

<sup>261</sup> The Russian Federation, Criminal Code Article 127.2 (the of Russian Federation, No. 63-Fz of June 13, 1996) < <https://www.legislationline.org/documents/id/21248>> accessed 18 November 2019.

<sup>262</sup> League of Nations, *Convention to Suppress the Slave Trade and Slavery*, (25 September 1926), 60 LNTS 253, Registered No 1414, <[www.refworld.org/docid/3ae6b36fb.html](http://www.refworld.org/docid/3ae6b36fb.html)> accessed 18 November 2019.

		<i>himself voluntarily</i> (emphases added). <sup>263</sup>
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Second, the Article's title, “use of slave labor,” literally understood, means that the legislator penalizes the *use* of slave labor but not the circumstances which become slavery. It was challenging to find sufficient scholarly works covering the interpretation of criminalization of human exploitation acts in Russia to try and understand this choice of words – why criminalize the use of slave labor, but not the very acts that force individuals into slavery? Interviewed experts assume that the legislator would consider the Criminal Code, encompassing Article 127.2, Article 126 (Abduction of a person), Article 127 (Unlawful deprivation of liberty), and Article 127.1. (Trafficking in persons), already criminally prohibits acts which precede slavery or other types of exploitation.<sup>264</sup> If this approach reflects the Russian legislator's position, it is quite complicated to assess the enforcement of rights enshrined in international treaties that Russia has ratified.

This thesis finds two problems with the lack of separate, specific criminalization of forced labor. First, it will cause a problem for law enforcement and how to qualify acts of forced labor as slavery given there is no essential element authority ‘akin to ownership.’ Second, when an indictment is brought under those other Criminal Code articles, the court may disagree with the crime’s qualification and re-qualify the act or send the case for further investigation. As a result, victims may not access adequate protection and if they do it will be unduly complex, and perpetrators may receive inappropriate punishment for the acts committed. Additionally, cases of forced labor will fall into the statistical data of other crimes. As a result, it will be complicated to understand how widespread forced labor is in Russia.

<sup>263</sup> ILO, *Forced Labor Convention*, (n 5).

<sup>264</sup> Interview with Yulia Grekhneva (n 95).

Filing a civil lawsuit for violations of Article 4 of the Labor Code is not excluded, however, in aggravating cases, this system cannot be considered adequate. Simple prohibition of forced labor in the Labor Code does not provide an opportunity to fine or sanction unscrupulous employers. Human rights activists also point out that victims always refrain from reporting abuse to law enforcement because they are afraid of being expelled. Law enforcement agencies are “inert” when it comes to violations of migrants’ rights, believe human rights advocates.<sup>265</sup> It is easier for law enforcement agencies to deport a migrant than to initiate criminal proceedings and delve into complicated prosecutions for forced labor which is not developed in the criminal legislation.<sup>266</sup>

To understand whether Russia implements the rights enshrined in Article 4 of the ECHR, Article 8 of the ICCPR, and ILO Conventions, more scholarly attention is necessary. This research finds that the absence of separate criminalization of forced labor in Russia is a medial measure, not in line with Russia’s international obligations. Russia, therefore, lags behind the US in the proper prosecution of forced labor. It also fails to comply with its obligations under ILO Convention No.29 and the ECHR, which oblige the Member States to impose a legislative and administrative framework to prohibit and punish forced labor.

### *c) Kazakhstan*

The Kazakh Constitution does not contain a direct prohibition of forced labor. Still, Article 24 establishes that “involuntary labor shall be permitted only based on a court verdict or in the conditions of a state of emergency or martial law.”<sup>267</sup> This, turned on its head, prevents the use of involuntary labor unless permitted in such circumstances.

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<sup>265</sup> *ibid.*

<sup>266</sup> *ibid.*

<sup>267</sup> Constitution of the Republic of Kazakhstan (1995 amended 23.03.2019 r.).

Kazakhstan prohibits the use of forced labor in its Labor Code. Article 7 defines forced labor in the exact words of Article 2 of ILO Convention No. 29 prohibition.<sup>268</sup> Thus, only Kazakhstan includes in its legislation the recognized international definition of forced labor among the selected jurisdictions. Whether this leads to real justiciability of the right is still an open question.

While prohibited, the Criminal Code of Kazakhstan does not punish forced labor. Unlike Russia, the Criminal Code also fails to punish the use of slave labor. Kazakhstan provides punishment only for human trafficking.

As in Russia, when NGOs identify cases of forced labor of migrant workers, it is difficult to apply to law enforcement (the police or prosecution office) where it is not a human trafficking case. Although the legislation allows for filing a civil claim for violation of labor laws, it is challenging to prove labor relations between the undocumented migrant and the employers.<sup>269</sup> Forced labor could be prosecuted under other criminal code articles, for example, kidnapping or illegal imprisonment, as in Russia. Still, these qualifications will be challenging both for law enforcement and judicial authorities in the same regard as assessed in Russia. In this respect, US law is advanced and more robust in protecting victims of forced labor and punishing perpetrators.

