

# THE PRICE OF PARADISE

Vulnerabilities to Forced Labor in the  
Hawaiian Longline Fishing Industry



Human Rights Institute  
GEORGETOWN LAW

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## **GEORGETOWN LAW**

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APRIL 2019



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# LIST OF ACRONYMS

|             |  |
|-------------|--|
| <b>AP</b>   | Associated Press                                 |
| <b>CBP</b>  | Customs and Border Protection                    |
| <b>DLNR</b> | Hawai'i Department of Land and Natural Resources |
| <b>EEZ</b>  | Exclusive Economic Zone                          |
| <b>HLA</b>  | Hawaii Longline Association                      |
| <b>ILO</b>  | International Labour Organization                |
| <b>IUU</b>  | Illegal, Unreported, and Unregulated             |
| <b>NOAA</b> | National Oceanic and Atmospheric Administration  |
| <b>OLE</b>  | Office of Law Enforcement                        |
| <b>TVPA</b> | Trafficking Victims Protection Act               |

# THE PRICE OF PARADISE



## Vulnerabilities to Forced Labor in the Hawaiian Longline Fishing Industry

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*“When I heard ‘Hawaii,’ I thought paradise.  
I don’t get out to go see it. But it’s paradise . . . paradise.”<sup>1</sup>*

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<sup>1</sup> Interview with Mani, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); see also Interview with Marc, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Milo, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Myron, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019).



# I. EXECUTIVE SUMMARY

Approximately 700 foreign fishermen work on American longline fishing vessels in Hawai‘i, catching tens of millions of pounds of fish per year.<sup>2</sup> Over the past several years, reports have surfaced that the foreign fishermen employed in this fleet face extremely harsh working conditions and abuse.<sup>3</sup> In some cases, these circumstances may constitute forced labor under international and national law. This is, in part, facilitated by the complex and often contradictory nature of the laws governing the Hawaiian longline fishing industry, as well as foreign fishermen’s exclusion from many of the same legal protections afforded to documented workers in the U.S.

Following these reports, industry stakeholders made an effort to clarify contracts and ensure safe working conditions for these workers,<sup>4</sup> and legislators attempted to strengthen protections for this population.<sup>5</sup> However, three years after allegations first surfaced, our research uncovered that foreign fishermen remain vulnerable to forced labor.

This report assesses systemic vulnerabilities to forced labor faced by foreign workers in the Hawaiian longline fishing fleet through the lens of both international and U.S. domestic law. It then examines how these vulnerabilities impact foreign fishermen over the course of their employment in Hawai‘i. Finally, this report concludes with recommendations for legislators, government agencies, and industry actors to address these vulnerabilities by: (1) resolving foreign fishermen’s lack of legal status; (2) clarifying agencies’ regulatory jurisdiction and responsibilities; and (3) strengthening the industry’s human rights-oriented policies and processes.

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2 See, e.g., Martha Mendoza & Margie Mason, *Hawaiian seafood caught by foreign crews confined on boats*, ASSOCIATED PRESS (Sept. 8, 2016), <https://www.ap.org/explore/seafood-from-slaves/hawaiian-seafood-caught-foreign-crews-confined-boats.html>; Hawaii Fishing Industry: Industry in Perspective, HAWAII SEAFOOD COUNCIL, <https://www.hawaii-seafood.org/hawaii-fishing-industry/> (last visited Mar. 31, 2019); Jim Mendoza, *Longline fishing industry scrutinized for hiring of foreign fishermen*, HAWAII NEWS NOW (Nov. 2, 2017).

3 See Mendoza & Mason, *supra* note 2; The Beautiful Shores of Hawaii a Hub for Slavery?, HUMAN RIGHTS FIRST, (March 20, 2017), <https://www.humanrightsfirst.org/blog/beautiful-shores-hawaii-hub-slavery/>; Mathew Daly, *Forum: Congress must help Hawaii fishermen confined to boats*, THE SEATTLE TIMES, (Dec. 6, 2016), <https://www.seattletimes.com/business/forum-congress-must-help-hawaii-fishermen-confined-to-boats/>.

4 See, e.g., Testimony of Jim Cook & Sean Martin of the Hawaii Longline Association: Hearing on HB 438 Before the H. Comm. on Ocean, Marine Resources & Hawaiian Affairs (2017) (statement of Jim Cook & Sean Martin); Hawaii Longline Association, The United Fishing Agency, & Hawaii Seafood Council, *Hawaii Longline Association Code of Conduct for Decent Working in Fishing* (Feb. 16, 2018) (on file with authors) [hereinafter HLA Code of Conduct]; Gina Mangieri, *Longline fishing’s new system ties auction access to fair-labor*, KHON2, (March 15, 2018), available at <https://www.khon2.com/news/always-investigating/longline-fishings-new-system-ties-auction-access-to-fair-labor/901607067>; Timothy Hurley, *Longliners Codify Ethics in Push-Back Against Human Rights Allegations*, HONOLULU STAR ADVISOR (Apr. 8, 2018), available at <https://www.staradvertiser.com/2018/04/08/hawaii-news/longliners-codify-ethics-in-push-back-against-human-rights-allegations/>.

5 See, e.g., Sustainable Fishing Workforce Protection Act, S.B. 2071, 115th Cong. (2017); Sustainable Fishing Workforce Protection Act, H.R. 4224, 115th Cong. (2017); see also Human Trafficking and IUU Fishing Act, H.R. 6834, 115th Cong. (2017-2018); Facilitate Addressing Issues with Regulating Forced Labor in International Seafood Harvesting Act (FAIR FISHING Act), S. 3641, 115th Cong. (2017-2018); E-mail from Jeremy Horan, Senator Hirono’s Chief of Staff (Fall 2018).





## II. RESEARCH METHODOLOGY

This report examines the experiences of foreign workers in the Hawaiian longline fishing industry in the context of international and domestic laws proscribing forced labor and emerging business and human rights principles. Its findings are based on research conducted by the Georgetown Law Human Rights Fact-Finding Practicum team, consisting of ten Georgetown University Law Center students, an adjunct professor, and a teaching fellow. This study's research methods follow the Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organizations, 2015 ("Lund-London Guidelines"),<sup>6</sup> and the United Nations Office of the High Commissioner for Human Rights (OHCHR) Training Manual on Human Rights Monitoring ("OHCHR Manual").<sup>7</sup> Georgetown University's Institutional Review Board approved the study's research methods.

The fact-finding team conducted both desk and field research over the course of the 2018-2019 academic year, including a week-long fact-finding trip in Hawai'i. During the trip, the team conducted interviews with foreign fishermen currently employed in the Hawaiian longline fleet. Before, during, and after the trip, the team also interviewed human rights advocates,<sup>8</sup> legal and subject matter experts, U.S. and foreign government representatives, industry actors, and other local stakeholders.<sup>9</sup>

### A. INTERVIEWS WITH FISHERMEN

Our research team interviewed 43 fishermen docked at Piers 17, 36, and 38 in Honolulu. To avoid drawing attention to ourselves and the fishermen who spoke with us, we worked with community members who have well-established rapport with the fishermen, and who bring volunteers with them to visit the piers and provide services on a regular basis. Our interviews took place on the boats where the fishermen live and work, as well as within the areas of the piers where the fishermen are allowed to congregate.

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<sup>6</sup> Int'l Bar Ass'n & Raoul Wallenberg Inst., Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organizations (2015), *available at* [http://www.ibanet.org/Fact\\_Finding\\_Guidelines.aspx](http://www.ibanet.org/Fact_Finding_Guidelines.aspx) (last visited Apr. 3, 2019).

<sup>7</sup> Office of the U.N. High Comm'r for Human Rights, Training Manual on Human Rights Monitoring, U.N. Doc HR/P/PT/7/Rev.1 (2011), *available at* <https://ohchr.tind.io/record/4835?ln=en>.

<sup>8</sup> This term denotes that the interviewee promotes or protects human rights in their profession.

<sup>9</sup> This term denotes a residual category, which includes individuals located in Hawai'i who have first-hand experience or personal knowledge of the current conditions faced by foreign fishermen in Honolulu or who have had business interactions with fishermen, captains, or the leaders within the Hawaiian longline fishing industry.

We conducted both in-depth and questionnaire-style interviews<sup>10</sup> with individuals, as well as longer, informal group discussions. Interviews ranged from thirty minutes to two hours, depending on participants' availability. Our research team also engaged in "moderate" participant-observation practices when not conducting interviews,<sup>11</sup> joining the fishermen in regular social activities to establish rapport and observe their social environment. We used both convenience sampling<sup>12</sup> and the "snowball" technique<sup>13</sup> of asking interviewees to recommend other potential participants. Additionally, some fishermen approached the team and asked to be interviewed.

Interviews were conducted after obtaining the fishermen's verbal informed consent. We regularly sought confirmation from fishermen throughout the interviews that they felt safe and comfortable speaking with us at that time and location. To ensure their safety and confidentiality, we did not ask for the fishermen's names.<sup>14</sup> We requested permission to record interviews to ensure the accuracy of our notes and did so only with participant consent. Some fishermen did not wish to be recorded, in which case we took detailed notes by hand. Many of our interviews were conducted with the assistance of an interpreter in the participant's preferred language (Indonesian, Vietnamese, or Tagalog). Interpreters were community members who were involved with the volunteer organizations serving the fishermen or had existing individual relationships with them.<sup>15</sup>

Our field research should be understood with the following limitations in mind:

- First, interviews with the fishermen took place outdoors on the piers and in public view. The team made every effort to conduct our interviews where third parties could not hear the discussions and in locations that would not attract attention. However, because the piers were often crowded and visible from nearby streets and restaurants, this was not always possible. While we asked interviewees regularly throughout the interview if they felt safe and comfortable speaking with us, it is possible that participants might not have shared everything about their experiences with the team given the reality of these interview locations.
- Second, the research team had limited time in which to meet the fishermen and establish rapport. As a result, it is possible that some fishermen chose not to share certain sensitive details about their experiences with us.
- Third, because of this small sample size, statistical significance should not be ascribed to the findings of this report. However, the experiences shared by interviewees provides qualitative value in identifying risks of forced labor.
- Fourth, victims of forced labor often don't admit/understand themselves to be victims. This limitation could affect how interviewees both view and describe their working environment to the research team.<sup>16</sup>

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10 Questionnaire-style interviews solicited information based on ILO indicators of forced labor. These include abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime. See ILO, *ILO Indicators of Forced Labour* (2012) [hereinafter *ILO Indicators of Forced Labour*].

11 The concept of participant observation, developed by Clifford Geertz, has been refined to distinguish varying degrees of researcher participation. Moderate participant-observation involves slightly more observation than participation, utilizing participation to establish ties with research subjects when needed and to better understand the population. See Kathleen M. Dewalt, et al., *Participant Observation: A Guide for Fieldworkers* 23 (2010).

12 Convenience sampling is a "type of nonprobability or nonrandom sampling where members of a target population that meet certain practical criteria, such as easy accessibility, geographical proximity, availability at a given time, or the willingness to participate are included." Ilker Etikan et al., *Comparison of Convenience Sampling and Purposive Sampling*, 5 AM. J. OF THEORETICAL & APPLIED STATISTICS 1, 2 (2016). Our convenience sample criteria included being in geographic proximity of Piers 17, 36, or 38, availability when we conducted our interviews, and interviewee's willingness to participate.

13 Snowball interviewing, also called the "chain method," is a sampling method in which participants recommend and recruit other potential participants from among their acquaintances. Mahin Naderifar et al., *Snowball Sampling: A Purposeful Method of Sampling in Qualitative Research*, 14 STRIDES IN DEV. MED. EDUC. 1, 2 (Sept. 30, 2017).

14 Pseudonyms for all fishermen interviewees are used throughout this report to protect their identities.

15 The professional and social community which has formed within and around the longline fleet in Honolulu is small and closely knit. In addition to their personal or charitable affiliations with other community members, some interpreters also had past professional ties to members of the HLA.

16 See, e.g., Jeffrey H. Zeeman and Karen Stauss, *Chapter 77 and Beyond: Charging Strategies in Human Trafficking Cases*, U.S. ATTORNEY'S BULLETIN, 139-49 (Nov. 2017), available at: <https://www.justice.gov/usao/page/file/1008856/download>; Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1678 (2007).

While the design of this study did not allow us to make any affirmative determinations as to whether concrete instances of forced labor have occurred, or are occurring, in the Hawaiian longline fleet, this report's findings identify a number of significant risks. In light of these ongoing risks, policymakers and industry stakeholders should take additional steps to protect the fundamental human rights of these fishermen.

## **B. INTERVIEWS WITH OTHER PARTICIPANTS**

Interviews with non-fishermen stakeholders were held in secure locations where participants indicated that they felt safe and comfortable. Some interviews with local sources were conducted informally in public locations, at their request, with researchers taking care to ensure that interviewees felt comfortable speaking with us at that time and location. Some government officials and other participants not located in Honolulu or Washington, D.C., were interviewed by telephone or email.

We used separate questionnaires for practitioners and advocates in contact with fishermen, government and law enforcement officials, and local sources. We obtained written informed consent from all non-fishermen study participants—except during informal, background conversations with some sources—and have in all cases respected interviewees' preferences as to anonymity and attribution in this report.





### III. CONTEXT

There are an estimated 4.6 million fishing vessels operating in the world, and between 260 million and 800 million people depend on employment in the seafood industry, making it the “world’s largest employer” by some estimates.<sup>17</sup> Today’s seafood supply chains are highly globalized.<sup>18</sup> These extended supply chains cross borders, and oversight and responsibility for labor protections are diffused across multiple jurisdictions—increasing workers’ vulnerabilities to human rights abuses such as forced labor and deceptive labor practices.<sup>19</sup> Seafood is produced with significant reported instances of these abuses in China, Japan, Russia, Spain, South Korea, Taiwan, and Thailand.<sup>20</sup> Recent research and reporting has sought to determine whether these risks also exist in the U.S. fishing industry.<sup>21</sup>

Virtually all of the foreign fishermen working in the Hawaiian longline fleet are ineligible for legal status or work authorization in the U.S. Without a valid entry visa, they face lengthy and difficult journeys from their home countries. Upon the fishermen’s arrival to the Port of Honolulu, this lack of status triggers a legal duty on the part of their captains to confiscate their passports and keep the fishermen confined to their vessels.<sup>22</sup> For the remainder of their time in the U.S., they are unable to set foot on U.S. soil without special permission from Customs and Border Protection (CBP).<sup>23</sup>

Beginning in 2016, the Associated Press (AP) published a series of investigative articles on the Hawaiian longline fishing industry, including one alleging forced labor of foreign workers.<sup>24</sup> Local industry officials made efforts to respond to these allegations, but the Hawaiian longline fishing fleet remains under scrutiny.<sup>25</sup>

17 Food and Agriculture Organization, *The State of World Fisheries and Aquaculture: Contributing to Food Security and Nutrition for All*, 5 (2016); see also Katrina Nakumara, et al. *Seeing slavery in seafood supply chains*, SCIENCE ADVANCES, 1 (2018), <http://advances.sciencemag.org/content/4/7/e1701833>.

18 See, e.g., Sabaa A. Kahn, *Protecting the Global Fishing Workforce: New International Labor Treaty to Enter into Force*, 21 AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS 6 (2017).

19 See, e.g., ILO, *Caught at Sea: Forced Labour and Trafficking in Fisheries* (2013).

20 See, e.g., 2018 Findings: Fishing, GLOBAL SLAVERY INDEX (2018), <https://www.globalslaveryindex.org/2018/findings/importing-risk/fishing/>; see also U.S. DEPARTMENT OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, 2018 TRAFFICKING IN PERSONS REPORT: REPUBLIC OF KOREA (2018); U.S. DEPARTMENT OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, 2018 TRAFFICKING IN PERSONS REPORT: TAIWAN (2018); see also U.S. DEPARTMENT OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, 2018 TRAFFICKING IN PERSONS REPORT: THAILAND (2018).

21 Mendoza & Mason, *supra* note 2.

22 See CUSTOMS & BORDER PROTECTION, VESSEL INSPECTION GUIDE (Jul. 2012), at 16 (“The master is responsible for the safekeeping of travel documentation of all nonimmigrant crew.”) [hereinafter CBP VESSEL INSPECTION GUIDE].

