

## ARTICLE

### DEFINING FORCED AND FREE LABOR, 1930–1957

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#### ABSTRACT

*This Article explores international debates around forced and free labor in the twenty-seven years following agreement on the Forced Labour Convention in 1930. On the coercive labor side, it explores the discussions around the abolition of penal sanctions in the colonial context, the 1956 Supplementary Convention on the Abolition of Slavery, and the 1957 Abolition of Forced Labour Convention. On the side of free labor, it considers the struggles to ensure the protection of freedom of association in international law that ultimately resulted in the 1948 Freedom of Association and Protection of the Right to Organise Convention. Overarchingly, the Article concludes that despite considerable attention to the area of law and policy in question, the discussions that took place over the mid-twentieth century were responsible for a weakening of subsequent understandings of labor coercion and freedom in two key ways: by directing attention away from the idea of indirect coercion, and by suggesting labor coercion and labor freedom should be considered as disconnected issues.*

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*ABBREVIATIONS*

CENL	Committee of Experts on Native Labour
ECOSOC	United Nations Economic and Social Council
FLC	Forced Labour Convention
ILC	International Labour Conference
ILO	International Labour Organization
NLS	Native Labour Section

*I. INTRODUCTION*

This Article concerns forced labor. It does not proceed from the standard premise that forced labor is a clearly defined and readily comprehensible category, however. Rather, drawing on historical investigation, it considers “forced labor” as a concept that has been deployed and defined with an extensive degree of mutability and open-endedness over time. This is not to say that any individual at any time is free to use such a concept exactly as they would like. Rather, it is to suggest that such concepts are defined, to a substantial degree at least, by large scale political dynamics and contestations.

In particular, this Article considers the twenty-seven years between 1930, when the Forced Labour Convention (“FLC”) was

agreed,<sup>1</sup> and 1957, when it was complemented by the Abolition of Forced Labour Convention.<sup>2</sup> Ideas of labor coercion were subject to extensive contestation prior to as well as in the process leading to agreement on the FLC.<sup>3</sup> The first outcome of the discussions of the 1920s was the Slavery Convention, agreed in 1926.<sup>4</sup> It was widely felt at the time that that convention failed to tackle the full slate of coercive labor practices taking place in the colonial context in particular, however, and thus the 1930 FLC was agreed as well. While agreement on the FLC gave more form to the concept of ‘forced labor,’ and introduced new international legal obligations into the area, the clarity the FLC provided remained sharply limited. Moreover, as this Article explores, agreement on the FLC did not end debate as to the appropriate mode of understanding and limits on coercive labor, but rather inaugurated a new period of reform and contestation.

Different states ratified the FLC with different degrees of alacrity. Ireland, Liberia, the United Kingdom, and Sweden were the first to do so, in 1931.<sup>5</sup> The Convention entered into force on May 1, 1932, one year after receipt of the second ratification, that of Liberia, as per the terms of Article 28 of the convention.<sup>6</sup> Australia, Denmark, Norway, Spain, Bulgaria, and Japan ratified the Convention in 1932, the Netherlands and Chile in 1933,<sup>7</sup> Nicaragua, Mexico, and Italy in 1934, Finland in 1936, France in 1937, and New Zealand in 1938. By the end of the 1930s, therefore, the Convention had been in force for eight years and had been ratified by five European colonial powers (the United Kingdom,<sup>8</sup> France, the Netherlands, Italy, and Spain), Japan, Australia,

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1. See Forced Labour Convention, 1930, ILO No. 29.

2. See Abolition of Forced Labour Convention, 1957, ILO No. 105.

3. See generally Christopher M. Roberts, *Re-Covering Forced Labor: Colonial Foreclosures and Forgotten Potential*, 25 MELB. INT’L L. J. 1 (2025).

4. Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 254.

5. For these and the following dates of ratification, see *Ratifications of C029 – Forced Labour Convention, 1930, ILO No. 29*, [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312174](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312174) [<https://perma.cc/M4HR-GWK3>].