In 2016, the UN Human Rights Committee (HRC) expressed its concern about forced and bonded labor of migrant workers in Kazakhstan's tobacco, cotton, and construction industries. The HRC requested the State improve access to legal employment for migrant workers and ensure that a proper framework is in place to effectively enforce their rights and protect them from any form of abuse and exploitation. The Committee recommended Kazakhstan to ensure that all forms of slavery and slavery-like practices, including forced

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<sup>268</sup> The Republic of Kazakhstan, Labor Code, Article 8 (the Republic of Kazakhstan, No 251 15 May 2007).

<sup>269</sup> Interview with Gulnura Idigeeva, Lawyer, Private Institution 'Information and Advisory Centre 'Daris', Kazakhstan (October 7, 2020).

labor, are precisely defined and criminalized under the State party's legislation.<sup>270</sup> In the III Periodic Report on the implementation by the Republic of Kazakhstan of the ICCPR, the Government of Kazakhstan responded to these recommendations, noting that the legislation fully complies with Article 8 of the ICCPR. As can be seen from the report, the Government does not see the need for legislative reform. The Government assumed that the existing legislation could protect victims of various forms of human exploitation. In the same report, the Government specifies all the measures taken to protect the rights of victims of human trafficking.<sup>271</sup> However, all of the named protection mechanisms available to victims of human trafficking will not be available to migrant workers who have become victims of forced labor outside the crimes of human trafficking. Thus, unless the Government criminalizes other human exploitation forms besides human trafficking, it cannot be said to comply with its international obligations to protect forced labor victims.

Although Kazakhstan applied the concept of forced labor as recognized by the international instruments in its labor legislation, there is no criminal prosecution of perpetrators for forced labor. Thus, the protection of migrant workers in Kazakhstan from human exploitation acts (except for the trafficking) is the most unenforceable among considered jurisdictions.

It can therefore be said that criminalization of forced labor is a crucial prerequisite to the protection of migrant workers and their access to justice, but that this requires far more than a mere definition in law; it requires an effective and accessible mechanism of enforcement, as seen in the US.

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<sup>270</sup> UN Human Rights Committee, *Concluding observations on the second periodic report of Kazakhstan* (9 August 2016 CCPR/C/KAZ/2) paragraphs 35-36.

<sup>271</sup> The Republic of Kazakhstan, Resolution of the Government 'On approval of the third periodic report on the implementation by the Republic of Kazakhstan of the International Covenant on Civil and Political Rights Resolution of the Government of the Republic of Kazakhstan' (The Republic of Kazakhstan, No 416, 30 June 2020).

< <http://adilet.zan.kz/rus/docs/P2000000416/info> > accessed 18 December 2020.

iv. *National legal frameworks against trafficking in persons*

Although this research aims to address forced labor issues, it seems helpful to have a complete picture and analyze how the criminal legislation regulates trafficking in human beings for forced labor.

a) *The US*

The US Combat Trafficking in Persons Code 18, ss. 1590 is considered a model statute which the UN Office on Drugs and Crime offered as a guide other States legislating against trafficking.<sup>272</sup> As amended by the Victims of Trafficking and Violence Protection Act of 2000, the US establishes that ‘whoever knowingly recruits, harbors, transports, provides, or obtains by *any means, any person* for labor or services’ will be sentenced. This US legislation also distinguishes between sex trafficking and other forms of trafficking.<sup>273</sup> Subsection 1592 also establishes as unlawful the confiscation or destroying of documents in trafficking, peonage, slavery, involuntary servitude, or forced labor crimes.<sup>274</sup>

The US legislation delineates responsibility for different types of exploitation, including in the framework of human trafficking crimes. Ultimately, such a distinction is primarily in favor of those investigating crimes of human trafficking and making the right enforceable for forced labor victims no matter whether the exploitation is an outcome of trafficking or a separate crime. It is important to note that the Palermo Protocol lists the minimum standards of defining the trafficking in persons.<sup>275</sup> The US went further.

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<sup>272</sup> UNODC in its ‘Toolkit to Combat Trafficking in Persons’ includes the US legislation as a positive model law.

<sup>273</sup> 18 US Code Section 1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.

<sup>274</sup> 18 US Code Section 1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.

<sup>275</sup> See also chapter I.



Elements of trafficking in person	Article 3 (a) of the Palermo Protocol	18 the US Code ss. 1590
Acts (what is done)	(i) Recruitment, (ii) transportation, (iii) transfer, (iv) harboring, (v) receipt of persons.	(i) Recruitment, (ii) transportation, (iii) harbouring, (iv) provides or obtains.
Means (how it is done)	(i) Use of force, (ii) threat of the use of force, (iii) other forms of coercion, (iv) abduction, (v) fraud, (vi) deception, (vii) abuse of power or a position of vulnerability, (viii) giving or receiving payments or benefits to achieve the consent of a person having control over another.	By <i>any</i> means (emphasis added).
Purpose (why it is done)	(i) Prostitution, (ii) other forms of sexual exploitation, (iii) forced labor or services, (iv) slavery,	for labor or services (generally).

	(v) practices similar to slavery, (vi) servitude, (vii) removal of organs.	
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As seen in the table, the US does not limit the ‘means.’ Similarly, the purpose of the crime could be for any ‘labor or services’ generally and will therefore encompass any purposes (new forms) that may appear.