23 See 8 C.F.R. § 252.1(a).

24 Mendoza & Mason, *supra* note 2.

25 See, e.g., *Hawaii boat crash spurs new concerns about foreign fishermen*, ASSOCIATED PRESS (Oct. 20, 2017), <https://www.staradvertiser.com/2017/10/20/breaking-news/hawaii-boat-crash-spurs-new-concerns-about-foreign-fishermen/>.

## A. HISTORY AND STATUS OF FOREIGN FISHERMEN IN THE HAWAI'I LONGLINE FISHING FLEET

For at least a century, foreign labor has been an important part of the Hawaiian fishing industry.<sup>26</sup> Today, however, the industry relies upon temporary foreign workers without legal status rather than on U.S. citizens or immigrants with work authorization. The estimated 700 foreign fishermen who work on these vessels catch 110 million USD worth of seafood annually off the shores of Hawai'i in the United States' Exclusive Economic Zone (EEZ).<sup>27</sup> In 2017, almost thirty-four million pounds of seafood landed at the Port of Honolulu,<sup>28</sup> most of which was caught using longline fishing techniques.<sup>29</sup> Nearly all of the fish that arrive at the Port of Honolulu are sold through the Honolulu Fish Auction,<sup>30</sup> which can auction off up to 100,000 pounds of fish in one day.<sup>31</sup>

Despite the lucrative nature of the trade, employers within the longline industry actively seek foreign crewmembers, in large part because foreign workers are willing to accept these difficult and dangerous jobs<sup>32</sup> for lower salaries.<sup>33</sup> Moreover, longline fishing vessels are exempted from federal laws requiring that seventy-five percent of fishing vessels' crews be comprised of U.S. citizens,<sup>34</sup> allowing fishing captains to recruit their crewmembers from anywhere in the world. Yet, while this exemption allows foreign fishermen to work on U.S. commercial fishing vessels, it does not afford them legal status.<sup>35</sup>

Most of the foreign workers in the Hawaiian longline fleet come to the U.S. from Indonesia, Vietnam, the Philippines, and Kiribati.<sup>36</sup> Many cite a lack of employment opportunities in their home countries and a need to support their families as the reasons why they come to work in Hawai'i.<sup>37</sup> While most understand from the employment contracts they sign with local recruitment agencies that they will have to leave their families for at least one year,<sup>38</sup> they are drawn by the promise of wages higher than those available in their home countries.<sup>39</sup> For example, the typical base pay rate of 500 USD per month in the Hawaiian longline fleet equates to an annual salary of about 25,000 Filipino pesos—which is more than the national Filipino family's yearly average salary of 22,000 pesos.<sup>40</sup>

26 See, e.g., J.W. Watson & D.W. Kerstetter, *Pelagic Longline Fishing Gear: A Brief History and Review of Research Efforts to Improve Selectivity*, 40 MARINE TECH. SOC'Y J. 3 (2016).

27 See, e.g., Mendoza & Mason, *supra* note 2. A country's EEZ extends 200 nautical miles from the country's shore, and is the area in which that country has sovereign rights relating to the preservation of exploiting natural resources, as well as "jurisdiction as provided for in international and domestic laws with regard to the establishment and use of artificial islands, installations, and structures, marine scientific research, and the protection and preservation of the marine environment." What is the EEZ?, NOAA NATIONAL OCEAN SERVICE, <https://oceanservice.noaa.gov/facts/eez.html> (last visited Mar. 31, 2019).

28 See, e.g., Haw. Division of Aquatic Resources, Dept. of Land & Natural Resources, Commercial Marine Landings Summary Trend Report (2017).

29 About thirty million pounds is either bigeye or yellowfin tuna or broadbill swordfish. See, e.g., *id.*

30 See, e.g., Hawaii Fishing Industry, *supra* note 2; Mendoza & Mason, *supra* note 2.

31 See, e.g., *id.*

32 See, e.g., Martha Cheng, *Tales of a Hawaii Longliner*, HONOLULU MAGAZINE (Dec. 2013), <http://www.honolulumagazine.com/Honolulu-Magazine/December-2013/The-Everything-Guide-to-Ahi/Tales-of-a-Hawaii-Longliner/index.php?cp=2&si=1>.

33 See, e.g., Interview with Bryant Carvalho, Former ATF Agent, in Honolulu, Haw. (Winter 2019); see also Informal Interview with NOAA Fisheries Staff Member (stating that American fishermen in the Alaskan market make approximately 7,000-12,000 USD a month).

34 46 U.S.C. § 8103 (b)(1)(B) (2016).

35 See *id.*

36 See, e.g., Mendoza & Mason, *supra* note 2; see also Interview with Katrina Nakamura, Founder, Sustainability Incubator, in Honolulu, Haw. (Winter 2019).

37 See, e.g., Interview with Marc, *supra* note 1; see also Interview with Jerry Saludez, Pastor, Seafarers Ministry, in Honolulu, Haw. (Winter 2019).

38 See, e.g., Interview with Chris, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Ken, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Craig, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Cain, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Luke, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Chuck, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Carey, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019).

39 See, e.g., Interview with Luke, *supra* note 38; Interview with Cole, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Greg, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Joel, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Marc, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Monty, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Saludez, *supra* note 37.

40 See Average Family Income in 2015 is Estimated at 22 Thousand Pesos Monthly, PHILIPPINE STATISTICS AUTHORITY (Oct. 24, 2016), <https://psa.gov.ph/content/average-family-income-2015-estimated-22-thousand-pesos-monthly-results-2015-family-income>.

Fishermen typically find employment in Hawai'i through friends or family who have worked there, or through recruitment agencies.<sup>41</sup> However, without a visa to enter the U.S., the fishermen cannot fly directly into Hawai'i; instead, they must fly to American Samoa or Mexico where Hawaiian fishing vessels travel to retrieve them and bring them to Honolulu.<sup>42</sup> This inconvenient journey can take a few weeks to a month and cost thousands of dollars.<sup>43</sup>

At the Port of Honolulu, fishermen undergo CBP inspection.<sup>44</sup> Because they do not have visas, CBP systematically denies the fishermen's requests for conditional landing authorization—which would allow them to go ashore during the brief periods their vessels are in port.<sup>45</sup> Despite the fact that they are ineligible for legal admission to the U.S., the Hawai'i Department of Land and Natural Resources (DLNR) still issues commercial fishing licenses to these fishermen.<sup>46</sup>

While in port, foreign fishermen are almost entirely confined to the piers where their boats are docked. To enter the U.S., they must receive a form of discretionary permission—known as “parole”—from CBP, which is granted only in very limited circumstances, such as serious medical emergencies.<sup>47</sup> If the fishermen are found outside the pier area or fail to “muster”<sup>48</sup> for spontaneous inspection by CBP within a designated timeframe, they may be immediately deported.<sup>49</sup>

## B. RESPONSES TO ALLEGATIONS OF FORCED LABOR

In 2016, the AP published its first report on labor conditions in the Hawaiian longline fleet, revealing inadequacies in foreign fishermen's living and working conditions, medical care, labor protections, and ability to seek legal recourse.<sup>50</sup> The report also claimed to have identified instances of human trafficking.<sup>51</sup> In response to the issues raised by the report, a public protest was staged in Honolulu,<sup>52</sup> and a number of grocery chains (temporarily) stopped buying longline-caught fish from the Honolulu Fish Auction.<sup>53</sup> Within weeks, two Indonesian fishermen brought a civil suit claiming that they had been subjected to forced labor while working in the Hawaiian longline fleet.<sup>54</sup> Although the lawsuit was settled, the plaintiffs were ultimately granted T visas.<sup>55</sup> Four months later, environmental and human rights non-profits filed a complaint with the Inter-American Human Rights Commission (IACHR) on behalf of the fishermen working in this fleet based on the allegations of labor abuses and forced labor.<sup>56</sup>

41 See, e.g., Interview with Cain, *supra* note 38; Interview with Chris, *supra* note 38; Interview with Chuck, *supra* note 38; Interview with Ian, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Immanuel, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Ira, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Irwin, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Isaac, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Marc, *supra* note 1; Interview with Myron, *supra* note 1; Interview with Randall, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019).

42 See, e.g., Interview with Cain, *supra* note 38; Interview with Chris, *supra* note 38; Interview with Cliff, Foreign Fisherman in Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Cole, *supra* note 39; Interview with Craig, *supra* note 38; Interview with Luke, *supra* note 38.

43 See, e.g., Interview with stakeholder; Informal Interview with Vessel Captain, in Honolulu, Haw. (Winter 2019); see *infra* Part V for additional information.

44 CBP VESSEL INSPECTION GUIDE, *supra* note 22.

45 See, e.g., *id.*; Interview with confidential source. (Winter 2019).

46 See, e.g., Interview with David Sakoda, Representative, DLNR, in Honolulu, Haw. (Winter 2019).

47 See 8 C.F.R. § 253.1(e); see also E-mail from Gregory Moore, Public Affairs Specialist, CBP (Spring 2019).

48 Muster refers to the requirement that fishermen be available for CBP inspection at their employing vessel. See CBP VESSEL INSPECTION GUIDE, *supra* note 22, at 24.

49 See, e.g., *id.*; Interview with Luke, *supra* note 38. Throughout this report, the term “deportation” is used to refer to removal within the meaning of 8 U.S.C. § 1229 (2018).

50 See Mendoza & Mason, *supra* note 2.

51 See *id.*; In the months that followed, several other news outlets followed the AP's lead in reporting on alleged labor abuses in the Hawaiian longline industry. See, e.g., Cliff White, Whole Foods, Seattle Fish sourcing from Hawaii again, Seafood Source (Feb. 8, 2017), <https://www.seafoodsource.com/news/supply-trade/whole-foods-seattle-fish-sourcing-from-hawaii-again>.

52 See, e.g., Cathy Bussewitz, *Hawaii lawmakers hold public meeting on foreign fishermen*, ASSOCIATED PRESS (Oct. 19, 2016), <https://apnews.com/71cc3122976f48e28f97f06c230371cd> (“Before the meeting [attended by leaders of the HLA], Hawaii residents rallied outside the state Capitol to call for better conditions for fishermen, demanding an end to what they call unacceptable living and working conditions.”).

53 See, e.g., White, *supra* note 51.

54 See Sorihin, et al. v. Nguyen, No. 4:16-cv-05422 (N.D. Cal. 2018 settled Jan. 3, 2018).

55 Under 8 U.S.C. § 1101(a)(15)(T)(i) (2018), T visas are granted to victims of human trafficking who assist law enforcement in investigations.

56 Complaint on file with authors.

Media, federal and state government, and consumers turned their attention to the “Hawaii Longline Association” (HLA).<sup>57</sup> The HLA, formed in 2000, advocates for the industry and works with federal and state agencies to develop “effective” regulations that will not “put the fishery out of business.”<sup>58</sup> The HLA informs its members (boat captains and owners) on conservation and management issues, facilitates the adoption of necessary gear and fishing practices to comply with regulations, and participates in international and domestic fishing agency meetings.<sup>59</sup> HLA leadership speaks on behalf of the industry to government bodies and the media and works to harmonize the practices of captains and boat owners across the fleet.<sup>60</sup>

The HLA, among other industry-led organizations, quickly formed the Hawaii Industry Task Force to address the AP articles’ claims.<sup>61</sup> The Task Force commissioned a survey of the foreign fishermen in the Hawaiian fleet.<sup>62</sup> The study and resulting sixty-five-page report, “Rapid Assessment of Foreign Crew on Hawai‘i Longline Vessels: Assessing Vulnerabilities of Foreign Crew to Forced Labor and Human Trafficking,” was completed in November 2016 by social science researcher Amy Gough.<sup>63</sup> As a result of the survey, HLA representatives; the United Fishing Agency, which operates the Honolulu Fish Auction;<sup>64</sup> and the Hawaii Seafood Council, a nonprofit organization focused on preserving Hawai‘i fisheries,<sup>65</sup> partnered to develop three key resources. These include: (1) the “Hawaii Longline Association Code of Conduct for Decent Work in Fishing”<sup>66</sup> for recruitment agents and employers, which reflects the International Labour Organization (ILO) definition of forced labor, the ILO Work in Fishing Convention, and the U.S. Department of Labor (DOL) definitions of forced labor; (2) a Model Crew Contract,<sup>67</sup> to standardize the terms of foreign fishermen’s employment in the longline fleet; and (3) a Crew Handbook<sup>68</sup> detailing the workplace, the work, fishing operations, relevant provisions of the Code of Conduct and Contract, and contacts through which fishermen may bring grievance complaints.<sup>69</sup> All HLA members must adopt the Code and provide written assurances of compliance to maintain good membership standing and continue to sell fish at the Honolulu Fish Auction.<sup>70</sup> Similarly, all recruiters must adhere to the Code of Conduct to continue working with Hawaiian longline industry employers.<sup>71</sup> Together, these resources were intended to demonstrate the industry’s zero-tolerance policy for forced labor and provide concrete standards governing all vessel owners, captains, and recruiters working in the industry.

57 Because the HLA is a company name, it does not include the “okina” consonant letter otherwise included in the proper noun “Hawai‘i.”

58 About HLA, Hawaii Longline Association, <http://www.hawaiilongline.org/> (last visited Mar. 31, 2019).

59 See, e.g., *id.*

60 See, e.g., *id.*

61 See Written Testimony in opposition of S.B. 152: Hearing on HB 438 Before the H. Comm. on Ocean, Marine Resources & Hawaiian Affairs (2017) (statement of John Kaneko).

62 See, e.g., White, *supra* note 51.

63 See, e.g., *id.* (“The report, which was obtained by SeafoodSource, was based off of interviews with 207 foreign fishermen onboard 105 of the 161 vessels in the Hawaiian longline fleet. It found that zero respondents reported fishing against their will or due to a threat of violence or other punishment. All were working under a signed contract, and none said they were employed as a means of repayment for loan or service, were unable to return to their country of origin if they desired, or were responsible for the cost of repatriation to their home countries upon completion of their contract.”); see also Kaneko, *supra* note 61 (“The Rapid Crew Assessment survey interviewed 207 out of 622 foreign crewmen (33%) from 105 of 141 active vessels (74%) in October 2016 (Gough, 2016). This survey involved interviews covering the 4 major home countries of the foreign crew (Philippines, Indonesia, Vietnam and Kiribati). The survey covered the entire work cycle from recruitment to repatriation. The results are a basis for collaboration within the fleet and with government agencies and contributed to the development of an employers’ code of conduct for the fleet and principles defining acceptable and unacceptable labor conditions.”).

64 See Honolulu Fish Auction: About the Auction, UNITED FISHING AGENCY, <https://www.hawaii-seafood.org/honolulu-fish-auction/> (last visited Mar. 31, 2019).

65 See Hawaii Seafood, HAWAIIAN SEAFOOD COUNCIL, <https://hawaii-seafood.org/uploads/HSCMissionStatement.pdf> (last visited Mar. 31, 2019).

66 See HLA Code of Conduct, *supra* note 4.

67 Numerous interviewees generally described the contract and the process of its development. See, e.g., Interview with Nakamura, *supra* note 36; Telephone Interview with Amy Gough, Independent Social Researcher, in Washington, D.C. (Winter 2019); Email from HLA Leadership (Spring 2019). However, despite our requests, the team was not provided with a copy of the contract to review.

68 HLA Code of Conduct, *supra* note 4.

69 *Id.*

70 See, e.g., Mangieri, *supra* note 4 (“If vessels can’t show they’re using the contract by October 1, they’ll be blackballed from the auction until they do.”); Hurley, *supra* note 4 (“We took a stance to never sell fish that isn’t following the protocol.”).

71 See HLA Code of Conduct, *supra* note 4.

However, despite industry actors' efforts, these measures alone are insufficient to address the vulnerabilities identified in the AP reports.<sup>72</sup> Indeed, fishermen continue to face harsh working and living conditions. Moreover, although the fishermen we spoke with had received a contract, not all boat owners adhere to the terms delineated in these contracts. For example, multiple sources commented on the fact that employers fail to provide fishermen with basic necessities—including adequate food, water, medical care, clothes, toiletries, and even safety gear.<sup>73</sup> Instead, much of the responsibility for meeting the fishermen's material needs has fallen on the Seafarers Ministry ("Ministry"), a local church group that has spent two days each week for the past five years at the piers assisting and engaging with the fishermen.<sup>74</sup> The Ministry provides fishermen with medical care, clothes, meals, toiletries, and even spiritual guidance in the form of optional protestant Christian worship services.<sup>75</sup> The Ministry has undertaken responsibility for the care of the fishermen, traditionally under the purview of employers. Their benevolence has enabled captains to avoid their responsibilities as employers.