6. See Forced Labour Convention, *supra* note 1, art. 28.

7. Yugoslavia also ratified the Convention in the first three years. See Native Labour: Relations with the BIDI, The Geneva Forced Labour Convention, 1930, ILO Archive File 206/1/01/3 [hereinafter Native Labour].

8. Article 26 of the Convention stated that colonial powers might specify if they wished their obligations not to apply in certain of the territories they controlled. *Supra* note 1, art. 26. The United Kingdom indicated the convention would apply to all not-fully self-governing colonies, protectorates, and mandated territories. Comm. of Experts on Native Labour (CENL),

New Zealand, and Liberia, as well as six other European states and three South American states.<sup>9</sup>

The regime established by the FLC was, however, vague and open-ended in several aspects. While the FLC required its ratifiers to immediately outlaw the use of forced labor for private purposes, forced labor for public purposes was only to be gradually abolished, though no deadline was set.<sup>10</sup> The Convention also included exceptions that allowed forced labor to continue to be employed in the context of military service, emergencies, civic obligations, communal services and labor imposed as a penal sentence.<sup>11</sup> Perhaps most significantly, the definition of forced labor—“all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”—was vague.<sup>12</sup> Taken together, these open-ended issues meant that even though forced labor was to some degree outlawed in international law, the precise boundaries of that illegality were deeply uncertain and open to contestation.

Despite the uncertainty as to the precise boundaries of forced labor and accompanying legal obligations, the period saw substantial efforts by several colonial powers to reform their laws. These reform attempts began in the 1920s, as discussions were underway, and were undertaken by states that didn't ratify, as well as those that did ratify, the FLC.<sup>13</sup> In practice, changing demographic and global economic

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Fourth Session, *Introductory Note*, 4–5 (Oct. 1932). Southern Rhodesia, Sudan, and India were among the areas excluded. *See id.* at 5–7.

9. Belgium and Portugal, two of the colonial powers most heavily criticized for abusive labor practices over the preceding decades, delayed their ratifications until 1944 and 1956 respectively. Russia also ratified the Convention in 1956 (three years after Stalin's death). As of 2024, the United States has still not ratified the Convention.

10. What was initially agreed was only that the matter would be reconsidered five years after the Convention came into force—in practice, therefore, since the convention came into force in May 1932, in May 1937. No firm decision was made at that point, however. For more, *See Roberts, supra* note 3 at 36–7.

11. Forced Labour Convention, *supra* note 1, art. 2(2).

12. *Id.* art. 2(1).

13. Important reforms were made by the Portuguese empire through the 1928 Native Labor Code and the 1930 Colonial Statute. In the French empire, a decree aimed at the regulation of compulsory labor was promulgated in 1930. In the British Empire, the Under-Secretary of State for the Colonies called for reform of colonial master and servant ordinances at a Conference of Governors and other Representatives of the Colonies, Protectorates and Mandated Territories in London in 1930. The laws in Nigeria, the Gold Coast, Gambia, Sierra Leone, Kenya, Nyasaland, the Straits Settlements, the Federated Malay states, North Borneo and Fiji

realities—which increased labor supply and reduced labor demand—may have been at least as important as normative developments in supporting a reduction in coercion.

In addition to reforms undertaken by colonial powers in practice, the Native Labour Section—the specialized body within the ILO that had driven the process leading to the Forced Labour Convention—continued to feel further attention to colonial coercive labor was necessary. In particular, the NLS focused on three issues: recruitment, the terms of contracts, and the use of penal sanctions. To assist its work, the NLS turned at first to a body of “experts” that had been consulted throughout the drafting of the FLC, the Committee of Experts on Native Labour (“CENL”). Beginning in 1928 and continuing through 1934, the NLS and the CENL engaged in research and discussions on the three subjects mentioned. These discussions ultimately resulted in three treaties: the Recruitment of Indigenous Workers Convention of 1936;<sup>14</sup> the Contracts of Employment (Indigenous Workers) Convention of 1939;<sup>15</sup> the Penal Sanctions (Indigenous Workers) Convention of 1939.<sup>16</sup> Of these discussions those on penal labor were the most meaningful and contested. The nature and significance of this period of debate over the appropriate boundaries of coercive labor is considered in Section II.

