

# BOFAXE

## Human Dignity Is Inviolable... Unless You Are a Prisoner? (Part 1)

### A BRIEF ANALYSIS OF THE CURRENT STATUS OF PRISON LABOUR UNDER INTERNATIONAL LAW

— A vote on abolishing slavery in 2022 - really? Yes, that is exactly what happened in several states in the United States this November. On 8 November 2022 the citizens of Alabama, Oregon, Tennessee and Vermont voted in favour of amending their respective state constitutions in order to repeal exceptions, allowing slavery and involuntary servitude as “punishment for a crime”. However, in Louisiana a similar vote failed and even after November 8th’s election, the federal constitution and more than a dozen American states still permit slavery and involuntary servitude for prisoners.

For their assignments inmates are paid a few cents an hour or nothing at all - while the largest private prison companies in the US are listed on the stock exchange. The system of mandatory prison labour in the US has been repeatedly criticised as a form of “modern-day slavery”.

This post will explore the legality of compulsory prison labour in the US and Germany under various sources of international law and discuss whether there is a need for change.

#### Prison Labour - Not Just an American Problem

Forced prison labour is, of course, not only an American phenomenon. It can also be found in various other legal systems around the world, even in Germany. The German constitution generally forbids forced labour while at the same time providing a loophole in cases of “judicially mandated imprisonment” (Article 12 (3)) and thereby allows workers in German prisons to be deprived of otherwise universally recognized employment rights. Thus, the German economy takes advantage of a cheap workforce of inmates that are only paid one to three Euros per hour.

#### What Do Different Sources of International Law Say?

For approximately a century there has been a basic understanding in international law that - as a consequence of the concept of human dignity as a sort of “minimum standard to be guaranteed to individuals placed under the power of public authorities or other private individuals” - slavery and hard labour generally need to be prohibited. Nevertheless, the different treaties touching upon the treatment of prison labourers do not provide a consistent legal regime.

##### 1927 Slavery Convention

The first source of international law that comes to mind is the 1927 Slavery Convention. In Article 2, it is specifically stated that the parties “agreed to prevent and suppress the slave trade and to progressively bring about the complete elimination of slavery in all its forms”. Moreover, *inter alia* due to its incompatibility with the concept of human dignity, the prohibition of slavery is recognized as *ius cogens* under international law (see here, para 28), which is thus even applicable to non-parties of the Convention. Art. 1 (1) of the Convention, defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. While prisoners around the globe receive little to no pay, their legal autonomy is not in question. Thereby, prison labour as it is found in the US and Germany - although often done involuntarily - does not fit the definition of slavery established by the Convention.

##### 1930 Forced Labor Convention

This leads us to the 1930 Forced Labor Convention, to which Germany is a party and the US is not. While the prohibition of forced labour as *ius cogens* is still debated, one has to take a step back and analyse whether the conditions in German and US prisons even constitute forced labour before considering applicability issues. A definition of forced labour is set forth in Art. 2 (1) of the Convention as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. According to some reports prisoners in the US are forced to work even when sick and are punished for refusing to work (e.g. by being placed in solitary confinement). Similar punishments (see here, Section 102) are enshrined in German law if a prisoner violates the obligation to work (*supra*, Section 41). Moreover, inmates are subject to arbitrary, discriminatory, and punitive decisions by the prison administrators who select their work assignments and are explicitly excluded from the most basic workplace protections. Interestingly enough, this kind of prison labour, although perfectly fitting the definition of forced labour, is specifically exempt from the Convention due to the wording of Art. 2 (2) (c) which states that “the term forced or compulsory labour shall not include [...] any work or service exacted from any person as a consequence of a conviction in a court of law”. In any other workplace, conditions such as those in German and US prisons would be “shocking and plainly unlawful”. So why are they allowed in jails? The underlying idea behind this exception is of course to not just exclude inmates from society but to provide them with a meaningful occupation that prepares them for their post-release life and at the same time let them contribute to the community. It seems, however, quite contradictory to make an effort to ban all kinds of forced labour due to its incompatibility with human dignity while also basically allowing it in regard to prisoners. While it makes sense to give prisoners the possibility of work, it is questionable why punishment is necessary in the case they do not want to do so and why they are not deserving of a minimum legal standard (e.g. the right to a minimum wage or overtime protection) that could avoid exploitation and abuse.