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72 See *infra* Part V for further discussion of continuing vulnerabilities the foreign fishermen of the Hawaiian longline fleet face.

73 See *infra* Part VI(C) for further discussion of these conditions.

74 See, e.g., Interview with Saludez, *supra* note 37.

75 See, e.g., *id.*





## IV. RELEVANT LEGAL FRAMEWORK

The United States is obligated to prevent and respond to forced labor under international legal instruments and ILO standards, as well as under domestic legislation.

### A. FORCED LABOR IN INTERNATIONAL LAW

The international community has addressed forced labor through the passage of various legal instruments.<sup>76</sup> Two ILO conventions, one protocol, and several recommendations enshrine the prohibition against forced labor, defining it as “all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.”<sup>77</sup> By ratifying the Abolition of Forced Labor Convention of 1957, the United States committed itself to securing “the immediate and complete abolition of forced and compulsory labor.”<sup>78</sup> Recognizing the particular vulnerability of migrant workers to forced labor and exploitation,<sup>79</sup> the ILO has provided extensive guidance on how best to give effect to these broad prohibitions.<sup>80</sup> Additionally, in 2007, the ILO adopted the Work in Fishing Convention, establishing binding international protections specifically for fishermen.<sup>81</sup> The convention entered into force on November 16, 2017.<sup>82</sup>

<sup>76</sup> U.S. international obligations to protect workers and prohibit forced labor begins with the International Bill of Human Rights. This consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). While the U.S. has only ratified the ICCPR, the principles enshrined within the other treaties reflect norms which are widely considered to have become binding by the international community. The U.S. may have additional customary international law obligations. Many international treaties are considered part of the body of customary international law, as they enshrine principles regarded as binding norms by the international community. While the U.S. has not ratified the UDHR, the ICESCR, the Forced Labor Convention, or the ILO Declaration on Fundamental Principles and Rights at Work, articles relating to the prohibition of slavery or servitude, torture and cruel, inhuman, or degrading treatment or punishment as well as the right to work and to health are widely accepted by the international community and may be considered binding upon the U.S.

<sup>77</sup> ILO, Forced Labour Convention, Jun. 28, 1930, C29.

<sup>78</sup> ILO, Abolition of Forced Labour Convention art. 1, Jun. 25, 1957, C105.

<sup>79</sup> See ILO, Protocol of 2014 to the Forced Labour Convention art. 2, Jun. 11, 2014, P029.

<sup>80</sup> See ILO, Forced Labour (Supplementary Measures) Recommendation, Jun. 11, 2014, R203.

<sup>81</sup> ILO, Work in Fishing Convention, Jun. 14, 2007, C188 [hereinafter Work in Fishing Convention]. Although the U.S. has yet to ratify the convention, it provides clear and relevant guidelines for the protection of fishermen from abusive working practices that may guide the government in its efforts to protect this vulnerable community. For example, Art. 8(2) and 32 establish clear responsibility of boat owners or “skippers” to protect the health and safety of fishermen, and Art. 14 limits hours fishermen may work without rest.

<sup>82</sup> *Id.* The convention entered into force following its ratification by ten States. It has since been ratified by a total of fourteen countries; however, the U.S., Philippines, Indonesia, and Vietnam have all failed to ratify the convention.

The ILO has developed eleven indicators that, alone or together, may indicate the existence of forced labor.<sup>83</sup> These are abuse of vulnerability; deception; restriction of movement; isolation; physical and sexual violence; intimidation and threats; retention of identity documents; withholding of wages; debt bondage; abusive working and living conditions; and excessive overtime.<sup>84</sup> Several of these indicators emerged in our conversations with fishermen and may suggest the existence of, or vulnerability to, forced labor in the Hawaiian longline fishing industry.

## B. FORCED LABOR IN U.S. DOMESTIC LAW

The Trafficking Victims Protection Act (TVPA)<sup>85</sup> and its subsequent reauthorizations<sup>86</sup> provide a contemporary face to the Thirteenth Amendment's absolute declaration against slavery and involuntary servitude.<sup>87</sup> The TVPA codified human trafficking and related offenses,<sup>88</sup> including forced labor, as federal crimes with severe penalties for those convicted,<sup>89</sup> including mandatory restitution for victims.<sup>90</sup> In 2003, Congress amended the TVPA to include a private right of action for victims.<sup>91</sup>

United States courts have jurisdiction to adjudicate cases arising under the TVPA when the offender is: (1) a national of the United States, (2) an non-citizen lawfully admitted for permanent residence, or (3) present in the United States.<sup>92</sup> Moreover, section 1596 includes a broad extraterritoriality provision allowing for the civil or criminal liability of any natural or legal person located in the United States for trafficking-related offenses occurring anywhere in the world.<sup>93</sup>

83 See ILO Indicators of Forced Labour, *supra* note 10.

84 See *id.* ("Deception relates to the failure to deliver what has been promised to the worker...[and] can include false promises regarding working conditions and wages...the type of work, housing and living conditions." Debt bondage occurs when laborers must work to pay off a debt, which may be increased through manipulation of accounts or undervaluing of the work performed. It "has the effect of binding the worker to the employer for an unspecified period of time." Excessive overtime may be imposed on laborers who must work more than allowed by law or "collective agreement." Generally, if they must work "more overtime that is allowed under national law [or] under some form of threat... this amounts to forced labor.").

85 See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

86 See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (establishing a federal civil right of action, new criminal causes of action, and protections against deportation for victims as well as reporting requirements for the U.S. Attorney General); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005) (expanding measures to combat trafficking internationally, shelter programs, grants to law enforcement, and strengthening regulation of government contracts); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (expanding prevention strategies, protections available to T-visa recipients and unaccompanied minors, and enhancing definitions of trafficking-related crimes and criminal sanctions to bolster criminal justice responses to modern slavery); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 110 (2013) (reauthorizing the TVPA through this act, Congress penalized the confiscation of identity documents, expanded resources for survivor services and extended jurisdiction to prosecute U.S. citizen living abroad who commercially sexually exploit children). The 2019 TVPA reauthorization is a legislative package made up of four bills, including the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425, 132 Stat. 5474 (2019), the Abolish Human Trafficking Act of 2017, Pub. L. No. 115-392, 132 Stat. 5254 (2018), the Trafficking Victims Protection Act of 2017, Pub. L. No. 115-393, 132 Stat. 5272 (2018), and the Trafficking Victims Protection Reauthorization Act of 2017, Pub. L. No. 115-427, 132 Stat. 5503 (2019). See also CURRENT FEDERAL LAWS, POLARIS PROJECT, <https://polarisproject.org/current-federal-laws> (last visited Mar. 31, 2019) (discussing the legislative history of the TVPA); U.S. Laws on Trafficking in Persons, U.S. Dep't. of State, <https://www.state.gov/j/tip/laws/> (last visited Mar. 31, 2019).

87 See U.S. Const. amend. XIII; see also Victims of Trafficking and Violence Protection Act of 2000, *supra* note 85; Joey Asher, *How the United States Is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT'L L. REV. 215, 217 (1994).

88 See 18 U.S.C. §§ 1581 to 1595, 1589 (2018); 18 U.S.C. § 1001 (2018); 22 U.S.C. § 7101 (2018); Benjamin J. Hawk, Bonnie Kane & Kimlani Ford, *Chapter 77 and Beyond: Charging Strategies in Human Trafficking Cases*, U.S. ATTORNEY'S BULLETIN, 46-49 (Nov. 2017) (noting that §§ 1589 and 1591 reach the same conduct as the offenses of involuntary servitude, slavery, and peonage).

89 See 18 U.S.C. §§ 1581 to 1595, 1589 (2019); 18 U.S.C. § 1001 (2018); 22 U.S.C. § 7101 (2018).

90 See 18 U.S.C. § 1593 (2018); see also, e.g., Institute for Human Rights and Business, Corporate Liability for Forced Labour and Human Trafficking, 19 (Oct. 2016).

91 See Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 86.

92 See 18 U.S.C. § 1596(a) (2018).

93 See 18 U.S.C.A. § 1596; Laura Zell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 Vand. L. Rev. 499, 521 (2016) ("[L]abor trafficking is a borderless crime with repercussions in countries beyond where the trafficking takes place. Courts have rejected the argument that § 1596 should be construed to limit application of the TVPRA to only circumstances where a victim is trafficked into the United States, saying, '[T]he thrust of the TVPRA would be severely undermined by a holding that U.S. defendants who gained commercial advantage in this country through engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders.'" (internal citations omitted); *United States v. Baston*, 818 F.3d 651 (11th Cir. 2016) (upholding extraterritorial jurisdiction under § 1596(a)(2) over a non-citizen as a valid exercise of congressional authority under the Foreign Commerce Clause and that the exercise of extraterritorial jurisdiction over defendant's sex trafficking in Australia satisfied due process).

The TVPA's proscription against forced labor encompasses certain forms of coercive labor relationships.<sup>94</sup> Specifically, section 1589 prohibits all persons under U.S. jurisdiction<sup>95</sup> from knowingly providing or obtaining labor or services through the use of: (1) force, physical restraint, or threats thereof; (2) serious harm or threats thereof; (3) abuse or threatened abuse of legal process; or (4) any scheme, plan, or pattern intended to cause the person to believe that if he did not perform such labor, he or another person would suffer serious harm or physical restraint.<sup>96</sup> If a person is compelled to labor against his will by any one of the prohibited means, such labor is said to be forced, even if he is paid or compensated for the work.<sup>97</sup> Additionally, sections 1589(b) and 1595 impose corporate liability on entities that benefit from forced labor if they know, "recklessly disregard," or "should have known" about such exploitation.<sup>98</sup>

Strong indicators of forced labor under both international and U.S. law include charging recruitment fees;<sup>99</sup> verbal or physical abuse;<sup>100</sup> threats and intimidation;<sup>101</sup> confiscation of documents;<sup>102</sup> deception about the nature of a job, location, or employer;<sup>103</sup> confinement or restrictions on movement;<sup>104</sup> and abuse of lack of education, cultural beliefs, or of the difficulty of living in an unknown area.<sup>105</sup> The Supreme Court has also noted that isolation from friends, family, transportation or other sources of food, shelter, clothing, or employment,<sup>106</sup> as well as weakness resulting from a lack of food, sleep, or medical care, may be considered "nonphysical means by which [perpetrators] coerce [victims]" because such conduct can "eliminate a victim's will to resist as readily as the fear of a physical blow."<sup>107</sup>

94 See, e.g., Spring Miller & Stacie Jonas, *Using Anti-trafficking Laws to Advance Workers' Rights*, CLEARINGHOUSE COMMUNITY (May 2015), <http://povertylaw.org/clearinghouse/articles/trafficking>.

95 See *U.S. v. Callahan*, 801 F.3d 606, 617 (6th Cir. 2015).

96 See 18 U.S.C. § 1589(a); see also Karin Dryhurst, *Liability Up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U. J. Int'l L. & Pol. 641, 660 (2013).

97 See *United States v. Bradley*, 390 F.3d 145, 154 (1st Cir. 2004), cert. granted, judgment vacated on other grounds, 545 U.S. 1101 (2005).

98 18 U.S.C. §§ 1589(b), 1595; see also Dryhurst, *supra* note 96, at 661; Ezell, *supra* note 93, at 519 (internal citations omitted).

99 *Federal Acquisition Regulation (FAR) – "Recruitment Fees"*, 83 Fed. Reg. at 65, 477 (to be codified at 48 C.F.R. § 22.1702) (defining recruitment fees in anti-trafficking and forced labor regulations as "fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.").

100 See, e.g., *United States v. Kozminski*, 487 U.S. 931, 948 (1988); *Kiwanuka v. Bakilana*, 844 F.Supp.2d 107 (D.D.C. 2012).

101 See, e.g., *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011); *United States v. Sou*, No. CRIM. 09-00345 SOM, 2011 WL 3207265, at \*4 (D. Haw. July 26, 2011).

102 See, e.g., *United States v. Mussry*, 726 F.2d 1448 (9th Cir.) (holding alleged conduct sufficient to demonstrate forced labor when defendants held poor, non-English speaking Indonesian workers against their will by enticing them to travel to the U.S., paying them little money, and withholding their passports and return airline tickets).

103 See, e.g., *Mairi Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134 (C.D. Cal. 2011) (finding forced labor where employers used a fraudulent scheme and threats of deportation to force workers to enter into and remain in their employment).

104 See, e.g., *United States v. Bradley*, 390 F.3d 145, 155 (1st Cir. 2004), cert. granted, judgment vacated on other grounds, 545 U.S. 1101 (2005).

105 See, e.g., *United States v. Nnaji*, 447 F. App'x 558 (5th Cir. 2011) (finding forced labor and considering the victim's status as a "poor, illiterate, [individual] who spoke little to no English" as vulnerability).

106 See, e.g., *United States v. Calimlim*, 538 F.3d 706, 708 (7th Cir. 2008).

107 *United States v. Kozminski*, 487 U.S. 931, 956-57 (1988) ("[W]eakness resulting from a lack of food, sleep, or medical care can eliminate the will to resist as readily as the fear of a physical blow...blackmail, fraud, deceit, and isolation are also illustrative methods—but it is unnecessary here to canvas the entire spectrum of nonphysical machinations by which humans coerce each other. It suffices to observe that one can imagine many situations in which nonphysical means of private coercion can subjugate the will of a servant.").





## V. VULNERABILITIES TO FORCED LABOR

The foreign fishermen’s lack of immigration status and resulting inability to leave the piers, combined with the hazardous nature of their work and the dearth of effective regulation and oversight in the fishing industry, makes them highly vulnerable to forced labor. Foreign fishermen in Hawai’i are separated from the larger community by the extended nature of their work at sea<sup>108</sup> and confinement to vessels docked at monitored piers in between voyages. They wholly rely on their employers and the Seafarers Ministry for their accommodations, food, and medical care.<sup>109</sup> They also rely on their captains for access to their passports, which the captains must confiscate under federal law.<sup>110</sup> Labor, tax, health, and other regulatory bodies have limited visibility regarding how the fishermen are treated. This lack of oversight stems largely from confusion as to which government agencies bear the responsibility for monitoring the labor conditions of undocumented fishermen who are not considered to be legally present in the U.S.<sup>111</sup>

All of these vulnerabilities are further aggravated by the fishermen’s lack of familiarity with U.S. law and fear of being deported if they assert their rights.<sup>112</sup> Strong competition, spurred by a booming global fishing industry and a ready supply of vulnerable and inexpensive foreign workers, renders the fishermen’s employment structurally precarious.<sup>113</sup> When aggregated, these conditions strip away the fishermen’s bargaining power and exclude them from basic legal protections,<sup>114</sup> leaving them at greater risk of being exploited or subjected to forced labor.

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108 See, e.g., Naomi Jiyoung Bang, *Castling a Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain*, 17 U. PA. J.L. & SOC. CHANGE 221, 228 (2014).

109 See, e.g., Know the Chain, 2018 Food and Beverage Benchmark Report, Forced Labor Risks in Food and Beverage Supply Chains, 44, 49 (2018).

110 See CBP VESSEL INSPECTION GUIDE, *supra* note 22, at 18; Mendoza & Mason, *supra* note 2 (“[The fishermen] weren’t allowed to touch their passports, which were handed to a contracted driver in a black SUV.”).

111 See, e.g., Mangieri, *supra* note 4; Interview with Anonymous Advocate, (“If you can figure out who can investigate and when, please tell me...That’s one of the problems, no one is fully responsible for what is going on”).

112 See H.R. Conf. Rep. No. 106-939, at 5 (2000) (“Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them...”).

113 See, e.g., Bang, *supra* note 108.

114 See, e.g., Know the Chain, *supra* note 109.

## A. COSTLY RECRUITMENT AND TRAVEL PROCESSES LEAVE FISHERMEN VULNERABLE

.....

*“The [labor] brokers . . . will support crewmembers or squeeze crewmembers, or somewhere in the middle. So, what happens with the crewmember is, they functionally just have too many bosses and no real security about who’s got their back.”<sup>115</sup>*

.....