*b) The Russian Federation*

Russia prosecutes labor trafficking under Article 127.1 of the Criminal Code. In 2003, the Federal Law “On introducing changes and additions to the Criminal Code of the Russian Federation” adopted an amendment to the Criminal Code, and trafficking in persons was given a legal definition.

There is scholarly debate concerning the definition of trafficking in person contained in Russia’s Criminal Code.<sup>276</sup> However, this research does not attempt to participate in this and only compares the extent to which the definition of trafficking in person meets the Palermo Protocol’s minimum standards. The comparison identified that Russia’s definition of trafficking in person is narrower than the US’s.

<sup>276</sup> For example, Russian researchers discuss the controversy of the term “buying and selling a person” and the need to indicate the objectives of exploitation and the presence or absence of aggravating qualifications of the crime. As an example, see Rogava, I. ‘Problems of qualification of crimes related to trafficking in human beings (International Journal of Humanities and Natural Sciences, vol.8 2018)188.

Elements of trafficking in person	Article 127.1 of the Criminal Code of Russia	18 the US Code ss. 1590
Acts (what is done)	<i>The buying and selling of a person.</i> other actions in the form of recruitment, transportation, transfer, harboring, or receipt.	Recruitment, transportation, harboring, providing, or obtaining.
Means (how it is done)	N/A.	Any means.
Purpose (why it is done)	‘for the purpose of exploitation.’	‘for labor or services.’

Depending on the gravity of the crime, the punishment could be up to 15 years of imprisonment.<sup>277</sup>

Article 127.1 contains two Notes defining the situations where perpetrators could be exempt from responsibility, and the concept of exploitation.<sup>278</sup> In Note 2 of Article 127.1, the term ‘exploitation’ is defined as “the use of the engagement in prostitution by other persons and other forms of sexual exploitation, slave labor (services), servitude.” Forced labor is not included in this list. This does not mean that when a specific crime of human trafficking is

<sup>277</sup> The Russian Federation, Criminal Code Article 127,1 (The Russian Federation, No. 63-Fz, 13 June 1996) available at: <<https://www.legislationline.org/documents/id/21248>> accessed 15 November 2019.

<sup>278</sup> In some post-Soviet countries, criminal codes could have ‘Notes’ for specific articles. These Notes may contain definitions, may establish exceptional grounds for exemption from criminal liability or cases where criminal liability is excluded, and may also regulate other issues not reflected in the disposition of a particular article.

committed, forced labor will be excluded, but the absence of forced labor in the list of forms of exploitation will likely complicate the collection of evidence (as mentioned earlier, indicators of forced labor differ from all other forms of exploitation).

In the ideal, States should not restrict the already established minimum. The US approach concerning a broader understanding of ‘means’ and ‘purposes’ is the best practice. Experts underlined that although human trafficking for forced labor exists in Russia, investigators tend to link trafficking in persons only to sexual exploitation.<sup>279</sup> Therefore, this thesis supports the assertion that investigators need to be better trained in understanding human trafficking. The perception that trafficking is mainly related to sexual exploitation needs to be changed. To change this, the Criminal Code language needs to be clear and non-exhaustive to ensure it complies with the established and recognized human rights standards, as a minimum.

### *c) Kazakhstan*

Kazakhstan prohibits trafficking under Article 128 of its Criminal Code.<sup>280</sup> In 2019, Kazakhstan amended Article 128 of the Criminal Code - the definition of trafficking and its sentencing period changed. The current definition of trafficking in persons is identical to Russia’s, except that the Kazakh version is wider, following the explicitly listed types of ‘acts’ with “other acts committed” for the purpose of exploitation. Again, like Russia’s, Kazakhstan’s Criminal Code does not contain the ‘means,’ and depending on the gravity of the crime, the punishment might be up to 15 years of imprisonment.

Article 3 of the Kazakh Criminal Code establishes the definition of human exploitation and forced labor is here listed as an exploitation act, unlike in Russian legislation. Under Article 3, forced labor includes ‘any work or service under the menace of violence or the threat of its

<sup>279</sup> Interview with Andrey Yakimov (n 94).

<sup>280</sup> The Criminal Code of the Republic of Kazakhstan No. 226-V (dated July 3, 2014 with amendments and additions as of December 30, 2020).

use for work or services,' performed involuntarily (the ILO definition). Thus, if we compare Kazakhstan and Russia's criminal prosecution of trafficking with the aim of forced labor, theoretically, Kazakhstan's prosecution offices have a more substantial basis to investigate and prosecute based on the existing legal framework. How this happens in practice will be discussed in the following subchapter.

### *Conclusion*

This analysis indicates that the US exceeds the established international standards regarding the prosecution of forced labor in its domestic law. Russia and Kazakhstan fail to meet even those minimums. Further, the absence of criminalization of forced labor leads to difficulties in the investigation and prosecution of those responsible.

Even though Russia has ratified the Protocol of 2014, the experts interviewed are very sceptical that forced labor will be criminalized in Russia. Nevertheless, they believe that the Protocol's adoption is an essential step for Russia, as it provides an opportunity to discuss and develop countering forced labor at the governmental level.

## VI Regulatory Approaches in Practice

### *a) Investigation and prosecution in the selected jurisdictions*

After discussing three legal frameworks that are differently placed within the regulatory spectrum, this chapter focuses on comparing the practice of migrants' access to justice and remedies available for them when facing human exploitation.