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## Human Dignity Is Inviolable... Unless You Are a Prisoner? (Part 2)

A BRIEF ANALYSIS OF THE CURRENT STATUS OF PRISON LABOUR UNDER INTERNATIONAL LAW

### — European Convention of Human Rights (ECHR)

In the case of Germany, the ECHR is of great importance, and even the German constitutional court emphasised the importance of the Convention in its own judicial system (see [here](#)). Yet, the ECHR seems not to be very protective when it comes to prisoners' rights. [Article 4 \(1\) ECHR](#) states that "no one shall be held in slavery or servitude". The European Court of Human Rights (ECtHR) even adopted the slavery definition of the 1927 Convention (see [here](#), para 122). In the same vein, Art. 4 (2) ECHR forbids forced or compulsory labour, and refers to the 1930 Convention for its definition (see [here](#), para 32). However, the parallel to the 1930 Convention does not end there: in [Article 4 \(3\) \(a\) ECHR](#) an almost identical exemption from the definition is made for prison work. The Court has noted the specific structure of Article 4 Paragraph 3 is not intended to "limit" the exercise of the right guaranteed by paragraph 2, but to "delimit" the very content of that right (see [here](#), para 130). Thereby the ECtHR apparently reinforced the notion that when it comes to compulsory labour the dignity of prisoners deserves to be protected only to a lesser degree than the one of non-inmates. As an explanation, the Court stated that the four subparagraphs of paragraph 3, irrespective of their diversity, prisoners are "grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs" (*supra*). The Court went even further and noted that inmates do not have a right to be paid for their labour under Art. 4 (3) (a) ECHR - simply because the Convention does not contain such an entitlement (see [here](#), para 122).

*International Covenant on Civil and Political Rights (ICCPR) & International Covenant on Economic, Social and Cultural Rights (ICESCR)*

[Art. 8 \(3\) ICCPR](#) generally prohibits forced labour and yet, just like the US and the German Constitution, the covenant allows states to impose hard labour "as a punishment for a crime". Unsurprisingly, the Committee on Economic, Social and Cultural Rights provides a more progressive understanding: According to the Committee, inmates are only supposed to work for private companies if they expressed their consent beforehand. In its [General Comment No. 23](#) (para.10) the Committee stated that under [Art. 7 ICESCR](#), which guarantees just and favourable conditions of work, prison workers have a right to a fair remuneration, which the Committee understands to be "above the minimum wage".

### Conclusion

Historically seen, prison labour has been not only considered a means for punishment and retaliation, but also for rehabilitation and reintegration (cf. [Art. 10 \(3\) ICCPR](#)) and was thus generally accepted. This acceptance is mirrored in various international treaties. Although the practice of states paying prisoners (almost) nothing for their labour, sanctioning their disobedience and [letting them work for private companies](#) appears to be at least problematic under some of the mentioned conventions, there is apparently no consistent degree of the protection of inmates' rights. Obviously, there is a fine line between providing an inmate with a reasonable occupation that prepares him for the time after his release and exploiting him for the sake of corporate interests. Unfortunately, the relevant human rights treaties still provide enough space for the latter and therefore need an update.

All the relevant treaties are based on the principle of human dignity in one way or the other: In [Art. 10 \(1\) ICCPR](#) the importance of the inmates' dignity is explicitly mentioned, whereas the other treaties recognize the utmost importance of human dignity in different ways (e.g. [preamble ICESCR](#) or [additional protocols](#)) and the ECtHR [regularly confers](#) to the concept in its jurisprudence. In order to grant prisoners a minimum level of protection, the relevant treaties should therefore be interpreted in a way that compels states to ensure their compatibility of prisoners' labour with the principle of human dignity instead of allowing them to strip prisoners of the most basic protections against exploitation and abuse. Thus, it is important that prisoners, if forcing them to work is allowed, must be granted minimum labour rights such as being allowed to be absent when sick. Furthermore, they should at least receive a decent remuneration for their labour, just as the Committee on Economic, Social and Cultural Rights already [demanded](#) in 2016.