As mentioned previously, to fill the demand for cheap, skilled labor in the Hawai‘i longline fishing industry, boat owners rely almost exclusively on foreign workers for their crew.<sup>116</sup> Foreign fishermen are vulnerable at every stage in the longline fleet recruitment process. Lack of regulation surrounding recruitment agencies and complicated travel to and from Hawai‘i contribute to this vulnerability.

### 1. Recruitment Agencies Lack Regulation and Accountability

Unregulated recruitment agencies increase fishermen’s vulnerability to abusive practices—such as debt bondage through the collection of recruitment fees.<sup>117</sup> Whether these agencies are licensed or collect fees or debts from the fishermen varies greatly, and it is difficult for governments and industry stakeholders to regulate their practices.<sup>118</sup> Due to this potential for abuse, international law broadly prohibits agents from charging recruitment fees, while U.S. law prohibits recruitment fees in government supply chains and in certain employment-based visa categories.<sup>119</sup> However, agents are rarely held accountable for exploitation.<sup>120</sup>

While many fishermen stated that they did not have to pay a fee to their agent,<sup>121</sup> others reported their labor brokers did collect a recruitment fee or force them to provide collateral.<sup>122</sup> For example, one fisherman stated that his agent held two months’ worth of his wages until he completed his contract.<sup>123</sup> Another fisherman’s agent required him to provide his motorcycle title as collateral, stating that he would only return the title to the fisherman upon the completion of his contract. If the fisherman breached his contract, he would be required to pay 500 USD to retrieve his title.<sup>124</sup> Although this recruiter’s conduct was reported to the HLA, its leadership continues to use his services.<sup>125</sup>

115 Interview with Nakamura, *supra* note 36.

116 See Interview with HLA Leadership, in Honolulu, Haw. (Winter 2019).

117 See ILO Indicators of Forced Labour, *supra* note 10 (Describing debt bondage as the requirement to pay off a loan that “bind[s] the worker to the employer for an unspecified period of time” and is often compounded by “manipulation of accounts” or “undervaluing the work performed.”); 48 C.F.R. § 22.1702 (2018) (defining recruitment fees in anti-trafficking and forced labor regulations as “fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.”).

118 See, e.g., Interview with Lance Collins, Attorney, in Honolulu, Haw. (Winter 2019); Interview with Nakamura, *supra* note 36.

119 See, e.g., Exec. Order No. 13627: Strengthening Protections Against Trafficking In Persons In Federal Contracts, 77 Fed. Reg. 60029 (2012) (prohibiting government contractors, contractor employees, and their agents from charging recruitment fees); 20 C.F.R. § 655.135(j) (2018) (prohibiting employers or their agents from seeking payment for any activity relating to obtaining an H-2A visa); 20 C.F.R. § 655.22 (j) (2009) (prohibiting employers and recruiters from charging recruitment fees for H-2B visa recipients); ILO, General Principles and Operating Guidelines for Fair Recruitment (2016) (stating that “No recruitment fees or related costs should be charged to, or otherwise borne by workers”); Institute for Human Rights and Business, Dhaka Principles for Migration with Dignity (2012) (listing as its first principle that no fees should be charged to migrant workers).

120 See, e.g., Interview with Ron, *infra* note 123; Interview with Anonymous source in Honolulu, Haw. (Winter 2019).

121 See, e.g., Interview with Cliff, *supra* note 42; Interview with Cole, *supra* note 39; Interview with Cain, *supra* note 38; Interview with Collin, Foreign Fisherman in the Hawai‘i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Ian, *supra* note 41; Interview with Immanuel, *supra* note 41; Interview with Ira, *supra* note 41; Interview with Irwin, *supra* note 41; Interview with Isham, Foreign Fisherman in the Hawai‘i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Isaac, *supra* note 41; Interview with Ivan, Foreign Fisherman in the Hawai‘i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Mani, *supra* note 1; Interview with Marc, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Myron, *supra* note 1.

122 E.g., Interview with Cain, *supra* note 38; Interview with Robin, Foreign Fisherman in the Hawai‘i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Randall, *supra* note 41; Interview with Remington, Foreign Fisherman in the Hawai‘i Longline Fleet, in Honolulu, Haw. (Winter 2019) (“I was charged a fee the first time I came but not the second.”); Telephone Interview with Anonymous Source (Winter 2019).

123 Interview with Ron, Foreign Fisherman in the Hawai‘i Longline Fleet, in Honolulu, Haw. (Winter 2019).

124 Interview with Randall, *supra* note 41.

125 See Interview with Anonymous Advocate, in Honolulu, Haw. (Winter 2019).

Furthermore, the HLA Code of Conduct requires fishermen to pay the costs of their travel home if they end their contract early.<sup>126</sup> However, some fishermen stated that they had to pay for their travel home even though they had successfully completed their contracts.<sup>127</sup> Others said that they will have to pay a 500 USD fee to return home, but will not otherwise contribute to the cost of their repatriation.<sup>128</sup> Charging fishermen recruitment and repatriation fees may cause them to suffer severe financial hardship that effectively coerces them to continue working when they might otherwise wish to leave.<sup>129</sup>

Inconsistencies in the fishermen's medical examinations and the information provided to fishermen about their jobs further demonstrate how the unregulated recruitment process can render fishermen vulnerable to mistreatment. Some fishermen are not told that they will be confined to vessels and piers for the duration of their contract at the outset of the recruitment process.<sup>130</sup> Additionally, some recruiters are not forthcoming or careful regarding the health and safety of recruited fishermen. For example, while members of the HLA say that the fishermen are heavily vetted for medical conditions by their agencies before they arrive in Hawai'i,<sup>131</sup> a local physician who provides weekly medical services for the fishermen is unsure about the quality of these processes.<sup>132</sup> "We find various inconsistencies just with what [the physical examination] is," and what the fishermen's actual medical conditions are once they arrive in Honolulu.<sup>133</sup>

## 2. Foreign Fishermen Face Restricted Travel to and from Hawai'i

Foreign fishermen's lack of legal status complicates their travel to Hawai'i, often pushing them to accept extended contracts to limit the need to go back-and-forth to their home country.<sup>134</sup> Until 2004, foreign fishermen were allowed to fly into Hawai'i.<sup>135</sup> Now, however, the fishermen cannot fly directly into Hawai'i without a visa.<sup>136</sup> Therefore, they must first fly to American Samoa (sometimes Mexico) where vessel captains will retrieve them and bring them to Hawai'i by boat.<sup>137</sup> One captain indicated that each trip can take weeks and cost ten to fifteen thousand USD—more than ten times the cost of flying the fishermen into Hawai'i—he called these trips a "waste of time and fuel."<sup>138</sup>

This journey can also be dangerous. In the past, fishermen had to jump from one boat and swim to the Hawaiian boats on the high seas. This practice has reportedly stopped in recent years.<sup>139</sup> The 2017 crash of the Pacific Paradise, however, shows the continued potential dangers of the voyage.<sup>140</sup> The Pacific Paradise, coming from American Samoa, was carrying

126 See *supra* note 4.

127 See, e.g., Interview with Cam, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); see also Interview with Cliff, *supra* note 42; Interview with Collin, *supra* note 121. This is in violation HLA policy that "Employers shall bear the cost of travel to the workplace and repatriation of workers at the end of their contracts." HLA Crew Handbook, *supra* note 4, at 3.

128 See, e.g., Interview with Irwin, *supra* note 41; Interview with Isham, *supra* note 121; Interview with Ivan, *supra* note 121.

129 This potentially constitutes a violation of the TVPA. See 18 U.S.C. § 1589(a)(2) (2018) (proscribing the "use or threatened use of serious harm,"); 18 U.S.C. § 1589(c)(2) (2018) (defining serious harm as "any harm... including... financial...that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.").

130 See Interview with Greg, *supra* note 39; Interview with Luke, *supra* note 38.

131 See, e.g., Informal Interview with Vessel Captain, *supra* note 43.

132 See Interview with Craig Nakatsuka, Lead Physician, Seafarers Ministry, in Honolulu, Haw. (Winter 2019).

133 *Id.*

134 See *infra* Part VI(b) for further discussion of the fishermen's lack of legal status.

135 See Interview with Micah, Foreign Fisherman in the Hawai'i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with HLA Leadership, *supra* note 116.

136 See, e.g., Interview with Bruce Anderson, Former Administrator, Hawai'i DLNR, in Honolulu, Haw. (Winter 2019); Interview with HLA Leadership, *supra* note 116.

137 See, e.g., Interview with Foreign Government Official, in Honolulu, Haw. (Winter 2019); Interview with Chris, *supra* note 38; Interview with Cliff, *supra* note 42; Interview with Cole, *supra* note 39; Interview with Joel, *supra* note 39; Interview with Luke, *supra* note 38; Interview with Mani, *supra* note 1; Interview with Marc, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Myron, *supra* note 1; Interview with Robin, *supra* note 122.

138 Informal Interview with Vessel Captain, *supra* note 43.

139 See, e.g., Interview with Foreign Government Official, *supra* note 137; Interview with Saludez, *supra* note 37.

140 See *Hawaii boat crash spurs new concerns about foreign fishermen*, ASSOCIATED PRESS (Oct. 20, 2017), <https://www.staradvertiser.com/2017/10/20/breaking-news/hawaii-boat-crash-spurs-new-concerns-about-foreign-fishermen/>.

twenty people—three times the number of people it was intended to accommodate.<sup>141</sup> Nineteen were coming to crew on longline fishing vessels when the boat crashed off the shores of Honolulu; fortunately, no one was injured.<sup>142</sup>

As a result of the long and expensive process required to travel to-and-from Hawai‘i, fishermen accept longer contracts. Because of extended periods of time away from their homes and families, the fishermen often become depressed.<sup>143</sup> In addition, the fishermen may fail to secure a new contract or may have to contract with different vessel owners when they wish to return to the U.S.<sup>144</sup> However, if the fishermen could fly into Hawai‘i, captains could easily re-hire them after the completion of their contracts and a visit home.<sup>145</sup> The travel restrictions may inhibit job security and seniority in employment even if fishermen repeatedly contract to work on the same vessel.<sup>146</sup>

One stakeholder commented:

“What [the fishermen] really want is to be able to work for eleven months and go home for one month, then come back. The way things are right now with the regulations, they cannot do that. They have to stay, so they stay like two years. So, [then] they go home and they’re done. Or if they get deported, they’re done. Which is not really [in] anybody’s interest. If you talk to vessel owners here, they’ll say, ‘We wish they could go home for a month and come back again easily without triggering this whole thing.’”<sup>147</sup>

The recruiters’ inconsistent fees, the long trip to transport crews, and incomplete information about working in Honolulu demonstrate how the unregulated recruitment process can leave fishermen vulnerable to extortion and danger on the high seas. These practices may force fishermen into longer contracts than they would prefer, and unnecessarily separate them from their homes and families for extended periods of time. Furthermore, the lack of accountability surrounding the recruitment process and their transportation to Honolulu leaves the fishermen vulnerable to abuse and with no avenue for recourse.

## B. FOREIGN FISHERMEN FISH LEGALLY, BUT WITHOUT LEGAL STATUS

.....

*“To sacrifice my freedom for my family, I will stay here.”<sup>148</sup>*

.....

One of the greatest challenges foreign fishermen face in exercising their labor rights in Hawai‘i is their lack of legal status in the United States. Without lawful permanent residence or an employment authorization document (work permit), foreign workers must have some form of non-immigrant work visa to be lawfully employed in the United States;<sup>149</sup> however, section 101(15)(D) of the Immigration and Nationality Act (INA) generally renders foreign fishermen

141 See *id.*; Patricia Tummons, *Pacific Paradise Debacle, Lawsuit Draw Attention to Fishermen’s Plight*, ENVIRONMENT HAWAII (Feb. 2018), <http://www.environment-hawaii.org/?p=10180>.

142 See *id.*

143 See, e.g., Interview with Joel, *supra* note 39; see also Interview with Luke, *supra* note 38.

144 See, e.g., Interview with Nakamura, *supra* note 36; Informal Interview with Vessel Captain, *supra* note 43.

145 See Informal Interview with Vessel Captain, *supra* note 43.

146 See, e.g., Interview with Nakamura, *supra* note 36. The potential for job security and promotions appears to be completely dependent on whether or not the captain likes a fisherman enough to wait for his return. One fisherman stated that he had worked on the same boat in Hawai‘i for 14 years and has returned home for six months every two to three years; however, this was not the norm among the fishermen we interviewed. See Interview with Luke, *supra* note 38.

147 Interview with Nakamura, *supra* note 36.

148 Interview with Greg, *supra* note 39.

149 *Working in the US*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/working-united-states/working-us> (last visited April 5, 2019).

employed on U.S. vessels ineligible to receive nonimmigrant visas.<sup>150</sup> In November 2017, in response to growing public awareness following the release of the AP reports, U.S. Senator Mazie Hirono (D-HI) introduced the Sustainable Fishing Workforce Protection Act, and U.S. Hawai'i Representatives introduced a companion bill in the House.<sup>151</sup> The legislation would have created a D-3 non-immigrant visa for the foreign fishermen.<sup>152</sup> However, the bill did not pass.<sup>153</sup>

## 1. Fishermen's Lack of Lawful Status Results in Confinement to the Piers.

When foreign fishermen arrive in Hawai'i, they must undergo immigration inspection by CBP, whose officers adjudicate their Form I-95 Crewman's Landing Permit applications.<sup>154</sup> Approval of these applications for conditional landing authorization would allow the fishermen to enter Hawai'i temporarily while their vessels are docked.<sup>155</sup> However, CBP cannot approve the fishermen's requests for landing permits since the fishermen are ineligible for "D visas."<sup>156</sup> Because the fishermen do not have D visas, CBP systematically rejects the permits and stamps them with the language: "Permission to land temporarily at all U.S. ports is refused."<sup>157</sup>

After denying the fishermen's conditional landing applications, CBP provides the fishing vessels' captains with these rejected I-95 applications, along with a "Form I-410: Receipt for Crew List" stating the names of all fishermen whose landing permits have been denied.<sup>158</sup> Because the rejection of the I-95 form constitutes a denial of entry into the United States, the fishermen must be "detained on board the vessel," confined to the boats where they live and work.<sup>159</sup> However, CBP maintains a longstanding, informal practice of permitting the fishermen to disembark from their vessels for brief periods of time to "receive humanitarian services,"<sup>160</sup> such as medical care or religious services. Nevertheless, to receive these services, the fishermen must remain within the immediate area of the piers—an area extending no further than a few hundred yards onto land.<sup>161</sup> They must also always be available to muster<sup>162</sup> if called.<sup>163</sup> Subject to the limited exceptions described below, a fisherman who steps foot on U.S. soil outside of the pier area may be immediately placed in deportation proceedings.<sup>164</sup>

During interviews with the research team, foreign fishermen demonstrated an acute sense of the physical limits of their presence on land. Some counted their way down a row of trees next to the water and others pointed out where they must stop when walking away from the fishing vessels. One fisherman pointed out his own perception of this boundary line, pointing towards the entrance to a road several dozen yards away: "All the [foreign] fishermen in Hawai'i, we cannot go outside. You see in the front, the street? That's the border. We cannot go outside that. We have to stay here."<sup>165</sup> These boundaries result in feelings of isolation and loneliness. For example, one fisherman lamented, "When I am here, I cannot go outside; I have to stay here forever."<sup>166</sup>

150 See 8 U.S.C. § 1101(15)(D)(i) (2018). However, this statutory prohibition is subject to exceptions for fishermen working on U.S. vessels in Guam and the Northern Mariana Islands. See 8 U.S.C. § 1101(15)(D)(ii) (2018). It also does not affect foreign workers employed on vessels not involved in fishing, such as cruise ships. See 8 U.S.C. § 1101(15)(D)(i) (2018), see also Interview with Foreign Government Official, *supra* note 137.

151 Sustainable Fishing Workforce Protection Act, *supra* note 5.

152 Sustainable Fishing Workforce Protection Act, *supra* note 5, §3(a)(2); see also, E-mail from Hirono, *supra* note 5.

153 Neither the House nor the Senate bill ever left committee. It appears that this was related to a lack of political will, rather than opposition to the bill.

154 See, e.g., CBP VESSEL INSPECTION GUIDE, *supra* note 22, at 5.

155 See 8 U.S.C. § 1282(a) (2018).

156 8 U.S.C. § 1101(15)(D) (2018).