It should be noted that the best means of comparing practical implications would be to assess court decisions. However, due to the lack of criminalization of forced labor in Russia and Kazakhstan, such a comparison is impossible. Therefore, this chapter will observe the practical situation with access to justice of migrant workers who are victims of different types of human exploitation in Russia and Kazakhstan. The US is again used as a model in this comparison.

McCarthy argues that judges in Russia have a conservative, narrow-interpretation approach with human trafficking cases. McCarthy also states that judges in Russia fear an acquittal or their decisions being overturned on appeal and therefore persistently tried to avoid cases relating to labor and sex trafficking.<sup>281</sup> Instead, judges will say that investigators used human trafficking statutes incorrectly or convict perpetrators on the other, alternative or lesser, charges. These arguments put into perspective the findings in the previous chapter concerning the potential effects of legal gaps in Article 127.1 and 127.2 of Russia's Criminal Code. It is important to note also that McCarthy analyzed several cases related to human trafficking (both sex and labor trafficking) and concluded that legal professionals in Russia stereotype that victims of slavery or trafficking must be held and unable to escape. It is submitted that court decisions border on "absurdity."<sup>282</sup> For example, in one case, the judge found that the defendant was not guilty of using slave labor because the victims who had been severely beaten could not

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<sup>281</sup> Lauren A McCarthy, 'Decision-Making in the Russian Criminal Justice System: Investigators, Procurators, Judges and Human Trafficking Cases' in Marina Kurkchyan and Agnieszka Kubal (Eds.), *A Sociology of Justice in Russia* (Cambridge Studies in Law and Society, 2018) 205-230.

<sup>282</sup> *ibid.*

then perform the work. As a result, the defendant was accused of murder, but not slave labor. Per the court logic, perhaps the indicator of using slave labor must be that the worker completed the work. However, abandoning all reasoning, this situation is just an example of how the judicial system inadequately considers human exploitation cases because of gaps in the regulatory norms, particularly in criminal legislation. An additional problem is the lack of the necessary training for law enforcement and judicial system employees in investigating and prosecuting cases relating to human exploitation.<sup>283</sup>

In the 2020 TIP report, authorities were observed to have threatened to expel foreign victims of human exploitation as undocumented migrants for unlawful presence rather than screening them for trafficking indicators and providing them with protection.<sup>284</sup> The “Golyanovo slaves” case mentioned in Chapter II examples another problem limiting victims’ access to protection; the illegal and corrupt relations between the police and perpetrators or unscrupulous employers.

In December 2019, the Supreme Court issued a Resolution (Postanovleniye) that provides judicial explanations on trafficking cases and criminal offences related to trafficking.<sup>285</sup> Experts hoped this Resolution would increase the use of the criminal code to prosecute and convict traffickers.<sup>286</sup> The Resolution explains when a court should find a crime, clarifying the concept of recruitment for exploitation acts and issues relating to the interpretation of ‘buying and selling with the purpose of exploitation.’ There are no clarifications, however, regarding the indicators of different forms of exploitation or how courts should consider specific groups of victims’ interests throughout the process of

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<sup>283</sup> Interview with Yulia Grekhneva (n 95).

<sup>284</sup> US Department of State, (n 87) 419 -422.

<sup>285</sup> The Supreme Court of the Russian Federation, Resolution of the Plenum of the Supreme Court of the Russian Federation "On judicial practice in cases of kidnapping, illegal imprisonment and human trafficking" (December 24, 2019 N 58).

<sup>286</sup> US Department of State, (n 87) 419 -422.

prosecution. Such explanations would enhance access to justice for victims of human exploitation acts, including migrant workers.

Fear of embarrassment over judicial decisions in trafficking cases can be seen in Kazakhstan courts also. Human rights activists underline that the overturn of a judge's decision does not entail liability in law (unless there was gross violations of the law), yet it is undesirable for judges.<sup>287</sup> NGOs reported that low-ranking police officials are often bribed to avoid bringing trafficking in person charges. Some cases are closed due to lack of evidence, all the while the victim's testimony will be ignored.<sup>288</sup> Worse still, some police officers themselves facilitate or benefit from forced labor crimes and will thus not be willing to bring the crime to light.<sup>289</sup>

It is clear that the problems of both investigating and prosecuting acts of human exploitation of migrant workers in Russia and Kazakhstan are effectively identical. Surface-level similarities, such as the imperfection of criminal legislation partly discussed in the thesis, deserve further scholarly attention to identify the reasons why the imperfections are tolerated.

The US system also has difficulties, however, if we compare the number of criminal cases initiated, the number of perpetrators punished, and the amount of compensation received, it is evident that the US has the most robust system for prosecution and protection among the selected jurisdictions. For example, the National Human Trafficking Hotline indicates that in 2019 more than 11,500 individuals contacted them, of which 1,236 were victims of forced labor.<sup>290</sup> This Hotline also provides detailed statistical data on victims' age, gender, citizenship, and the sectors they were exploited by or within. In comparison, Kazakhstan reported in 67 trafficking cases in the same year, without details of the type of exploitation, age, gender, or citizenship,<sup>291</sup> and Russia reported 61 trafficking victims, among which four males were victims

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<sup>287</sup> Interview Gulnura Idigeeva (n 269).