The period following the Second World War saw both an explosion of interest in and attention to human rights and renewed impetus towards the expansion of labor rights. Among other things, the political space was opened up for the ILO to pursue a goal that had always been central to its agenda but on which international progress was impossible in the interwar period: the protection of freedom of association within international law. A mere three years after the war ended, agreement was reached in 1948 on the Freedom of Association

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were all reformed to a certain degree in the period, by forced labor ordinances or otherwise. In the Dutch East Indies, the 1931 ‘Coolies Ordinance’ provided for the gradual abolition of penal sanctions in the outer Dutch Indies, a step further supported by Ordinance 8 of June 1932. *See* Native Labour, *supra* note 7; *see also* ILO, CENL, Fifth Session, *Penal Sanctions*, at 80 (Apr. 1934).

14. ILO, Recruitment of Indigenous Workers Convention, 1936, ILO No. 50.

15. ILO, Contracts of Employment (Indigenous Workers) Convention, 1939, ILO No. 64.

16. ILO, Penal Sanctions (Indigenous Workers) Convention, 1939, ILO No. 65.

and Protection of the Right to Organise Convention (“Freedom of Association Convention”).<sup>17</sup> Section III explores this history.

Attention to Forced Labor revived but also substantially transformed following the Second World War as well. The postwar attention to the subject had three distinct strains. First, several states pushed for continuing attention to penal sanctions—continuing the emphasis on the need to push back against colonial labor extraction. The ultimate result of this process was the 1955 Abolition of Penal Sanctions (Indigenous Workers) Convention.<sup>18</sup> Second, the anti-slavery tradition, focused primarily on what were understood as persisting traditional practices restrictive of liberty, was revived, leading eventually to the 1956 Supplementary Convention on the Abolition of Slavery.<sup>19</sup> Third, in 1947 the United States pushed for renewed attention to forced labor with an emphasis on the practices of the Soviet Union in particular.<sup>20</sup> This sparked a decade long process, eventually resulting in the 1957 Abolition of Forced Labour Convention.<sup>21</sup> These three international legal developments are considered in Section IV.

The twenty-seven years following agreement on the FLC, in sum, saw extensive ongoing debate over how coercive labor should be conceptualized and governed within international law. These debates were not simply different parts of the same project; rather, numerous different concepts and political projects were embedded in the different visions and legal standards that were advanced. Particularly notable were both colonial powers’ desire to slow and minimize regulation of

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17. ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948, ILO No. 87.

18. ILO, Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955, ILO No. 104.

19. Supplementary Convention on the Abolition of Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

20. The United States’ vision of forced labor was supported by organizations such as the Commission against the Concentration Camp Regime, founded in 1949, and took one particularly powerful form in Herling’s 1951 *The Soviet Slave Empire*. See ALBERT K. HERLING, *THE SOVIET SLAVE EMPIRE* (1951); Sandrine Kott, *The Forced Labor Issue between Human and Social rights, 1947-1957*, 3 HUMANITY 231, 326–27 (2012). On another level, the development of a theory of totalitarianism which connected Nazi and Soviet governments in the war’s wake helped to advance the United States’ vision of totalitarianism as well. See, e.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951). For a critique of the ways the concept of totalitarianism has been used, see Enzo Traverso, *Totalitarianism Between History and Theory*, 55 HIST. & THEORY 97 (2017).

21. See ILO, Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, 320 U.N.T.S. 291.

their empires in practice, and the United States' attempt to use a particular vision of forced labor as a cudgel in the intense years of Cold War conflict following the Second World War. Collectively, these dynamics helped to reorient thinking about forced labor as such. The limitations in the understanding of forced labor that developed through this process are addressed in Section V.