157 8 C.F.R. § 252.1(g); CBP VESSEL INSPECTION GUIDE, *supra* note 22, at 24.

158 *Id.*

159 8 C.F.R. § 252.1(a); see also Email from Moore, *supra* note 47.

160 Email from Moore, *supra* note 47. Because this important and rights-protective practice appears to be an exercise of discretion not supported by any binding written authority, there is at least a theoretical risk that it could be terminated, or that certain fishermen could be denied access to it. Given the vital importance of the services the fishermen receive on the pier, this is not desirable from a fundamental-rights perspective.

161 See, e.g., Email from Moore, *supra* note 47; Interview with Chris, *supra* note 38; Interview with Luke, *supra* note 38; Interview with Marc, *supra* note 1; Interview with Carvalho, *supra* note 33.

162 See *supra* note 43.

163 See, e.g., Interview with Nakamura, *supra* note 36.

164 See CBP VESSEL INSPECTION GUIDE, *supra* note 22, at 21.

165 Interview with Luke, *supra* note 38.

166 Interview with Robin, *supra* note 122; see also Interview with Isaac, *supra* note 41; Interview with Luke, *supra* note 38.

## 2. Fishermen Must Receive Permission from CBP, “Parole,” to Leave the Pier

Under certain limited circumstances, CBP may grant “parole” to foreign fishermen, exercising its discretionary authority to allow them to enter the U.S. temporarily even though their I-95 landing permits have been denied and they are without a visa.<sup>167</sup> A CBP spokesperson explained:

“CBP receives and approves paroles for the detained fishermen on a daily basis. These fishermen are regularly paroled to seek medical attention, visit[] their consulate to renew passports, transfer vessels, or . . . depart the U.S. and return to their home country. Additionally, paroles are granted for all detained fishermen to seek shelter in the event of major storms, i.e. hurricanes.”<sup>168</sup>

The parole process usually requires an advance request to CBP, the submission of certain forms, and the payment of a parole fee,<sup>169</sup> currently about 65 USD.<sup>170</sup> These documents are prepared and submitted by the vessel owners or captains, who are also responsible for payment of the parole fee.<sup>171</sup> However, one interviewee affiliated with a foreign government referred to recent cases where fishermen had been asked to cover the fee out of their own wages.<sup>172</sup>

CBP may grant parole for regular medical appointments and emergent medical care.<sup>173</sup> All fishermen interviewed by the research team reported that, in the event of a medical emergency such as a serious injury, the fishermen would be permitted to enter Hawai‘i to receive treatment at the vessel owners’ expense.<sup>174</sup> Industry sources also clarified that, in the case of a life-threatening emergency, it would not be necessary to obtain advance CBP permission.<sup>175</sup>

However, although applicable regulations allow CBP a degree of discretion to grant parole in situations from regular medical appointments to emergency medical care,<sup>176</sup> parole generally appears to be sought and used only in relatively serious cases. This excludes regular medical visits for fishermen with conditions like diabetes and high blood pressure, and even follow-up visits for more serious conditions and injuries like amputations.<sup>177</sup> A service provider in the medical community relayed that, “We have seen several amputations, and the owner will not bring them back for follow-ups, they are going to take care of only the emergency.”<sup>178</sup> The necessity of the vessel owners’ and captains’ involvement in CBP’s granting of parole increases the fishermen’s dependency on the owners and captains, which may render them more vulnerable to abuse.

## 3. Employers Use Fishermen’s Denied Landing Permits to Obtain Fishing Licenses for Foreign Fishermen

Despite their formal ineligibility for nonimmigrant legal status in the U.S., the fishermen are still considered eligible for commercial state fishing licenses. Although Hawai‘i state law prohibits foreigners not “lawfully admitted” to the U.S.

167 See 8 C.F.R. § 253.1 (2018), see also Email from Moore, *supra* note 47.

168 Email from Moore, *supra* note 47.

169 See, e.g., CBP VESSEL INSPECTION GUIDE, *supra* note 22.

170 See, e.g., Interview with Foreign Government Official, *supra* note 137.

171 See, e.g., *id.*

172 Interview with Ron, *supra* note 123.

173 8 C.F.R. § 253.1(b), (e) (2018); see, e.g., *id.*

174 See 8 C.F.R. § 253.1(a), (e) (2018) (authorizing parole for medical treatment at the expense of the vessel owners). At the time of the parole request, vessel owners must submit a form guaranteeing payment for “all expenses incurred or to be incurred for the hospitalization, care, and treatment, and for burial in the event of death” of the fisherman. See U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY, CBP FORM I-510, GUARANTEE OF PAYMENT (2018) [hereinafter CBP Form I-510]; see also 8 U.S.C. § 1283 (2018). All fishermen interviewed emphasized that vessel owners were responsible for any medical costs the fishermen might incur while working. See, e.g., Interview with Chris, *supra* note 38; see also Interview with Robin, *supra* note 122.

175 See Interview with Local Industry Source, in Honolulu, Haw. (Winter 2019).

176 See 8 C.F.R. § 253.1(b), (e), (2018).

177 See Interview with Nakatsuka, *supra* note 132.

178 *Id.*

from engaging in commercial fishing in state waters and from receiving commercial fishing licenses,<sup>179</sup> the DLNR accepts the fishermen's denied I-95 applications as sufficient proof of "lawful presence" to justify the issuance of a permit.<sup>180</sup> The department reasons that the fishermen are not unlawfully present as long as they remain confined to the piers.<sup>181</sup> By reasoning that the fishermen are not "illegally" present in the United States if they remain confined, the fishermen are considered "lawfully admitted enough" to be eligible for a commercial fishing license.<sup>182</sup>

Foreign fishermen in the Hawaiian longline fleet are subject to a paradoxical legal regime that legitimizes them as sources of labor but physically isolates them from the larger community, leaving them vulnerable to potential abuses and limiting their access to effective remedies.

### C. FOREIGN FISHERMEN ARE ISOLATED FROM EFFECTIVE GRIEVANCE MECHANISMS

*"We have complaints . . . we tell the pastor and the pastor tells them [the owners]."*<sup>183</sup>

Existing informal grievance mechanisms do not provide effective recourse to fishermen wishing to voice complaints. This contributes to the fishermen's isolation from many forms of legal assistance and increases their vulnerability to abuse.

#### 1. Foreign Fishermen's Employers Fail to Operate an Effective Grievance Mechanism

The lack of confidential, accessible, and predictable grievance mechanisms exacerbates foreign fishermen's vulnerabilities to forced labor. They do not enjoy the same legal protections or bargaining power that enable other workers to redress labor abuses.<sup>184</sup> According to the United Nations Guiding Principles on Business and Human Rights (UNGPR),<sup>185</sup> a grievance mechanism comprises "any routinized, State based or non-State-based . . . process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought."<sup>186</sup>

Under the UNGPR, businesses are responsible for providing individuals access to effective remedies for potential workplace abuses through "legitimate processes," or formal grievance mechanisms.<sup>187</sup> The grievance mechanisms made available by businesses, such as longline vessels, should be: (1) accessible (i.e., obtainable and known by all stakeholders); and (2) predictable (i.e., the process and likely outcomes of a grievance mechanism are clear to all employees).<sup>188</sup>

179 See Haw. Rev. Stat. § 189-5 (2018). Although the coastal state only has sovereignty over the first twelve nautical miles from shore, waters of the state include "the high seas when navigated as part of a journey or ride to or from the shore of the State." Haw. Rev. Stat. § 291E-1 (2018).

180 See Letter from Linda Chow, Former Deputy Attorney General, Hawai'i, to Kaniela Ing, Former Member, Hawai'i House of Representatives (Mar. 24, 2017), 3.

181 See *id.*

182 See *id.*

183 Interview with Chuck, *supra* note 38; see also Interview with Carey, *supra* note 38.

184 See, e.g., U.S. CONST. Amend. V; 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act 1964, 42 U.S.C. § 2000e *et seq.*

185 *Access to Remedy*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <https://www.ohchr.org/EN/Issues/Business/Pages/AccessToRemedy.aspx> (last visited Mar. 31, 2019).

186 U.N. Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, ¶ 27, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter U.N. Guiding Principles].

187 U.N. Guiding Principles, *supra* note 186 at ¶ 22.

188 *Id.* ¶¶ 31(b), 31(c).

In Honolulu, the HLA’s Crew Handbook directs fishermen to voice complaints to volunteers with the Seafarers Ministry,<sup>189</sup> who can then informally convey the complaints to the HLA or vessel owners.<sup>190</sup> If a vessel owner is unresponsive to the Ministry’s efforts, the HLA claims that it generally succeeds in directing the vessel owner or captain to resolve the issue.<sup>191</sup>

These grievance mechanisms do not satisfy the conditions of predictability or accessibility recommended by the UNGPs largely because of their informal nature and the fact that there is no predictable outcome. The likelihood of a grievance being remediated is entirely dependent on the availability and accessibility of individual Ministry volunteers, and on the degree of influence they might be able to exercise with particular captains or vessel owners. This process is also not anonymous; fishermen identify themselves by reaching out to social contacts in the Ministry and cannot request anonymity.<sup>192</sup> Additionally, the costs of this complaint process are borne by the Ministry, not by the fishermen’s employers.

Because of the highly individualized and case-specific nature of the process, similar complaints might generate very different results, and fishermen cannot be certain of the consequences of reporting a particular problem. Finally, this lack of a formal structure could prevent the HLA and others from identifying patterns of complaints to address in an industry-wide effort, rather than individually-based responses.

Because of the insufficiency of this informal mechanism, some fishermen bring their complaints to government officials, such as consular staff from their countries of origin, or from their region if their country does not have consular staff present in Honolulu,<sup>193</sup> or CBP officers. In a number of interviews, fishermen noted that they could raise concerns to CBP officers, whom they typically referred to as “immigration.”<sup>194</sup> Two fishermen told us that their captain would ration their food unless the workers regularly complained to CBP,<sup>195</sup> and that informal complaints made through the Ministry had been ineffective.<sup>196</sup> Another fisherman stated, “The captain cannot talk bad to me, because if he talks bad to me, immigration comes.”<sup>197</sup>

Others reported interventions by CBP to force vessel owners to pay the fishermen their contractually agreed-upon salary.<sup>198</sup> One remembered, “My friend had a problem about salary, so I called [CBP] and they came right away.”<sup>199</sup> The same fisherman also recalled that “immigration” asked whether they were given enough food: “Now, I think it’s OK because the immigration talked to the captain or the owner, saying they have to make sure there is enough food to go fishing. If you have enough food, you can go fishing; if you don’t have enough food, you cannot go fishing.”<sup>200</sup>

This helpful role CBP seems to adopt in certain circumstances contrasts with its mandate to deny the fishermen entry to the U.S. and to enforce the restrictions on movement attached to that denial, which potentially includes deportation. As a result, fishermen who are intimidated by CBP’s law enforcement role or who greatly fear deportation may feel unable to voice concerns to them. In any event, fishermen reporting to an agency with the jurisdiction to deport them is not a substitute for a reliable and confidential industry-wide grievance mechanism.

189 See HLA Code of Conduct, *supra* note 4.

190 See, e.g., Interview with Cam, *supra* note 127; Interview with Carey, *supra* note 38; Interview with Chuck, *supra* note 38; Interview with HLA Leadership, *supra* note 116.

191 See, e.g., Telephone Interview with HLA Leadership (Spring 2019); Interview with Anonymous Source, *supra* note 122.

192 Interview with Seafarers Ministry Volunteer, in Honolulu, Haw. (Winter 2019).

193 See Interview with Foreign Government Official, *supra* note 137.

194 See, e.g., Interview with Luke, *supra* note 38.

195 See, e.g., Interview with Chuck, *supra* note 38; Interview with Carey, *supra* note 38.

196 See, e.g., *id.*

197 Interview with Joel, *supra* note 39.

198 See, e.g., Interview with Luke, *supra* note 38.

199 *Id.*

200 *Id.*

Though the Seafarers Ministry provides the fishermen with at least an informal grievance mechanism, the voluntary nature of the Ministry’s work to aid the fishermen in voicing their complaints cannot substitute for a formal, accessible, and predictable grievance mechanism provided by the employer.<sup>201</sup>

## 2. Foreign Fishermen Face Difficulties Accessing U.S. Courts

Although the fishermen are neither U.S. citizens nor lawfully admitted non-citizens, U.S. federal and state courts still retain jurisdiction over legal disputes arising out of their employment on U.S.-flagged fishing vessels.<sup>202</sup> Since a U.S.-flagged vessel is considered a “floating island” of its flag country, federal and state prosecutors may pursue criminal cases that arise aboard the vessel, wherever it is at sea, under federal or state anti-trafficking or labor laws.<sup>203</sup> The fishermen may also have standing to bring civil suits against U.S. vessel captains under U.S. maritime law and the TVPA, including suits related to working conditions and contract violations.<sup>204</sup> U.S. maritime law (under the Jones Act) and the TVPA make no distinction between alien seamen and U.S. seamen who are injured while working on U.S.-flagged vessels.<sup>205</sup>

Despite their formal standing to sue in U.S. courts, the foreign fishermen’s confinement to the piers prevents them from accessing legal assistance.<sup>206</sup> Advocates indicated that they were broadly aware of conditions in the longline fleet but had no direct way to make contact with fishermen at the piers to offer their assistance.<sup>207</sup> The Crew Handbook also does not provide contact information for any legal services providers.<sup>208</sup>

Without effective access to legal services, fishermen are unable to pursue legal remedies regarding labor abuses or contract violations. Their isolation from the legal system augments their vulnerability to potentially abusive practices.

## D. GOVERNMENT ACTORS FAIL TO FULLY UTILIZE AVAILABLE AVENUES TO PROTECT FISHERMEN

*“If you can figure out who can investigate and when, please tell me . . . that’s one of the problems, no one is fully responsible for what’s going on.”<sup>209</sup>*

Widespread confusion exists regarding U.S. government agencies’ and departments’ jurisdiction over forced labor and other abuses on U.S.-flagged fishing vessels.<sup>210</sup> At sea and at the piers, various agencies and departments have jurisdiction to address fishing and immigration regulations, as well as direct or indirect statutory authority to address forced labor. However, overlapping jurisdiction creates confusion regarding which agency or department holds responsibility for addressing forced labor or other abuses on U.S.-flagged fishing vessels. As a result, neither advocates nor fishermen know where to report abuses. One stakeholder commented, “You get all of these jurisdictions overlaid and then everybody’s like,

201 See, e.g., Bang, *supra* note 108, at 231.

202 See, e.g., 28 U.S.C. § 1333 (2018); see also Taylor v. Atl. Mar. Co., 179 F.2d 597 (2d Cir.), *vacated*, 181 F.2d 84 (2d Cir. 1950).

203 See Interview with Koplow; See also United Nations Convention on the Law of the Sea art. 92, art. 94, Dec. 10, 1982, 1833 U.N.T.S. 397; see also 18 U.S.C. § 7 (2001).

204 28 U.S.C.A. § 1916 (2018).

205 The Merchant Marine Act of 1920, § 33, 41 Stat 1007, 46 U.S.C.A. § 688 now 46 U.S.C.A. §§ 30104 to 30105 (2007) (the Jones Act); see Section IV. B. for discussion of U.S. jurisdiction over cases involving victims who lack U.S. legal status; 5 Robert Force & Martin J. Norris, *The Law of Seamen* §1:24 (2018).

206 See, e.g., Interview with Anonymous Advocate, *supra* note 125; see also Interview with Collins, *supra* note 118.

207 See, e.g., Interview with Anonymous Advocate, *supra* note 125.

208 HLA Crew Handbook, *supra* note 4.

209 Interview with Anonymous Advocate, *supra* note 125.

210 At sea, various agencies have jurisdiction on U.S.-flagged fishing vessels in the U.S.’s EEZ, the inner boundary of which is “coterminous with the seaward boundary of each” U.S. state, and on the high seas, the waters beyond the U.S.’s EEZ. See 16 U.S.C. § 1802(11) (2018); 16 U.S.C. § 5502(3) (2018).

‘No, it should be you.’ Nobody wants it.”<sup>211</sup> This confusion results in an ineffective legal regime that fails to adequately protect foreign fishermen.