<sup>288</sup> US Department of State, (n 87) 289-291.

<sup>289</sup> *ibid.*

<sup>290</sup> See National Human Trafficking Hotline, accessible at: <<https://humantraffickinghotline.org/states>>

<sup>291</sup> US Department of State, (n 87) 289-291.



of forced labor. To the contrary, NGOs estimated the number of victims to be in the thousands in these States.<sup>292</sup>

Migrant workers in the US may additionally bring claims before the Equal Employment Opportunity Commission for discrimination.<sup>293</sup> There have been numerous high-profile cases in the US whereby exploited workers received investigations resulting in remedies.<sup>294</sup> Migrant workers in the agriculture sector can also bring actions under the Migrant and Seasonal Agriculture Worker Protection Act (1983). Importantly, US law does not prevent undocumented workers from bringing labor claims, including for unpaid wages or overtime, under its legislation. As such, there are multiple mechanisms and bodies willing to criminalize forced labor, as defined in US law which is, in itself, of a higher human rights standard. In Russia and Kazakhstan, we see the opposite in both regards.

*b) Access to support services for migrant workers - victims of exploitation.*

This subchapter demonstrates that migrant workers in the US have several opportunities to protect their rights when exploitation occurs or is at risk of occurring. In addition to government mechanisms, the US also has numerous strong NGOs that receive sufficient funding to implement relevant programs.<sup>295</sup>

Migrants' unwillingness to interact with official bodies in Russia has been seen already. Migrants prefer to apply to NGOs in Russia, and their services are in great demand. NGOs are usually the first to identify and provide assistance and rehabilitation to migrant workers who are victims of human exploitation. However, after Russia adopted the law on foreign NGOs (in 2015), the possibility for NGOs to receive funding abroad were limited. More than a

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<sup>292</sup> *ibid* 419 -422.

<sup>293</sup> Labor Exploitation Accountability Hub, <<https://accountabilityhub.org/provision/29-u-s-c-%c2%a7-206/>> accessed 15 November 2019.

<sup>294</sup> American Civil Liberties Union, 'David, et al. v. Signal International, LLC et al' < <https://www.aclu.org/cases/david-et-al-v-signal-international-llc-et-al>> accessed 15 November 2019.

<sup>295</sup> US Department of State, (n 87) 514-522.

hundred shelters for victims of exploitation and violence were closed, further limiting victims' access to remedies and protection.

In Kazakhstan, there is a Trafficking in Persons Working Group, led by the Ministry of Internal Affairs, and the National Anti-Trafficking Action Plan was developed. Here also, NGOs still receive foreign funding, and they implement the majority of their activities towards providing support to migrant worker victims of forced labor. Of course, in terms of the scale of assistance, this is not comparable to the US, but Kazakhstan's situation is much better than in Russia. Through its agency, USAID, the US provides a significant part of Kazakhstan's funding to prevent trafficking and exploitation and protect victims of exploitation.

Access to support services clearly largely depends on funding and availability of NGOs in the migrant-receiving countries. The better funding and more credible the NGO, the better protection which can be offered to victims of exploitation. In this regard, the US provides both while Russia limits both, and Kazakhstan's civil society is dependent on foreign funding.

### *Conclusion*

McCarthy is correct when he argues that judges in Russia narrowly interpret human exploitation cases because they fear the embarrassment of an acquittal or overturned decision. Russian investigators are also reluctant to have a proactive role, for different reasons. This is only possible as a result of a weak regulatory approach as seen in Russia, exacerbated by a judiciary which fails to protect migrant workers from exploitation.

Undocumented migrants' last resort to obtain support and services in Russia and Kazakhstan are therefore NGOs. In Russia, NGOs experience the most challenges - they can hardly support migrant workers to access justice, and currently, they have little influence on legislation changes. In Kazakhstan, NGOs working with migrant workers are in a better position than their Russian colleagues. However, the services they provide and their advocacy

are dependent on their international development partners' support. Kazakhstan therefore has reduced capacity and delivers minimal support for victims. Further, it seems that the government was happy to shift this responsibility onto NGOs' shoulders. Nevertheless, Kazakh NGOs can still act relatively freely, receive funding from international institutions, and conduct work which benefits migrant workers. But this should be in addition to a government-provided regulatory approach, not as an alternative to. As seen in the US, institutional investigation and prosecution is as essential as a robust civil society.

## VII Conclusion and Recommendations

“We called for labor power, and human beings came.”

- Max Frisch.<sup>296</sup>

In the contemporary world, not all countries receiving migrant workers choose to develop their admission policies following humanistic principles or the principles based on human rights. An approach in which migrant workers are primarily seen as ‘illegal’ also considers them a “cheap labor force,” and a threat to the internal labor market (although this market needs this labor force). This leads to the absence the essential element in such policies – the human rights element. Without this element of protection in policymaking, a parallel shadow market emerges, criminal and corruption structures are supported, and legal loopholes broadened. Further, migrant-receiving countries lose their potential income, and the risks of social tension increase. In a narrow sense, this the omission of a human-rights element is tragic for individual migrant workers. However, countries receiving migrants still lack the political will to open the pathway and put human rights at the centre of policy regulation of migration. In response, society should raise awareness of the alarming issues, discuss them from different points of view, and propose solutions. This is the reason that this thesis sought to reveal just how ineffective policies and laws can lead to different forms of human exploitation, and particularly forced labor.