## II. ATTEMPTS TO FURTHER LIMIT COERCIVE LABOR AFTER THE FORCED LABOR CONVENTION

### 1. Initial Discussions

As noted in the introduction, the FLC was agreed upon in 1930. The understood purpose of the FLC was to address some of the worst forms of labor coercion, short of slavery, taking place around the world.<sup>22</sup> When the CENL was established in 1927, its immediate purpose was to assist the NLS in preparing the draft of the FLC. At the same time, from the beginning there was an understanding that not all important issues relating to colonial labor would be covered by the FLC. As such, it was expected that in addition to considering forced labor, the CENL should also devote attention to issues such as recruiting, contract terms, and the like, in recognition that these colonial practices also involved a substantial share of coercion.<sup>23</sup> While recruiting and contract issues might indicate less coercion on their own, collectively they could amount to high levels of compulsion. As the NLS's 1932 report put it, the combination of "long . . . contract[s]," "penal sanctions, by which were punished breaches of the contract on the part of the worker," and "the more or less fraudulent methods sometimes used by the recruiters" collectively "meant that the Native worker was placed in a situation bordering on slavery."<sup>24</sup>

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22. See Roberts, *supra* note 3. Initially and for much of the drafting of the FLC, it was understood the text being prepared was aimed at the colonial context in particular. Towards the end of the process, it was decided the convention should be understood as having universal effect, however. *Id.*

23. ILO, CENL, Fourth Session, *Introductory Note* (Oct. 1932). As the Twelfth ILC put it, "even the suppression of forced labour will not abolish all forms of compulsion to labour of which workers can complain, and particularly in connection with long-term contracts." *Id.*

24. ILO, CENL, Fourth Session, *General Note on the Question of Contract Labour*, at 24 (Oct. 1932).

In response to these issues, the NLS prepared several reports between 1928 and 1934, the details of which were discussed at length by the CENL. Among other themes, the NLS's reports addressed the need to limit over-recruiting, avoid undue influence by government or tribal leaders, prevent abusive recruitment practices, ensure workers understood their contracts and that contract terms were controlled by law, limit the employment of children, limit contract length, and ensure medical care be provided to workers from the moment of engagement on.<sup>25</sup> While some CENL members complained, for instance arguing that "too much attention had perhaps been devoted to the natives' interests by the Office" and that more attention should be paid to employers' interests, others pushed back, including by resisting the suggestion that "exceptional extensions of contracts" should be possible in some cases, on the grounds that "this seemed to be forced labour."<sup>26</sup> While weakened by the CENL's efforts, ultimately the process led to generally positive text on both recruiting and contract terms.

The most contentious issue in the post-FLC discussions, however, was that of penal labor sanctions. From one point of view, it was odd that the whole notion of penal labor sanctions had survived the forced labor discussions, as any reasonable interpretation of forced labor, defined as involuntary labor extracted under the menace of a penalty, would seem immediately to cover penal sanctions. That this was not immediately understood by the colonial authorities involved in the process testifies to how normalized those penalties were in the period, as well as to how unable those figures were to clearly perceive the deeply coercive nature of the systems they had overseen. At the same time, in addition to providing an indication of the profound cognitive dissonance at play within the international legal processes in question, the discussions on penal labor also made clear that some—in this case, the officials within the NLS—recognized that such sanctions constituted a form of coercion essentially indistinguishable from forced labor, and were determined to work for their repeal.

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25. See ILO, CENL, Second Session (Dec. 1928); ILO, CENL, Fourth Session, *supra* note 24.

26. See ILO, CENL, Second Session, *Minutes of the Fifth Sitting*, at 38, 42 (Dec. 6, 1928). Camille Lejeune, the French Director of Colonial Companies, was the committee member responsible for the regressive suggestions in both cases. *Id.*

The tension between penal sanctions' advocates and opponents played out repeatedly in the CENL's discussions in the early 1930s. In 1932, one British representative, Fremantle, supported Weaver, the ILO's representative, in opposing penal sanctions, while another British representative, Lord Lugard, supporting their maintenance.<sup>27</sup> Gohr, the Belgian representative, supported Lugard, arguing that penal sanctions remained necessary "when dealing with Natives who had no property of any kind," in order not to "weake[n] the obligatory character of engagements undertaken by them," and noted that while "it was said that public opinion was inclined to favour the abolition of penal sanctions . . . the Committee ought not to concern itself too much with public opinion," but rather "should have in view only the requirements of colonisation."<sup>28</sup> For his part, Lugard resisted even the restriction of penal sanctions relative to children, arguing that "if the employer were not able to punish a mischievous boy, he would send him to his father, with the result that the boy would probably be punished more heavily."<sup>29</sup> Lugard felt so strongly about the issue, in fact, that he prepared a separate (albeit brief) memorandum in support of the maintenance of penal sanctions.<sup>30</sup>