## 1. NOAA Has No Formal Jurisdiction Over Forced Labor Concerns

At sea and on the piers, the National Oceanic and Atmospheric Administration (NOAA), of the Department of Commerce (DOC), has the power to address illegal, unreported, and unregulated (IUU) fishing and overfishing.<sup>212</sup> Due to the correlation between issues of IUU fishing and overfishing and forced labor and human trafficking,<sup>213</sup> NOAA has taken some action to monitor the fishermen’s living and working conditions. However, confusion regarding the agency’s potential jurisdiction over forced labor inhibits NOAA’s ability to provide adequate protection for the fishermen.

As part of its mission to combat IUU fishing and overfishing, NOAA places observers on board a sample of vessels that catch species of fish most at risk of IUU fishing and overfishing, which includes longline vessels.<sup>214</sup> Hawai‘i longline vessels must carry observers as directed by NOAA’s Pacific Islands Regional Office Regional Administrator, as part of the enforcement of the Magnuson-Stevens Fisheries Conservation and Management Act (MSA).<sup>215</sup>

NOAA mandates that observers identify and report evidence of IUU fishing and overfishing. Most observers do not report evidence of forced labor, since they are not required to do so.<sup>216</sup> One fisherman remarked that the observers never spoke to him about his living and working conditions; they were “just concerned with catching.”<sup>217</sup> However, a former observer explained that some observers do collect evidence of abuses “just by chance . . . because we care.”<sup>218</sup>

In an attempt to address the potential of forced labor and human trafficking on fishing vessels, NOAA sometimes partners with other government agencies and departments, including CBP.<sup>219</sup> For example, when NOAA trains its observers, it invites the Department of Homeland Security’s CBP or Immigration and Customs Enforcement (ICE), as available, to train the observers on identifying these human rights abuses.<sup>220</sup> As a result, some officers with NOAA’s Office of Law Enforcement (OLE)—who are responsible for patrolling the piers and inspecting vessels’ catch and gear on a daily basis<sup>221</sup>—have begun to report evidence of forced labor and human trafficking to CBP.<sup>222</sup> In the words of a former OLE officer, “We are the eyes of CBP.”<sup>223</sup>

211 Interview with Nakamura, *supra* note 36.

212 Illegal fishing constitutes fishing operations in contravention of applicable laws and regulations; unreported fishing constitutes fishing operations un- or misreported to relevant authorities in contravention of applicable laws and regulations; and unregulated fishing constitutes fishing operations in areas or for fish stocks for which there are no applicable conservation or management measures, inconsistent with State responsibilities under international law; or where such operations are conducted by vessels without nationality or by vessels flying the flag of a State not party to the governing management agreement. *See, e.g., Alfa Int’l Seafood v. Ross*, 264 F. Supp. 3d 23, 31 (D.D.C. 2017); PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD, ACTION PLAN FOR IMPLEMENTING THE TASK FORCE RECOMMENDATIONS (2015) [hereinafter Task Force Action Plan]; Understanding Illegal, Unreported, and Unregulated Fishing, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) (June 28, 2017), <https://www.fisheries.noaa.gov/insight/understanding-illegal-unreported-and-unregulated-fishing>.

213 *See, e.g.*, Telephone Interview with NOAA Fisheries Administrator (Winter 2018); *see also* Email from Katherine Lee, Legislative Assistant to Congresswoman Madeleine Z. Bordallo (Nov. 30, 2018) (Former Congresswoman Madeleine Z. Bordallo (R – GU) remarked: “The depletion of fish stocks contributes to IUU fishers looking for cheaper, faster labor in order to stay competitive in the industry. Fishers then turn to human trafficking to fulfill this labor need.”); *see also* INTERNATIONAL LABOUR ORGANIZATION (ILO), GAP, *Fish: Global Action Programme Against Forced Labour And Trafficking of Fishers At Sea* (2015) (creating a global action program based on the link between IUU fishing and overfishing and forced labor and human trafficking); *see also* Tiffany T.V. Duong, *The True Cost of “Cheap” Seafood: An Analysis of Environmental and Human Exploitation in the Seafood Industry*, 24 HASTINGS ENVTL. L.J. 279, 283 (2018) (“Fisheries around the world are being challenged to synthesize these opposing market forces of increasing demand and dwindling, overfished supplies. Unfortunately, some fleets accomplish this by cutting costs through environmental and labor exploitation.”).

214 *See Fish Auction Report*, POP FISHING & MARINE, <http://pop-hawaii.com/information-etc/auction-archive/> (last visited Mar. 31, 2019) (recording the species of fish sold at auction).

215 *See* 16 U.S.C. § 1857(1)(D) (2018); *Pacific Bigeye Tuna*, NOAA FISHERIES: SPECIES DIRECTORY, <https://www.fisheries.noaa.gov/species/pacific-bigeye-tuna> (last visited Mar. 31, 2019); *and Pacific Yellowfin Tuna*, NOAA FISHERIES: SPECIES DIRECTORY, <https://www.fisheries.noaa.gov/species/pacific-yellowfin-tuna> (last visited Mar. 31, 2019); *and North Pacific Swordfish*, NOAA FISHERIES: SPECIES DIRECTORY, <https://www.fisheries.noaa.gov/species/north-pacific-swordfish> (last visited Mar. 31, 2019).

216 *See, e.g.*, Informal Telephone Interview with NOAA Government Official (Fall 2018); Telephone Interview with NOAA OLE Officer (Winter 2019).

217 Interview with Marc, *supra* note 1; Interview with Mani, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Myron, *supra* note 1. Interview with Former NOAA Observer in Honolulu, Haw. (Winter 2019).

219 *See, e.g.*, Telephone Interview with NOAA OLE Officer, *supra* note 216.

220 *See, e.g., id.*; Informal Interview with NOAA Fisheries Staff Member, *supra* note 33.

221 *See, e.g.*, Informal Telephone Interview with NOAA Fisheries Administrator (Winter 2018).

222 *See, e.g.*, Telephone Interview with NOAA OLE Officer, *supra* note 216.

223 Telephone Interview with NOAA OLE Officer, *supra* note 216.

Despite NOAA's efforts to train its observers on forced labor issues, many observers fear retaliation from vessel captains if they report human rights violations.<sup>224</sup> As one NOAA Fisheries staff member explained, during inspections, observers are alone on a vessel with its captain and crew on the ocean; they are isolated from the mainland and law enforcement and subject to the captain's control.<sup>225</sup> As a result, observers fear that if they do report an abuse, or are even seen documenting one while on the vessel, they could face retaliation from a captain.<sup>226</sup> Moreover, former boat observers have noted that because reporting on forced labor and human trafficking is not currently mandated, and therefore rare, any reports can easily be traced to the reporting observer.<sup>227</sup>

Congress has expressed an interest in having NOAA systematically address forced labor and human trafficking.<sup>228</sup> NOAA, in conjunction with the Department of Justice (DOJ), has begun to examine legal grounds for jurisdiction,<sup>229</sup> which could remedy the fact that NOAA currently does not have direct statutory authority to address forced labor on fishing vessels.

## 2. The U.S. Coast Guard Has Jurisdiction to Conduct Inspections of the Fishermen's Working Conditions and Address Forced Labor Concerns

In addition to NOAA, the U.S. Coast Guard also has the power to enforce laws against IUU fishing and overfishing; however, unlike NOAA, it also has jurisdiction to enforce laws prohibiting forced labor.<sup>230</sup> The Coast Guard may board any fishing vessel under U.S. jurisdiction in the EEZ and on the high seas, and "make inquiries, examinations, inspections, searches, seizures, and arrests . . . for the prevention, detection, and suppression of violations of laws of the United States."<sup>231</sup>

The Coast Guard also has the power to conduct health and safety inspections of fishing vessels.<sup>232</sup> However, one fisherman described the inadequacy of these inspections, stating that the Coast Guard inspected his vessel only once every six months.<sup>233</sup> A former boat observer remarked, "the Coast Guard fails to . . . inspect these boats really well. [For example, w]e had one boat that sank . . . . That boat was never seaworthy."<sup>234</sup>

Fishermen reported that the Coast Guard concentrates its efforts on checking that all fishermen required to be detained on the boats are still confined there,<sup>235</sup> despite its authority to investigate violations of the laws of the United States, including forced labor.<sup>236</sup> Given that both NOAA and the Coast Guard regularly interact with the Hawaiian longline fleet, confusion over, and ineffective exercise of, their jurisdiction result in missed opportunities to protect foreign fishermen.

224 See, e.g., Informal Interview with NOAA Fisheries Staff Member, *supra* note 33; Telephone Interview with Former NOAA Observer (Winter 2019).

225 See, e.g., Informal Interview with NOAA Fisheries Staff Member, *supra* note 33; Telephone Interview with Former NOAA Observer, *supra* note 224.

226 In 2015, a U.S. citizen observer disappeared from an international tuna transshipment vessel operating in Panama after reporting human rights violations committed on the vessel. Though the observer was not working for NOAA at the time, and was in fact working in another country, his disappearance affected the U.S. observer community. See, e.g., *id.*; Interview with R.D., IUU Files (Winter 2019); Sarah Tory, *The Mysterious Disappearance of Keith Davis*, Hakai Magazine (Jan. 4, 2017), <https://www.hakaimagazine.com/features/mysterious-disappearance-keith-davis/>.

227 See, e.g., Informal Interview with NOAA Fisheries Staff Member, *supra* note 33; Telephone Interview with Former NOAA Observer, *supra* note 224.

228 See, e.g., Telephone Interview with NOAA OLE Officer, *supra* note 216; S. Rept. 115-139, 115th Cong., Title II (as reported by S. Comm. on Appropriations, July 27, 2017) (mandating a DOJ-led multi-agency task force to address "the use of labor that may have been subject to human trafficking to harvest fish in international waters.").

229 See, e.g., *id.*

230 14 U.S.C. § 102 (2018).

231 See 14 U.S.C. § 522(a) (2018).

232 *Id.*

233 See Interview with Luke, *supra* note 38.

234 Interview with Former NOAA Observer, *supra* note 224.

235 See, e.g., Interview with Micah, *supra* 135; Interview with Monty, *supra* note 39.

236 14 U.S.C. § 102 (2018).

### 3. CBP Has Unclear Jurisdiction to Address Allegations of Forced Labor and Rarely Inspects Working Conditions in the Hawaiian Fishing Industry

CBP plays a key role in enforcing immigration regulations at the piers.<sup>237</sup> In addition, CBP officers have the authority to address human trafficking in the Hawaiian fishing industry.<sup>238</sup> However, the extent to which CBP has jurisdiction over forced labor and other labor abuses on U.S.-flagged vessels remains unclear and creates confusion within the agency.<sup>239</sup>

Despite its unclear jurisdiction, CBP has taken initiatives to address forced labor in the context of its commitment to combat human trafficking.<sup>240</sup> As described above, CBP officers sometimes act as intermediaries between the fishermen and their vessel owners and captains.<sup>241</sup> While the team was unable to discuss these initiatives directly with a local CBP representative,<sup>242</sup> it appears that CBP has also strengthened partnerships with NOAA, the U.S. Coast Guard, and consulates and embassies to gather further information on potential cases of forced labor.<sup>243</sup>

As discussed in the section on grievance mechanisms,<sup>244</sup> CBP officers are placed in a paradoxical position: they are asked to both confine foreign fishermen to the piers and simultaneously address the abuses emanating from their confinement, investigating the work and living conditions of fishermen who potentially fear them. This dual role can undermine CBP's ability to effectively address vulnerabilities to forced labor in the Hawaiian longline fishing industry.<sup>245</sup>

Ultimately, the lack of clarity surrounding agency jurisdiction over the fishermen's working conditions, as well as potential forced labor in the fishing fleet, minimizes the likelihood of fishermen receiving remedies for potential workplace abuses. It is also especially problematic that the same agency, in the case of CBP, is responsible for both ensuring that the fishermen remain confined to their boats, and for investigating their working conditions and potential instances of forced labor. This compounds an already challenging problem inherent in combating human trafficking and forced labor:

“[Forced labor] . . . can be especially difficult to detect, investigate, and prosecute for a number of reasons, including isolation of the victims, limited sources of corroborating evidence, and challenges in earning the trust of victims in order to elicit their statements. Not all law enforcement is sensitive to a trauma-informed, victim-centered approach and appreciative of the full spectrum of human trafficking . . . . Also, many victims do not see themselves as victims.”<sup>246</sup>

To improve detection and enforcement, fishermen must be able to trust the agencies responsible for monitoring their working and living conditions, and agencies must have a clear understanding of their statutory power to intervene when they observe human rights abuses.

237 See 6 U.S.C § 211 (2018).

238 See *id.*

239 The research team made numerous attempts to contact CBP for an interview or written comment over the course of six months. Besides general comments given by e-mail, CBP officers and staff in Hawai'i have consistently refused to speak with the research team. See also Interview with Kathryn Xian, Advocate (Winter 2019); Interview with Anonymous Source in Honolulu, Haw. (Winter 2019).

240 See, e.g., Paul Koscak, *CBP Takes Aim at Forced Labor* (2017), available at: <https://www.cbp.gov/frontline/cbp-takes-aim-forced-labor> (last accessed Feb 18, 2019).

241 See *supra* Section V(C)(2) for more information.

242 The research team made numerous attempts to contact CBP for an interview or written comment over the course of six months. Besides general comments given by e-mail, CBP officers and staff in Hawai'i have consistently refused to speak with the research team.

243 See, e.g., Informal Telephone Interview with NOAA Government Official, *supra* note 216; Interview with Foreign Government Official, *supra* note 137.

244 See *supra* Section V(C).

245 CBP can also refer cases to ICE's Homeland Security Investigations (HSI), which holds direct authority to investigate cases of forced labor and relies on reports by local law enforcement officers. See 18 C.F.R § 1589 (2018); Hidden in Plain Sight: Understanding Federal Efforts to Stop Human Trafficking: Hearing Before the H. Comm. on Homeland Sec. Subcomm. on Border and Maritime Sec., 115th Cong. 17-18 (2018) (statement of Steve W. Cagen, Spec. Agent in Charge, HSI Denver).

246 Hidden in Plain Sight, *supra* note 245.







## VI. IMPACTS OF VULNERABILITIES TO FORCED LABOR

The fishermen’s confinement, isolation, and lack of legal status create vulnerabilities that often manifest in harsh working and living conditions. While some captains do treat their workers fairly and create positive work environments, others take advantage of these vulnerabilities to the detriment of the fishermen. The lack of oversight and enforcement in the industry gives employers wide discretion over almost every aspect of the fishermen’s lives, including: (A) working hours; (B) scope of work; (C) health and safety; (D) wages and provision of basic necessities; and (E) quality of fishermen–captain relationships. Despite the introduction of a Model Crew Contract, HLA Code of Conduct, and Crew Handbook intended to lay out uniform working standards for all fishermen on HLA member vessels, the legal and structural conditions detailed above result in conditions ripe for abuse.

### A. WORKING HOURS

.....

*“I throw the line for six hours. And after that, we’re done, so I have to rest [for] four hours. . . . After, I wake up and pick up the line . . . for, like, twelve hours. After, . . . we sleep two hours, and continue setting.”<sup>247</sup>*

.....

The men of the Hawaiian longline fishing fleet work long hours and get little opportunity for sleep when out at sea. Some fishermen stated that they worked up to twenty-three hours a day when out at sea.<sup>248</sup> Others stated they worked approximately eighteen hours a day: “We wake up in the morning mostly, at, like, 7:00 AM,” one fisherman reported. “Then I throw the line for six hours. And after that we’re done, so I have to rest [for] four hours. . . . After I wake up and pick up the line . . . for like twelve hours. After, . . . we sleep two hours, and continue setting.”<sup>249</sup> Difficult hours are common in longline fishing because a boat must continuously set and pull in fishing line to catch fish and make a profit. Unlike American fishermen, however, the foreign fishermen of the Hawaiian longline fleet are confined to the pier and isolated from services that could facilitate self-advocacy against abusive hours. This vulnerability is clear in the wide

<sup>247</sup> Interview with Luke, *supra* note 38.

<sup>248</sup> See, e.g., *id.*

<sup>249</sup> *Id.*

disparity of working hours that the fishermen reported, ranging from eighteen to twenty-three hours a day.<sup>250</sup> Foreign fishermen are left at the mercy of their captains and boat owners who determine their work hours.