Among all forms of so-called modern slavery, forced labor of migrant workers in the private economy is increasingly an issue to which international institutions and experts pay attention. The ILO’s role in this process is becoming increasingly significant. The development

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<sup>296</sup> Max Frisch was a Swiss novelist focusing on identity, individuality, responsibility, morality, and political commitment. This quote of the writer is used frequently in articles discussing guest worker programs.

and adoption of the ILO Protocol of 2014 marked a new milestone for preventing forced labor and, among other vulnerable groups, underlines the protection of migrant workers from exploitation. One of the significant recommendations the ILO proposed is the development of a comprehensive labor migration policy and the criminal prosecution of forced labor. This was the motivation for engaging in research on what may cause and resolve the problem of forced labor of migrant workers in three comparative countries.

This research revealed that forced labor is widespread in all three jurisdictions – the US, Russia, and Kazakhstan. The vulnerability of migrants to forced labor is predetermined by the lack of human rights approach in the governance of migration in jurisdictions. All three jurisdictions' policies led to a security paradigm in regulating migration, but which was not an effective management framework which therefore failed to reduce illegal migration as desired. The burdensome and costly procedures for migrants and employers had a knock-on effect, increasing migrants' vulnerability to different forms of exploitation, including forced labor.

All three jurisdictions have international and regional obligations. Comparatively, however, the US has ratified the smallest number of instruments on eliminating forced labor of migrants, while Russia and Kazakhstan are attached to more treaties. This thesis revealed that universal international instruments do not play the desired or needed role for standard-setting in these countries. Regional obligations are certainly a more robust mechanism for Russia, and still relatively forceful in the US. Undoubtedly, US domestic measures to counter the forced labor of migrant workers could serve as a model for many countries. However, its current treatment of international mechanisms, instruments, cooperation, and finally, their approach towards regulating migration, defy the spirit of international laws. This has undermined the country's prestige as a democracy promoting human rights and freedom from exploitation throughout the world.

Among the selected jurisdictions, Kazakhstan is unique in that it lacks any effective regional human rights mechanism to protect migrant workers from exploitation and forced labor. For migrant workers from Kyrgyzstan, the EAEU Treaty's preferences for migrant workers could be an alternative regional tool to secure migrants' labor rights. However, this would require migrant-sending State Parties to have a stronger EAEU treaty implementation and a political will to hold migrant-receiving State Parties accountable in cases of the violation of the rights guaranteed by the Treaty for migrant workers.

While discussing the domestic regulatory approach, this study found for the necessity of two main aspects. First, the use of comprehensive definitions, or at least non-restrictive definitions, when compared to their international counterparts. Kazakhstan and Russia could use these established terms in their national law to better develop domestic instruments and mechanisms to fight against forced labor.

Second, there is a need for distinct criminalization of the most widespread acts of human exploitation. This analysis indicates that the US prescribes the minimum of the established international standards for the prosecution of forced labor in its domestic law. Russia and Kazakhstan fail to meet even these. The absence of criminalization of forced labor leads to difficulties in the investigation and prosecution, as discussed in this research. Russia has ratified the Protocol of 2014, which could be a sign of hope of changing the situation.

The thesis also underlined that role of a vibrant civil society is essential. NGOs could provide services and substantially support governments in developing a comprehensive policy, law, and enforcement system that eliminates human exploitation. The real potential of NGOs' is effectively used in the US, while unjustifiably neglected in Russia. In Kazakhstan, NGOs' potential is overused and underfunded. For example, the provision of services to victims of human exploitation is entirely entrusted to NGOs, and the State does not actively participate in this process or adequately support NGOs in their work.

The COVID-19 pandemic increased migrant workers' vulnerability to exploitation, forced labor, and trafficking.<sup>297</sup> However, it was not studied in this research, and the issue requires further attention more generally.

In the next subsection, I provide recommendations, having in mind the discussed challenges which are vital for protecting the rights of migrant workers.

#### *i. Recommendations*

The following recommendations are mainly directed at Russia and Kazakhstan with the aim of protecting migrant workers from forced labor, and specific attention to migrant workers from Central Asia. These recommendations were developed based on the research results and interviews with experts. Because labor migration is a process involving countries of origin and destinations, and measures to protect migrants from exploitation require a comprehensive approach and collaboration of sending and receiving countries, some recommendations address Kyrgyzstan, Tajikistan, and Uzbekistan.

The recommendations for the US have a broader nature because this jurisdiction acted as a 'tested' model in this research.

#### *a) for Russia and Kazakhstan*

Experts from Russia and Kazakhstan who were interviewed for this study stated that both the professional community and ordinary people do not perceive forced labor of migrant workers as a problem. Therefore, the States' initial attempts should recognize the risks of migrant workers to forced labor in existing policies aimed at regulating fair and favorable working conditions, labor migration, anti-trafficking plans, and programs that provide for access to justice. Additionally, Russia and Kazakhstan need to revise the existing legislation regulating

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<sup>297</sup> ILO, 'Protecting migrant workers during the COVID-19 pandemic. Recommendations for Policymakers and Constituents' <[https://www.ilo.org/global/topics/labour-migration/publications/WCMS\\_743268/lang--en/index.htm](https://www.ilo.org/global/topics/labour-migration/publications/WCMS_743268/lang-en/index.htm)> accessed 30 April 2020.

labor migration and trafficking in persons to align them with international and regional obligations.