## 2. *The 1934 Discussions*

The NLS dug its heels in, however, and prepared an extensive report on the subject as background to the subsequent CENL discussions in 1934.<sup>31</sup> While noting a certain trend towards the recognition of the problematic nature of such sanctions, the report also observed how extensively they continued to be deployed in practice, including in the Belgian, British, Spanish, French, Dutch and Portuguese empires.<sup>32</sup> In addition to directly authorizing penal sanctions, the report observed that national laws enabled workers to be imprisoned in other ways as well, including, for instance, by requiring

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27. See ILO, CENL, Fourth Session, at 88–90 (Oct. 27–Nov. 2, 1932).

28. See *id.* at 90.

29. See *id.* at 106.

30. See ILO, CENL, Fourth Session, *Penal Sanctions: Memorandum by Lord Lugard*, (Oct. 1932).

31. See ILO, CENL, Fifth Session, *Penal Sanctions*, (Apr. 1934).

32. See *id.* at 1–33.

them to pay damages in certain circumstances and enabling their detention should they not do so.<sup>33</sup>

The NLS also took it upon itself to summarize the arguments against abolished penal labor sanctions that it had encountered. First, it observed how some defenders of penal sanctions argued that “the legal systems of modern civilised States cannot be applied in an unmodified form to primitive peoples,” as “the Native mind would be entirely unable to distinguish between the conceptions of fines and damages.”<sup>34</sup> Second, some argued that “civil procedure . . . is unsuitable to the great majority of Natives owing to the difficulty of enforcing civil judgments,” since “Native[s] . . . frequently [had] no individual property.”<sup>35</sup> Third, some argued that “the employer, particularly if he has incurred expense in the recruiting of the worker, must be given an effective guarantee against irresponsible breaches of contract on the worker’s part.”<sup>36</sup> Fourth, some argued that that failure to apply the more effective penal approach would lead “the employer [to] take the law into his own hands.”<sup>37</sup> Fifth, some argued that “there is nothing inhuman or of the nature of servitude about the penal sanctions,” which were “freely entered into by the worker,” who was “free to depart when the contractual period of service [came to] an end.”<sup>38</sup> Sixth, some argued that “the presence in the contract of penal sanctions affecting the worker makes it possible to include penal sanctions affecting the

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33. *See id.* at 16. The NLS adopted a nuanced approach relative to different sorts of penal sanctions as well: while some were directly condemned—in particular “failure to commence the service stipulated in the contract,” “absence without valid reason or without permission,” “refusal to perform the work stipulated in the contract” and “desertion”—others were deemed more complicated—in particular, “drunkenness causing incapacity to work,” “neglect to perform work or careless performance of work,” the “use of abusive or insulting language,” “menaces, violence, or other disorderly conduct,” the “use without permission of the employer’s property,” “any acts done wilfully or through drunkenness which involve the employer in material damage or loss,” the “omission to perform, wilfully or through drunkenness, any acts necessary to preserve the employer from material damage or loss” and “leaving employment without repayment of advances on wages.” *Id.* at 34–35.

34. *Id.* at 36.

35. *Id.* The NLS also noted—here, it seems, speaking more with its own voice—that “mak[ing] damages a charge on wages would . . . lead to an undesirable indebtedness [sic] of the Native to the employer [that] might be tantamount to compulsion to labour,” and that states might also, problematically, penalize individuals who hadn’t paid off their debts with imprisonment. *Id.* at 36–37.

36. *Id.* at 37.