Within this constant cycle of throwing and retrieving the fishing line, fishermen lack the opportunity to rest and recuperate. When asked if he could get enough sleep when out at sea, a fisherman stated, “Usually it’s not enough sleep, but [it’s] okay. Mostly, one day of sleep is, like, five hours.”<sup>251</sup> The fishermen work at this pace for two to three weeks at a time before returning to port for about three days to unload the fish.<sup>252</sup> During these three days the fishermen try to make up for lost sleep: “After we’re done with the set we come home, so we have time to sleep. . . . I sleep for three days.”<sup>253</sup>

Prolonged lack of sleep can have serious health and safety consequences. Many of the fishermen suffer from high blood pressure, which can be related to lack of sleep.<sup>254</sup> Lack of sleep may also result in more accidents and injuries at sea. According to the HLA, the Model Crew Contract includes standardized hours aligned with the ten-hour-a-day maximum articulated in the ILO Work in Fishing Convention.<sup>255</sup> However, some fishermen stated that their contracts did not include this cap on working hours.<sup>256</sup> The fishermen’s confinement and isolation, combined with the lack of standardized hours or a formal and anonymous complaint mechanism, leave them without recourse if required to work an unhealthy, unsustainable number hours.

## B. SCOPE OF WORK

.....  
*“Sometimes I help with the engine. . . . They did not say it before, and no pay.”<sup>257</sup>*  
 .....

The fishermen’s lack of legal status and isolation create additional vulnerabilities regarding their scope of work. Occasionally, boat owners require fishermen to perform tasks that might be against the law, and that are outside the bounds of their contracts. While the Model Crew Contract details the terms and conditions of the fishermen’s work, boat owners might still require additional tasks from the fishermen.<sup>258</sup> In addition to limitations in the fishermen’s contracts, applicable laws prohibit fishermen from performing certain tasks for boat owners, including maintenance and longshoreman work.<sup>259</sup> However, boat owners may demand this work from the fishermen as part of their employment, sometimes without compensation or under threat of deportation.<sup>260</sup> “I had to fix the plumbing on deck,” one fisherman reported.<sup>261</sup> Another described working on the boat’s engine.<sup>262</sup>

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250 See, e.g., *id.*

251 *Id.*

252 See, e.g., Interview with Cole, *supra* note 39.

253 Interview with Luke, *supra* note 38.

254 See, e.g., Interview with Nakatsuka, *supra* note 132; Interview with Saludez, *supra* note 37.

255 See Work in Fishing Convention, *supra* note 81, at Art. 14; E-mail from HLA Leadership (Spring 2019).

256 See, e.g., Interview with Randall, *supra* note 41; Interview with Ray, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Remington, *supra* note 122; Interview with Richard, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Rick, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Robin, *supra* note 122; Interview with Roland, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); Interview with Ron, *supra* note 123; Interview with Nakamura, *supra* note 36.

257 Interview with Chuck, *supra* note 38.

258 See, e.g., Interview with Chuck, *supra* note 38; Interview with Nakamura, *supra* note 36; E-mail from HLA Leadership (Spring 2019).

259 See 8 C.F.R. §258.1(a)(2) (2018) (defining longshore work and prohibiting nonimmigrant crewmen to perform longshore work).

260 See, e.g., Interview with Chuck, *supra* note 38; Interview with Nakamura, *supra* note 36.

261 Interview with Cole, *supra* note 39; Interview with Robin, *supra* note 122.

262 See Interview with Carey, *supra* note 38 (responding to the question: “Do you have any duties or responsibilities on the boat now that you did not expect to have?” by stating: “Sometimes. Because sometimes, I help with the engine . . . they did not say it before, and no pay . . . Extra work, no pay.”).

If caught performing these prohibited tasks, the fishermen can be deported, which may also result in their loss of lucrative salaries, any collateral they provided to their recruiters, and the costs of their repatriation.<sup>263</sup> By contrast, the captain would only be charged a fine.<sup>264</sup> One crewmember disclosed that he and his fellow crewmembers are forced to perform additional jobs every time their vessel ventures into open waters to evade detection by the Coast Guard for performing these tasks.<sup>265</sup> The fishermen are at risk of losing their jobs whether they perform the tasks or not: “The fishermen know they’re not supposed to do it, [but] if the owner directs them to do so, they really cannot say no,” a coordinator at the Seafarers Ministry told the research team.<sup>266</sup> “If they don’t follow the owner of the boat, they’ll be sent home; but if they do it and Customs finds out, they get sent home too.”<sup>267</sup> As one advocate stated, “once . . . out in the ocean, they ha[ve] no choice, they can’t go anywhere.”<sup>268</sup>

The captains’ threats of deportation for failure to perform these additional jobs are effective because fishermen fear that, if they do not follow their captains’ orders, they will suffer serious financial and reputational harm.<sup>269</sup> If a fisherman is sent home by his captain, these harms include loss of income, the costs of repatriation, and being “blacklisted” among the longline fishing community, preventing a fisherman from seeking future employment in the fleet.<sup>270</sup> Fear of these consequences coerces fishermen to follow their captains’ orders, even when these orders require that they break the law. Demanding the performance of additional tasks under threat of deportation may, therefore, violate the TVPA’s prohibition against threatening abuse of the law or legal process<sup>271</sup> and serious harm to subject an individual to forced labor.<sup>272</sup> The vulnerabilities created by the fishermen’s lack of legal status and isolation leave them susceptible to this type of abuse by their employers.

### C. HEALTH AND SAFETY

.....

*“[Some captains] don’t really do much, only in emergencies or really bad injuries.”*<sup>273</sup>

.....

The hazardous and physically strenuous nature of longline fishing places fishermen in danger of accidents and injuries. The Occupational Safety and Health Act (OSHA) states that employers must provide a place of employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees.<sup>274</sup> Other federal regulations and international conventions require that vessels be furnished with various safety equipment.<sup>275</sup> The longline fishing industry is inherently dangerous work for all fishermen, including U.S. workers. However, the foreign fishermen’s confinement to the pier isolates them from medical caregivers and creates conditions ripe for neglect of employers’ health-related responsibilities.

263 See, e.g., Interview with Ron, *supra* note 123; Interview with Randall, *supra* note 41; Interview with Remington, *supra* note 122.

264 Interview with Ron, *supra* note 123.

265 See Interview with Ron, *supra* note 123 (Question: “Does that happen every trip?” Answer: “Yes.”).

266 Telephone Interview with Seafarers Ministry Volunteer (Winter 2019).

267 *Id.*

268 Interview with Anonymous Advocate, *supra* note 125.

269 See, e.g., Interview with Randall, *supra* note 34; Interview with Ray, *supra* note 256; Interview with Remington, *supra* note 122; Interview with Richard, *supra* note 256; Interview with Rick, *supra* note 256; Interview with Robin, *supra* note 122; Interview with Roland, *supra* note 256; Interview with Ron, *supra* note 123.

270 *Id.*; see Interview with Myron, *supra* note 1.

271 See 18 U.S.C. §§ 1589(a)(3), 1589 (c)(1) (2018) (prohibiting the “abuse or threatened abuse of law or legal process” “in order to exert pressure on another person to cause that person to take some action or refrain from taking some action”); see also *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 790 F. Supp. 2d 1134, 1144 (C.D. Cal. 2011) (finding forced labor where an employer threatened an employee with deportation for complaining to a reporter about poor treatment); *Ramos-Madrugal v. Mendiola Forestry Service*, 799 F. Supp. 2d 958, 960 (W.D. Ark. 2011) (ruling that employers’ threatening to report H-2B workers to immigration officials constituted threatened abuse of law or legal process).

272 See 18 U.S.C. §§ 1589(a)(2), 1589 (c)(2) (2018).

273 Interview with Chuck, *supra* note 38; see also Interview with Carey, *supra* note 38.

274 29 U.S.C. § 654(a)(1) (2018).

275 See, e.g., 46 U.S.C. § 4502 (b)-(c) (2018); see also *Work in Fishing Convention*, *supra* note 81, at Art. 8(2) & 32.

Some fishermen face unsanitary and unsafe working and living conditions on the boats. One former boat observer described regularly encountering bedbug infestations.<sup>276</sup> Another advocate attributed a past hepatitis outbreak to a lack of sanitation on the boats.<sup>277</sup> Additionally, a coordinator for the Seafarers Ministry described an incident in which a boat caught fire during the night as the fishermen slept on board.<sup>278</sup> Although the Coast Guard and Harbor Police both have jurisdiction to inspect vessels for health and safety,<sup>279</sup> unsafe conditions persist. This may be due to fishing vessels' exemption from several statutory inspection requirements,<sup>280</sup> or to confusion regarding jurisdiction over such inspections.<sup>281</sup>

Fishermen stated that they are often responsible for administering their own first aid and do not always receive time off to recover from injuries.<sup>282</sup> Additionally, boat owners and captains do not always return to port when serious injuries occur to avoid the loss of income from an incomplete fishing trip. When asked about primary complaints he receives from the fishermen, a medical source told us: “. . . not coming back to port for significant injuries.”<sup>283</sup> A fisherman injured at sea has the same rights “as though he had been injured within the country of the vessel’s flag.”<sup>284</sup> Fishermen injured on U.S.-flagged vessels in the Hawaiian longline fleet therefore have the same right to medical care as any other employee in the U.S.

Once back on land, the potential cost of parole<sup>285</sup> and medical care often dissuades vessel owners from taking the fishermen to receive adequate medical care.<sup>286</sup> Medical expenses for emergency and non-emergency care incurred by the fishermen during the course of their contracts are typically covered by the vessel owners. In fact, in many cases, the payment of medical expenses is also an explicit term of the employment contract.<sup>287</sup> When a fisherman is granted parole to receive medical attention, the vessel owners must commit to paying all medical expenses incurred by the fisherman.<sup>288</sup> The lack of enforcement mechanisms and the significant variations in treatment across vessels means that this care might not actually be covered by every boat owner. Whether the fishermen receive medical attention, and who bears the cost, is completely dependent on the decision of vessel owners and captains.

On some vessels, parole is sought only when serious medical issues arise.<sup>289</sup> The fishermen receive more regular medical attention through the Seafarers Ministry from volunteer doctors and medical students at the pier.<sup>290</sup> These weekly visits are the fishermen’s only opportunity to speak to a medical professional and receive treatment for a variety of chronic and employment-related illnesses.<sup>291</sup> However, the care that this volunteer team can provide on the pier is limited, and fishermen cannot regularly access specialized medical care. A former NOAA observer summarized the problem: “[T]hey can’t go to doctor’s when they want to! They can’t go to the dentist when they want to!”<sup>292</sup>

During interviews, most of the fishermen commented on their lack of access to medical care.<sup>293</sup> One fisherman stated that during his employment in Hawai’i he was unable to see a doctor for six years.<sup>294</sup> Many of the fishermen suffer from

276 See Interview with Former NOAA Observer, *supra* note 224.

277 See Interview with Kathryn Xian, Advocate (Winter 2019).

278 See Telephone Interview with Seafarers Ministry Volunteer, *supra* note 266.

279 See 14 U.S.C. § 522(a) (2018).

280 See 46 U.S.C. § 3302(b) (2018) (exempting fishing vessels from required inspections); 46 U.S.C. § 4502(b) (2018) (requiring inspections for vessels with sixteen or more people but failing to cover most vessels in the Hawaiian longline fleet).

281 See *supra* Part V(D) for further discussion of issues of jurisdiction.

282 See, e.g., Interview with Chuck, *supra* note 38; Interview with Carey, *supra* note 38.

283 Interview with Nakatsuka, *supra* note 132.

284 5 ROBERT FORCE & MARTIN J NORRIS, *THE LAW OF SEAMEN* §1:35 (2018).

285 See *supra* Part V(B)(1) for further discussion of the complications of the parole process.

286 Interview with Nakatsuka *supra* note 132.

287 See, e.g., Interview with Luke, *supra* note 38; Interview with Nakamura, *supra* note 36.

288 See 8 C.F.R. §253.1(a), (e) (2018) (explaining that, at the time of the parole request, vessel owners must submit a form guaranteeing payment for “medical and other related expenses” of fishermen); CBP Form I-510, *supra* note 174; see also 8 U.S.C. § 1283 (2018).

289 See, e.g., Interview with Nakamura, *supra* note 36.

290 See, e.g., Interview with Nakatsuka, *supra* note 132.

291 See, e.g., Interview with Micah, *supra* note 135.

292 Interview with Former NOAA Observer, *supra* note 224.

293 See, e.g., Interview with Cliff, *supra* note 42; Interview with Mani, *supra* note 1; see also Interview with Milo, *supra* note 1.

294 See Interview with Micah, *supra* note 135.

conditions such as diabetes and high blood pressure that require routine medical visits for “hypertension control, diabetes control, prevention of things that could lead to medical emergencies.”<sup>295</sup> Due to their confinement, however, the fishermen cannot access medical care and cannot purchase necessary medications for themselves in Honolulu.<sup>296</sup> They instead rely on the generosity and capacity of the Seafarers Ministry to provide volunteer medical services and medications.

The fishermen’s confinement to the piers also prevents them from receiving mental health services. Despite the risks posed by the stressful and socially-isolated conditions in which they work, the fishermen cannot access psychological or psychiatric assistance. Some fishermen stated that they face psychological problems because of captains’ mistreatment, which makes them feel constantly insecure.<sup>297</sup> An advocate in the medical community affirmed that “there are some men that are depressed . . . and [there] will always be a challenge of getting the cooperation of the captains and the owners to have them seek further care.”<sup>298</sup> Another advocate relayed the story of a fisherman whose vessel owner sent him home due to his mental illness, without any escort or other form of support; the fisherman was later found wandering the streets alone and naked in his country of origin.<sup>299</sup>

Despite statutory requirements for safe and healthy work environments, the fishermen of the Hawaiian longline fleet continue to struggle with access to medical care for both illnesses and injuries, and they have no access to mental health services. Their confinement and isolation also hinders their ability to advocate for their own safe working and living conditions.

#### D. WAGES AND PROVISION OF BASIC NECESSITIES

*“I contract with fishermen for 500–600 USD per month, which is typical, but there is no standard.”<sup>300</sup>*

The foreign fishermen of the Hawaiian longline fleet are paid an average of 500 USD per month, with variation depending on experience.<sup>301</sup> Although these wages are much higher than average wages in the fishermen’s home countries, they are well below American standards of fair pay.<sup>302</sup> For example, American fishermen in Alaska earn fourteen to twenty-four times more than foreign fishermen in Hawaii.<sup>303</sup> Additionally, the research team uncovered disparity in pay among fishermen, depending on their boat owners. Some fishermen we spoke to stated that, to their knowledge, they had not received pay raises over time based on length of service or experience.<sup>304</sup> Others stated they would receive an additional 100 USD per month for every year they continued working on the same boat.<sup>305</sup> As all fishermen are exempted from the Fair Labor Standards Act (FLSA), those working in the Hawaiian fleet have no clear legal recourse for failure to pay minimum wage or even working excessive overtime.<sup>306</sup> This lack of legal protection, standardization, and regulation results in vast disparities in pay even among boats at the same pier.

295 Interview with Nakatsuka, *supra* note 132; see also Interview with Carvalho, *supra* note 33.

296 See Interview with Logan, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019); see also Interview with Collin, *supra* note 121 (recalling that their own medications from their origin countries were confiscated by CBP in American Samoa).

297 See, e.g., Interview with Luke, *supra* note 38.

298 Interview with Nakatsuka, *supra* note 132.

299 See, e.g., Telephone Interview with Anonymous Source, *supra* note 122; Telephone Interview with Seafarers Ministry Volunteer, *supra* note 266.

300 Informal Interview with Vessel Captain, *supra* note 43.

301 See, e.g., Interview with Irwin, *supra* note 41; see also Interview with Isham, *supra* note 121; Interview with Ivan, *supra* note 121; Interview with Luke, *supra* note 38; Interview with Mani, *supra* note 1; Interview with Marc, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Myron, *supra* note 1.

302 See, e.g., Interview with Carvalho, *supra* note 33; Interview with Luke, *supra* note 38.

303 See Informal Interview with NOAA Fisheries Staff Member, *supra* note 33 (stating that American fishermen in the Alaskan market make approximately 7,000–12,000 USD per month).

304 See, e.g., Interview with Luke, *supra* note 38.

305 See, e.g., Interview with Irwin, *supra* note 38; Interview with Isham, *supra* note 121; Interview with Ivan, *supra* note 121.