#### Enhancing law and policy

1. To provide separate and precise definitions of human exploitation acts in domestic legislation and determine their specific characteristics, especially for ‘forced labor,’ ‘trafficking in person,’ and ‘slavery.’
2. To ensure that forced labor is criminalized separately from the crime of trafficking in human beings and to establish a proportionate punishment for the crime of forced labor.
3. To adopt laws on the prevention of human exploitation acts. Such law should guarantee human rights protection mechanisms for all individuals (regardless of legal status) who are victims of trafficking, forced labor, slavery, and other severe human exploitation forms. This law also should include rights to compensation and reintegration.
4. To adopt a law on labor migration aligned with international human rights standards. This should guarantee migrant workers’ rights to fair and favorable working conditions, regulate organized recruitment and preparation of migrants under bilateral agreements with countries of migrants’ origin, and establish private employment agency regulation.
5. To conduct anti-corruption appraisal of all legislative acts related to the regulation of labor migration, migrants’ legalization, and access to employment. Based on the results, to reform legislation on labor migration to prevent and reduce corruption schemes. Engage civil society organizations (CSOs) to discuss the results of such an examination and next steps.
6. To ensure that existing legislation does not discriminate against migrant workers and established rules and procedures on regulating migrant’s employment and are not over-



bureaucratized, time-consuming. Make administrative costs of legalization and employment of migrants reasonable.

7. It is recommended that Russia revise the system of issuing patents and work permits for migrant workers to reduce the number of required documents and exams for temporary and seasonal migrant workers. In general, policy measures should be differentiated depending on the goals of migrant workers and the duration of stay.
8. Russia should revise the criteria for including migrants on “blacklists,” and reconsider the process of appealing the entry ban for minor offences.
9. It is recommended that Kazakhstan expands the current quota system to recruit low-skilled migrant workers.

#### Enhancing employer and recruiter responsibility

10. Hold employers accountable for violating migrant workers’ rights, including wage theft, occupational safety, and health violations, and ensure that migrant workers have access to justice and remedies for such abuses in line with States’ commitments under ILO treaties.
11. In cooperation with Kyrgyzstan, Tajikistan, and Uzbekistan’s migration authorities, develop an electronic database of unscrupulous employers, recruiters, and private employment agencies (PEA). Simultaneously, create a database of reliable PEA that assist migrant workers in employment.

#### Enhancing measures for organized recruitment of migrant workers

12. For the effective implementation of bilateral agreements on organized recruitment of migrant workers from Tajikistan and Uzbekistan in Russia, it is recommended that

Russia supports the creation of a system of pre-departure training for migrant workers in countries of origin.

#### COVID-19 response measures

13. The continuing COVID - 19 pandemic increases migrant workers' vulnerability to exploitation. As an emergency response, it is recommended that Russia and Kazakhstan develop and implement, together with Kyrgyzstan, Tajikistan, and Uzbekistan, supporting programs for migrant workers. Such programs should ensure migrant workers' access to essential services in Russia and Kazakhstan, access consulate services of migrant-sending countries in Russia and Kazakhstan to provide migrants information, medical services, humanitarian aid, and assistance to return home.
14. During periods of quarantine, self-isolation or other restrictions in Russia and Kazakhstan, a cooperation program with national diasporas, CSOs, and migrant communities should be established to provide food, housing, and medical aid to the most vulnerable migrants workers who have lost jobs.

#### Further measures for Kazakhstan

15. Allocate funding to state bodies and NGOs providing assistance and rehabilitation to migrant workers who are victims of human exploitation acts.
16. To develop and conduct State-funded public awareness outreach campaigns to educate more individuals on indicators of different types of exploitation, focusing on the vulnerability of migrant workers.

### Recommendations for Kyrgyzstan, Tajikistan, and Uzbekistan

17. Kyrgyzstan, Tajikistan, and Uzbekistan need to conduct regular monitoring of the implementation of bilateral and multilateral agreements (including the EAEU Treaty) in Russia and Kazakhstan. Based on the results, these countries should initiate policy debates on the revision of bilateral and trade treaties covering labor migration to include protection of human rights of migrant workers, regardless of status.
18. Continue and progress awareness-raising campaigns to inform migrant workers and their families of the indicators of forced labor and what protection mechanisms are in place for victims in countries of origin and destination.

### Recommendations for international institutions

19. International and donor institutions should monitor the situation of human rights defenders in Russia and Kazakhstan who primarily assist State fulfilment of international obligations, including to eliminate human exploitation. Grant support programs of the EU and UN development programs for Central Asian countries should include stronger conditional terms for Governments requiring them to support and develop civil society and protect human rights defenders.
20. The ILO and the UN should continue to encourage Russia and Kazakhstan to ratify international instruments to protect migrant workers from human rights violations and human exploitation.