37. *Id.*

38. *Id.*

employer, and thus to protect the worker more effectively against inhuman or fraudulent treatment by bad employers.”<sup>39</sup> And seventh, some argued that “penal sanctions have an educative value in bringing the Native to understand the sanctity of the contract and thus assisting him to accomplish that essential step in his progression towards civilisation that is represented by the change from status to contract.”<sup>40</sup>

The NLS presented its own counter-arguments to these points as well. First and foremost, the NLS’s report noted “advocates of the abolition of penal sanctions are no doubt most strongly swayed by the view that penal sanction contracts are a form of servitude.”<sup>41</sup> Particularly “repugnant” from this perspective was the fact that penal sanctions might lead to a situation in which “human beings may be constrained by the menace of criminal penalties”—in short, forced labor.<sup>42</sup> The report described this as “the complete alienation of liberty . . . irreconcilable with [the] modern idea of human liberty and of the dignity of the human being.”<sup>43</sup> While the report presented this as the most important argument against penal sanctions, it advanced others as well. First, that “in practice the penal sanction system is a failure”:

“[I]nstead of being a factor in the education of primitive peoples to labour it causes them to regard labour with aversion, instead of teaching them to respect the sanctity of the contract as a higher form of human relations than those based on status it teaches them to regard it as an instrument of oppression, [and] instead of inculcating respect for the law it brings the law into contempt in their eyes.”<sup>44</sup>

Second, that penal sanctions “protec[t] the bad employer, since the employer who treats his workers well has . . . no difficulty in obtaining and keeping labour.”<sup>45</sup> And third, that penal sanctions “militat[e] against both public order and good order in the undertaking, since the

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39. *Id.* at 37–38.

40. *Id.* at 38.

41. *Id.* at 38. As the report continued, “the continuance [of such servitude] is intolerable at this time when the conscience of civilised humanity now almost universally condemns all forms of servitude except as a punishment for crime.” *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 38–39.

45. *Id.* at 39.

Native, so easily made into a criminal by the criminal punishment of civil offences, loses his sense of right and wrong or is led in desperation to commit real crimes.”<sup>46</sup>

Despite having been called out in advance, as it were, several CENL members still voiced their opposition to the NLS’ proposal to abolish penal sanctions, almost always utilizing one of the arguments the NLS had foreseen. Merlin, the chief French representative, opened the discussions here, suggesting that motivating a local population to work was challenging, and as such, extensive discretion should be left to local authorities.<sup>47</sup> Orde-Browne, the chief British representative, also demonstrated skepticism concerning the abolition of penal sanctions for workers. Orde-Browne suggested:

The existence of penal sanctions is a testimony to primitive conditions but not, in my opinion, necessarily to oppressive conditions. Their existence testifies rather to the essential freedom of the labourer, who is otherwise so ungettable that the criminal law has to be invoked in order to exercise any sort of coercion. In a civilised country a man has held over him the whole time the threat of discharge and loss of employment. That, in many of the primitive countries, is no threat at all to the worker; that is to say, the worker is in a singularly free position. He is in no way the individual who exists in civilised countries and who is sometimes called ‘the wage slave’. The fact that economic pressure is so great that it is possible to dispense with any sort of penal sanction in a civilised country does not, to my mind, necessarily mean that in countries where the conditions are so primitive that one has to resort to penal sanctions, the conditions are consequently oppressive.<sup>48</sup>

In sum, in other words, both Merlin and Orde-Browne supported penal sanctions precisely because they viewed them as a means of

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46. *Id.*

47. See ILO, CENL, Fifth Session, *Stenographic Record*, at 12–21 (May 4, 1934)(in French) (the numbering in the original passes directly from page 14 to page 21). In addition to arguing that poor subject populations could not be controlled with civil sanctions, Merlin suggested the task would be challenging even with penal sanctions too, as local populations “did not want to work” and would often find prison life comparatively nice. *Id.*

48. *Id.*, at 11–12.

compelling labor, which they clearly continued to feel entirely appropriate, despite the FLC having been in force for two years or so.