306 See 29 U.S.C. § 213(a)(5) (2018) (exempting fishermen from minimum wage and maximum hour requirements).

In addition to wages, boat owners are contractually required to provide the fishermen with all basic necessities, including food, water, and toiletries. Some interviewees, however, complained about the quality of the food and water that their employers provide. “The food is the worst part,” said one fisherman.<sup>307</sup> A former boat observer stated that “[t]he water is sometimes not drinkable.”<sup>308</sup> At times, the supplies provided are insufficient for the length of the trip and the fishermen must resort to eating their own catch.<sup>309</sup> Because of their confinement to the piers, the fishermen cannot purchase basic necessities for themselves, even at stores directly across the street from the piers in Honolulu. One former NOAA observer noted, “They can’t [even] go buy an apple when they want to!”<sup>310</sup> Instead, the fishermen rely on community members to provide basic necessities. One group of fishermen informed us that they received all of their vegetables from the Ministry.<sup>311</sup>

The Seafarers Ministry observed that the foreign fishermen docking in Honolulu require similar necessities that they cannot purchase for themselves on land. As a result, the Ministry began assembling welcome bags for new fishermen consisting of donated pillows and pillow cases, soaps, toiletries, and towels.<sup>312</sup> The Ministry has also purchased and solicited donations for long sleeve shirts, which help protect fishermen from jellyfish stings during longline work.<sup>313</sup> The fishermen’s confinement to the piers and the lack of a formal complaint mechanism for fishermen who do not receive the supplies promised in their contracts has left them dependent on the generosity of community volunteers for basic necessities.<sup>314</sup> Without addressing these underlying vulnerabilities, fishermen have no recourse when contractually and/or legally required resources are withheld or unavailable.

## E. RELATIONSHIPS WITH CAPTAINS

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*“If [we] could change one thing, [we] would change treatment [by our captains].  
If you are good to your crew, then they will also respect you.”<sup>315</sup>*

.....

The lack of enforced regulation and standardization of the working conditions for foreign fishermen leaves captains with wide discretionary power. While many of the fishermen reported that their captains treat them well, others complained of poor treatment, resulting in a negative work environment. Interviewees reported that some captains are “good” and some are “bad,” and that treatment is highly dependent upon the captain.<sup>316</sup> One fisherman explained that while some captains provide a good supply of food, others scold them for “eat[ing] too much” or try to limit their intake.<sup>317</sup>

Discrepancies and variations in relationships between captains and fishermen also affect the fishermen’s access to medical care, discussed above. Many interviewees confirmed that injured fishermen are taken to the hospital for treatment and

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307 Interview with Luke, *supra* note 38.

308 Interview with Former NOAA Observer, *supra* note 224.

309 See, e.g., Interview with Chuck, *supra* note 38; Interview with Carey, *supra* note 38.

310 Interview with Former NOAA Observer, *supra* note 224.

311 See Interview with Mani, *supra* note 1; Interview with Marc, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Myron, *supra* note 1.

312 See, e.g., Interview with E. Perino, Volunteer, Seafarers Ministry, in Honolulu, Haw. (Winter 2019); see also Interview with Saludez, *supra* note 37.

313 See *id.*

314 See *supra* Part V(c) for further discussion of grievance mechanisms.

315 Interview with Irwin, *supra* note 38; see also Interview with Isham, *supra* note 121; Interview with Ivan, *supra* note 106.

316 See, e.g., Group Interview with Foreign Fishermen in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019).

317 See, e.g., Group Interview, *supra* note 316.

that treatment is paid for by the boat owner.<sup>318</sup> One fisherman, however, reported that his captain told him, “I will call the helicopter if you die, but not before.”<sup>319</sup> Another fisherman had suffered from headaches for an extended period of time before his captain took him to receive medical attention.<sup>320</sup> Shortly after arriving at the hospital, the fisherman fell into a coma that lasted for over a year.<sup>321</sup> After awakening from the coma, the fisherman was returned to his country of origin. It is unclear what continued care (if any) he received and what condition he is in today.<sup>322</sup>

The fishermen’s isolation and precarious legal status, in addition to the lack of an independent grievance mechanism, make them vulnerable to abusive treatment from captains and vessel owners. Fishermen reported significant variation in how captains interacted with them. Some captains treat their crews very well; on these boats, fishermen often renew their contracts for many years beyond the initial one- to two-year commitment.<sup>323</sup> On other vessels, fishermen described threatening and abusive behavior, while still others reported that some captains treat crew members differently based on ethnicity or nationality.<sup>324</sup>

Although the fishermen we interviewed did not report physical abuse, they relayed that they experience verbal and mental abuse—including threats of deportation—from their captains. A group of fishermen said that when they asked their captain for basic supplies, he responded with, “Go home.”<sup>325</sup> Another fisherman reported that his captain yelled at him, “You lazy bastard, once we reach the pier, I’m sending you home.”<sup>326</sup> The fear of deportation discourages the fishermen from making complaints about their living and working conditions, and from seeking help in emergency situations. The disproportionate power that vessel captains enjoy compared to the foreign fishermen exacerbates this situation; captains can trigger the deportation of a foreign fisherman merely by calling CBP and indicating that the fisherman is “problematic.”<sup>327</sup> When asked if a captain might retaliate against them for complaining to authorities about their living or working conditions, a group of fishermen on Pier 17 laughed, responding, “Of course.”<sup>328</sup> When asked what would happen in a variety of circumstances, such as asking for additional benefits, complaining about a captain, or demanding medical attention, the men in the group responded that they would “be sent home.”<sup>329</sup>

As discussed above, captains also utilize threats of deportation when ordering fishermen to complete tasks that are outside of their contract and that they are not legally allowed to perform.<sup>330</sup> An advocate relayed the story of a fisherman whose captain threatened to send him home if he did not complete such a task; however, an immigration officer later confronted the fisherman and sent him home for breaking the law.<sup>331</sup> In another case, the captain threatened to send a fisherman home when he resisted orders to dive into open water to untangle a rope from the ship’s propeller.<sup>332</sup> Believing he had no choice, the fisherman completed the dangerous task.

Additionally, in a few instances, fishermen reported that they were treated less favorably on boats where they were not of the same ethnicity as their captain.<sup>333</sup> One fisherman stated that crew members of the same nationality as the

318 See, e.g., Interview with Chris, *supra* note 38; see also Interview with Luke, *supra* note 38; Interview with Mani, *supra* note 1; Interview with Marc, *supra* note 1; Interview with Milo, *supra* note 1; Interview with Myron, *supra* note 1.

319 Group Interview, *supra* note 316.

320 See Telephone Interview with Seafarers Ministry Volunteer, *supra* note 266.

321 See *id.*

322 See *id.*

323 See, e.g., Interview with Luke, *supra* note 38.

324 Group interview, *supra* note 316; Interview with Leon, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019).

325 See, e.g., Interview with Carey, *supra* note 38; Interview with Cal, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019).

326 Interview with Luke, *supra* note 38.

327 See, e.g., Interview with Nakamura, *supra* note 36; Interview with Carvalho, *supra* note 33.

328 Group Interview, *supra* note 316.

329 Group Interview, *supra* note 316.

330 See *supra* Part VI(c) for further discussion of this practice.

331 See Telephone Interview with Seafarers Ministry Volunteer, *supra* note 266.

332 See *id.*

333 See, e.g., Interview with Leon, Foreign Fisherman in the Hawai’i Longline Fleet, in Honolulu, Haw. (Winter 2019).

captain were allowed to sleep on the job, while others were yelled at when they did the same.<sup>334</sup> Another fisherman stated that the language barrier between the captain and the crew on his boat had resulted in the captain becoming verbally abusive.<sup>335</sup>

The fishermen’s isolation and the lack of a formal and anonymous grievance mechanism make them vulnerable to abuse of their captains’ discretionary power. Statutes requiring captains to maintain control over foreign fishermen’s documents and movements further substantiate these threats and contribute to their coercive power.<sup>336</sup> Threats of deportation and related fears of losing income, paying the high costs of their return travel home, forfeiting collateral, and being blacklisted from returning to Hawai‘i may have the effect of coercing foreign fishermen to remain in their current positions. This coercion may therefore constitute a “threatened use of serious harm”<sup>337</sup> and “threatened abuse of law or legal process” to induce a worker to remain in his abuser’s employ in violation of the TVPA.<sup>338</sup>

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334 See, e.g., *id.*

335 See, e.g., *id.*

336 See, e.g., CBP Vessel Inspection Guide, *supra* note 22.

337 See 18 U.S.C. § 1589(c)(2) (2018) (defining serious harm as “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”); see also *U.S. v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011) (citing 18 U.S.C. § 1589(c)(2)).

338 See 18 U.S.C. § 1589(a)(3) (2018); see also 18 U.S.C. § 1589(c)(1) (2018) (defining abuse of the legal process as “use or threatened use of a law or legal process, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause him to take some action or refrain from taking some action.”). See, e.g., *U.S. v. Farrell*, 563 F.3d 364, 374-75 (8th Cir. 2009) (“Even if the workers believed that they could leave the Farrells’ employment and seek help, the Farrells made them acutely aware that they could have them deported for holding jobs outside of the scope of their visas. This fear was not unfounded . . . Here, the threat of deportation was more than a threat of removal from the United States or a threat to legitimately use the legal process to ensure that the workers abided by the terms of their visas.”); *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115 (D.C.D. 2012) (holding that threats of deportation constitute forced labor through the abuse of the legal process); *U.S. v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2007).







## VII. CONCLUSION

Foreign fishermen working in the Hawaiian longline fishing industry are vulnerable to forced labor practices. Multiple factors contribute to these vulnerabilities:

1. Unregulated intermediaries involved in recruiting foreign fishermen for longline work leave the fishermen at risk of abusive recruitment practices, including recruiters who require them to turn over title to their property or pay recruitment fees.
2. The fishermen's lack of legal status and resulting inability to enter U.S. territory makes it difficult for them to seek legal assistance, reinforcing power imbalances between the fishermen and their captains. This obstacle, combined with their unfamiliarity with U.S. law, may make fishermen reticent to assert their rights.
3. Because the foreign fishermen must remain confined on the vessels and piers while in port, they are isolated from the larger Hawaiian community. As a result, they depend on the generosity of community members and their captains' consent to access basic necessities—including medical treatment, food, and clothing.
4. Finally, government agencies fail to effectively monitor labor practices in the Hawaiian fishing industry, which facilitates a system where the fishermen's working conditions are dependent on the goodwill of their captains and boat owners.
5. The foreign fishermen live in constant fear of deportation, which is sometimes exacerbated by their captains through threats and intimidation.

Longline fishing is inherently difficult and strenuous work. However, because of the structural vulnerabilities described throughout this report, some foreign fishermen in the Hawaiian longline fishing industry face particularly difficult working and living conditions. Indeed, the research that our team conducted in Hawai'i reveals the prevalence of indicators of forced labor under ILO standards, and the existence of some coercive practices prohibited under the TVPA. To ameliorate the existing vulnerabilities to forced labor, this report recommends: (1) creating a visa that would allow the fishermen to temporarily enter the U.S.; (2) clarifying U.S. agency jurisdiction to improve monitoring and enforcement; and (3) amplifying and improving the industry's business and human rights practices—including through the adoption of a formal, confidential grievance process. These recommendations are detailed in the following, final section of this report.





## VIII. RECOMMENDATIONS

Based on the team’s legal research and field research with fishermen, experts, and a wide range of industry and community stakeholders, we offer the following recommendations. These recommendations would resolve the fishermen’s lack of legal status, clarify regulatory jurisdiction and responsibilities, and encourage responsible corporate practices by actors in the Hawaiian longline fishing supply chain.

### A. RESOLVE FOREIGN FISHERMEN’S LACK OF LEGAL STATUS

Creating a visa for the foreign fishermen has great support across industry stakeholders, including fishermen, captains, HLA leadership, and local agencies, for its potential to limit vulnerabilities and improve how fishermen travel from their home country to the United States.<sup>339</sup>

- Reintroduce and pass S.2071, the Sustainable Fishing Workforce Protection Act,<sup>340</sup> or similar legislation, to:
  - Create a “D-3” visa<sup>341</sup> that allows the fishermen to temporarily enter the United States when their vessels are docked in Hawaii and grants them “lawfully admitted” status.
  - Permit fishermen to remain in the United States for limited periods between deployments to sea.<sup>342</sup>

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339 Informal Interview with HLA Leadership, *see supra* note 116; Informal Interview with Vessel Captain, *see supra* note 43; Interview with Nakamura, *supra* note 36.

340 Senator Hirono and Hawai’i representatives in the U.S. House of Representatives introduced the bill in November 2017 in response to the AP reports. The bill aimed to address issues with DLNR’s issuing of fishing licenses and create a D3 visa for the fishermen. The bill did not leave committee. *See* S. 2071, 115th Cong. (2017); *see also* H.R. 4224, 115th Cong. (2017).

341 The bill would create a third visa option under section (15)(D) of the INA. *See id.*

342 This bill allowed the fishermen to remain in the United States for 29-day periods.

## B. CLARIFY REGULATORY JURISDICTION AND RESPONSIBILITIES

As the DOJ Interagency Working Group on Human Trafficking in Fishing in International Waters works to clarify agency jurisdiction, individual agencies should continue to advance efforts to protect the foreign fishermen of the Hawaiian longline fleet.

- Expand the Authority of NOAA Boat Observers to Include Forced Labor:
  - Regularly train observers on indicators of forced labor and human trafficking and on safely reporting evidence of forced labor and human trafficking.
  - Require observers to report evidence of forced labor and human trafficking and ensure the confidentiality of such reports.
  - Protect boat observers from retaliation for reporting on forced labor.
- Improve Quality of Coast Guard Health and Safety Inspections and Train Inspectors on Forced Labor Indicators:
  - Conduct regular and thorough health and safety inspections of fishing vessels, with particular attention to the cleanliness of the fishermen's living conditions and the condition of the fishermen's food.
  - Provide regular training to U.S. Coast Guard employees on indicators of and reporting requirements for forced labor and human trafficking.
- Formalize CBP Procedures and Responses to Forced Labor Allegations and Poor Working Conditions and Increase Transparency Regarding This Work:
  - Ensure formal guidelines are followed regarding when CBP will respond to allegations of forced labor and poor working conditions. Formalize policies for investigations of referred cases of forced labor and human trafficking.
  - Make the guidelines and policies discussed above available to the public.

## C. ESTABLISH BUSINESSES' HUMAN RIGHTS RESPONSIBILITIES

The Hawaiian longline industry should help protect workers' well-being<sup>343</sup> by implementing a formal, confidential grievance mechanism for lodging complaints, and by improving accountability and compliance by industry stakeholders.

- Develop a Formal, Confidential Grievance Mechanism that:
  - Incorporates the perspectives of fishermen and advocates to better understand why fishermen may be unable or reluctant to voice grievances, including trauma and other barriers.
  - Includes clear responsibilities for each actor involved and establishes clear timeframes for resolving issues.<sup>344</sup>

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343 See, e.g., Dana Raigrodski, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains*, 8 WM. & MARY BUS. L. REV. 71, 75 (2016) (Ensuring worker's wellbeing is also a "win" for employers. Such efforts can improve supply chain efficiency, productivity, and reliability, and may ultimately enhance businesses' short-term bottom line and long-term value creation.).

344 See U.N. Guiding Principles, ¶ 31, *supra* note 186.

- Provides assistance in the languages of the fishermen and ensures confidentiality.
- Demonstrates its effectiveness by disclosing examples of outcomes, including information on whether any remedies provided were satisfactory to the victims of the allegation or the groups representing the victims.<sup>345</sup>
- Leverage Existing Accountability Mechanisms to Ensure Universal Compliance with Code of Conduct:
  - The HLA should monitor members' compliance with the Code of Conduct and continue exercising its leverage<sup>346</sup> to require labor brokers and vessel owner-members to abide by its Code of Conduct.
  - Monitoring and enforcement systems should be designed in consultation with foreign fishermen.

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<sup>345</sup> See, e.g., Know the Chain, *supra* note 103.

<sup>346</sup> The HLA has begun to use its leverage by excluding noncompliant vessels from selling fish at the auction, the most lucrative fish market in Hawai'i; however, additional mechanisms are needed to identify which captains are not complying with the HLA Code of Conduct.



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