#### *b) for the US*

US measures to counter forced labor of migrant workers at the prosecution stage, its access to justice and remedies, are models for many countries. However, these measures could not be considered entirely proactive as the policies and laws related to migrant workers' employment

still create preconditions for migrant workers' exploitation. Thus, the US should take a more proactive stance in preventing forced labor of migrant workers by revising the law and policy.

1. The US should evaluate and reconsider its laws and policies. Particular attention should be paid to procedures for obtaining H-visas, implementing workers' programs, and issuing temporary working visas based on the labor market's actual demand.
2. Take comprehensive measures on the reduction of migrants' vulnerability to exploitation, including a reconsideration of policies on preventing illegal migration that developed in the last four years. These measures violated the spirit of international laws and undermined the country's prestige as a democracy promoting human rights and freedom from exploitation throughout the world.
3. To establish a zero-tolerance goal regarding migrant workers' exploitation and forced labor by businesses and employers. To achieve this by educating workers, employers, policymakers, and the public on the human rights of migrant workers.

ii. *Professional Reflection*

While I was writing the conclusion of this thesis, I remembered one of my first cases relating to the protection of Tajik migrant workers. It happened fifteen years ago on New Year's Eve. A man came to the legal reception of my NGO and asked for legal aid. He looked so depressed that I agreed to provide a consultation despite it being the end of an intense working day. The story he told was a terrible one. His brothers were migrant workers who fell into slavery conditions while returning home from Russia through Kazakhstan. They were subjected to cruel exploitation in Kazakhstan, and after two weeks, found an opportunity to call home and tell them the situation. It was both my first and most extreme case. With the support of the IOM, I managed to rescue these victims, and this case determined my

professional career. For another 15 years, I worked to defend Tajik migrants' rights in Tajikistan, Russia, and Kazakhstan. Later, being a member of the Regional Civic Platform “Central Asia on the Move,” I had widened my professional scope and became involved in protecting migrant workers in the whole region. Therefore, I had no doubts that I would research migrant workers' vulnerability to forced labor in Russia and Kazakhstan for this academic paper. I then chose the US as a ‘tested’ model for comparison, believing that this system is the strongest in the world. Yet, during my academic research, I realized that even the proven model has problems in policies that predetermine situations of forced labor for migrant workers.

In Russia and Kazakhstan, local and western sociologists and anthropologists have studied labor migration quite profoundly. However, the subject of forced labor of Central Asian migrant workers is much less covered from the human rights perspective. The most comprehensive study in Russia is still considered the survey of Tyuryukanova, carried out 15 years ago. Recent scholarly articles in Russia and Kazakhstan that discuss legal issues are less focused on migrant workers' exploitation and forced labor from a human rights perspective, and mainly debate challenges in applying the existing standards against trafficking in persons. Therefore, in this work, I tried to see how universal and regional mechanisms could protect migrant workers from *forced labor* in Russia and Kazakhstan but faced shortcomings in finding enough academic evidence.

Nevertheless, interviews with experts provided an opportunity to develop my own findings. In my opinion, an important conclusion is that, despite Russia's political tensions with Europe, the CoE mechanisms work there. This system can protect workers from human rights violations under Article 4 of the ECHR. However, I found that ECtHR and IACtHR jurisprudence on slavery, trafficking, and forced labor are also underdeveloped, and it was not

possible at this stage to find a more in-depth understanding of the practical implementation of States' obligations.

The ILO supports an approach of criminalization of forced labor. Hence victims of forced labor, like victims of trafficking in human beings, should have access to State rehabilitation programs. However, I did not find sufficient sources or a clear interpretation by international institutions about this right for migrant workers who are victims of forced labor outside the crimes of human trafficking. Thus, I was not able to develop my ideas on this issue, but I was able to use the recommendations to qualify my own recommendations.

Kazakhstan lacks any regional systems safeguarding human rights, and the UN system remains weak, with Kazakhstan willingly ignoring the recommendations made by different UN mechanisms. Hence, I researched how treaties under integration unions (the EAEU) could fill this gap and protect migrant workers from labor rights violation and exploitation in this country. This was of particular interest because Russia wants Tajikistan, my home country, to also join the EAEU. Migrant welfare and protection from abuse are motivators for Tajikistan joining the EAEU Treaty. At the end of my academic journey, I concluded that although there is potential in this venture, countries sending migrants should have a more proactive position to monitor the implementation of bilateral and multilateral trade agreements that provide guarantees for migrant workers. Perhaps such a proactive role of migrant-sending countries will make migrant-receiving countries and investors implement promises in any agreement.

The Central Asian region suffers from a lack of working regional human rights systems. For different reasons, States increasingly ignore UN mechanisms.<sup>298</sup> The CIS's human rights protection mechanisms never worked, unsurprisingly. For the governments of countries with a tendency towards authoritarianism, such mechanisms are perhaps not needed. However, the

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<sup>298</sup> Among many reasons, I believe China has a growing influence in the region of Central Asia through its investments. Additionally, there is a general tendency in Central Asia and Russia of refusing so-called 'western' values.

population of Central Asia needs such protection as much as populations in other places of the world need it. It was therefore important for me to emphasize this gap (the absence of functioning regional mechanisms for protecting human rights in Central Asia) and open a discussion about what options are available to fill this gap, and to fill it effectively.

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