Cooke, the former director of Native Labour in South Africa, expressed different arguments against the abolition of penal sanctions for workers. First, he argued that if penal sanctions for workers were abolished, penal sanctions for employers too would have to be abolished, weakening workers' protection in the aggregate.<sup>49</sup> In addition, he suggested the abolition of "official discipline" would "engender[r] and stimulat[e] illegal methods of discipline."<sup>50</sup> Cooke also observed that in South Africa, civil sanctions might be particularly harsh, allowing individuals' minimal property to be seized, and afterwards for those individuals to be imprisoned in any case.<sup>51</sup> Cooke concluded by enunciating clearly and unashamedly what has since come to be referred to as the rule of colonial difference, suggesting "penal sanctions" should be applied "in regard to the very untutored people, while those who have, by means of civilisation, passed the stage where it is necessary to inculcate the sanctity of a contract into them should be relieved from the general laws applicable to Natives under the system of penal sanctions."<sup>52</sup>

Fremantle recognized and pushed back against "the argument that because penal sanctions of some kind are applied to the employer . . . they are necessarily applicable to the worker," however, observing the argument lacked substance.<sup>53</sup> Fremantle's other contributions were less progressive, however: he indicated that penal sanctions were necessary to support long contracts, which he implicitly took as necessary (failing a "redistribution of the population," of which he was in favor, but which was not taken seriously as a proposal).<sup>54</sup> Summing up towards the end of the discussions, Cooke noted that he felt there had been general consensus for his suggestion that "penal sanctions are still, and will continue to be, necessary for some time," until some unspecified future point when "an appreciable number of workers have sufficiently advanced in civilisation to respect the sanctity of contracts."<sup>55</sup>

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49. *See id.* at 21–22.

50. *Id.* at 22.

51. *See id.* at 22–24.

52. *Id.* at 24.

53. *Id.* at 51.

54. *Id.* at 51–52.

55. *Id.* at 61.

Given the resistance, Weaver and the NLS were forced to go back and reconsider their draft. The new draft called for “penal sanctions [to] be abolished as soon as possible,” but with “certain transitional measures” adopted in the meantime.<sup>56</sup> Weaver explained that he preferred this to the opinion the CENL had actually expressed, that “penal sanctions for breaches of written contracts of employment by workers are necessary in the case of primitive peoples who are not sufficiently evolved to respect the sanctity of contracts and to whom civil sanctions are inapplicable by reason of their social and economic organisation,” as, he noted, that “expression” would “certainly lead to considerable criticism and will not be understood.”<sup>57</sup>

Orde-Browne, Fremantle and Cooke opposed this position, however, arguing that the viewpoint Weaver sought to suppress was more accurate and ought to be maintained.<sup>58</sup> Their resistance was ultimately overcome, however, thanks to opposition from the French delegates, Merlin and Lejeune, and the Belgian Chair, Gohr, in particular—though only after Merlin had substituted new text, aimed at replacing the “too clear and too brutal” text of the NLS, by dropping the reference to steps taken “as soon as possible,” in order to give states as much time as they might like.<sup>59</sup>

What can be observed from the CENL’s later discussions? On the one hand, the majority of the committee members grudgingly accepted, to one degree or another, that penal sanctions should eventually be replaced—a hard position to entirely resist, given the NLS’ push in that direction. At the same time, they expressed a variety of argument pushing back against the abolition of penal sanctions, produced a text that was exceedingly weak on the issue, and were functionally able to delay any serious international pressure on the issue being exerted for a substantial amount of time. This was all the more remarkable in that any reasonable reading of the FLC would make clear such sanctions were already outlawed—a point the “experts” were almost, but not quite, able to grasp. Underlying almost all of the experts’ arguments was the unquestioned premise that compulsion to labor was necessary—demonstrating not only their colonial mindset, but how little the long process leading up to and following agreement on the FLC had meant for them.

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56. *Id.* at 62–63.

57. *Id.*

58. *See id.* at 63–71, 80–81.

59. *Id.* at 133.

### 3. *Moving Beyond the “Experts”*

The CENL’s 1934 session was the last this curious and deeply colonial body would have. In 1936, the Recruitment of Indigenous Workers Convention was agreed upon with little further debate needed.<sup>60</sup> Further process was required relative to the other issues that had been considered, however. At its third Sitting in 1938 the International Labour Conference (“ILC”) formed a new body, the Committee on Indigenous Workers’ Contracts, to look at the relevant issues.<sup>61</sup> The Committee considered the relevant issues between June 6 and 10.<sup>62</sup> While both contract terms and penal sanctions were considered, the discussions on penal sanctions were the more interesting and consequential. The South African, Belgian, and French employers’ representatives and the South African government representative all urged against the abolition of penal sanctions, with the South African employers’ representative for instance suggesting “abolition of th[at] system would result in chaos.”<sup>63</sup> The British and Dutch workers’ representatives pushed back, however.<sup>64</sup> Following that, the Committee on Indigenous Workers’ Contracts adopted a set of questions for governments imagining not only the potential abolition of penal sanctions, but also various other more limited restrictions on the use of such sanctions.<sup>65</sup>

On June 17, the ILC considered the Committee on Indigenous Workers’ Contracts’ report.<sup>66</sup> The Belgian employers’ representative indicated that the employers in general were unwilling to approve the proposed questionnaire, including due to its suggestion that penal sanctions should be abolished “at an early date” in particular.<sup>67</sup> In response, Kupers, the Dutch workers’ representative, suggested the use of penal sanctions in many cases essentially equated to forced labor.<sup>68</sup> Ross, the British workers’ representative, supported Kupers,

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60. ILO, Recruitment of Indigenous Workers Convention, 1936, ILO No. 50.

61. See ILO, *Int’l Lab. Conf., Twenty-Fourth Session, Rec. of Procs.*, at 21–25 (1938) [hereinafter *ILO Rec. of Procs., Twenty-Fourth Session*].

62. See ILC, 24th Session, *Draft Report of the Committee on Indigenous Workers’ Contracts*, ILO Archive File D624/1001/1 (1938).

63. *Id.* at 51–54.

64. See *id.* at 54–56.

65. See *id.* at 56–63.

66. ILC, 24th Session, *Record of Proceedings*, Eleventh Sitting (1938).

67. *Id.* at 275.

68. See *id.* at 279–80.

suggesting related measures were “in the direct line of descent from old slavery law.”<sup>69</sup> The government and workers’ delegates ultimately voted together to place the issue on the agenda of the next ILC, outvoting the employers’ representatives.<sup>70</sup>

The Committee on Indigenous Workers’ Contracts met again during the twenty-fifth ILC in 1939.<sup>71</sup> While the French, Australian, and South African government representatives, and the French employers’ representative, speaking on behalf of the employers’ group generally, resisted the immediate abolition of penal sanctions, the Brazilian, Indian, and Chinese government representatives as well as the Dutch, British, and South African workers’ representatives supported the abolition of such sanctions.<sup>72</sup> The British government representative emphasized potential agreement on language suggesting penal sanctions should be abolished “progressively and as soon as feasible.”<sup>73</sup> While the Indian government representative countered this by attempting to have the reference in the text to progressive abolition replaced by an obligation to abolish penal sanctions “immediately,” this proposal was rejected by fourteen votes to four.<sup>74</sup>

The ILC commenced its consideration of the proposed conventions on June 24.<sup>75</sup> The Indian government representative reiterated that India would have preferred the immediate abolition of penal sanctions, in which position it was supported again by the Chinese and Brazilian government representatives, but was willing to support the language proposed.<sup>76</sup> Notable was the intervention of Soekiman Wirjosandjojo, a workers’ representative from the Netherlands, who thanked the ILO for its work in the area, but expressed his “regret” that “only one single direct representative of the indigenous workers themselves could take part, whereas, on the other hand, representatives of the non-indigenous employers were fairly numerous.”<sup>77</sup> Wirjosandjojo also criticized the text for not taking a

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69. *Id.* at 286.

70. *See* ILC, 24th Session, *Record of Proceedings*, Thirteenth Sitting, at 315–17 (1938).

71. *See* ILC, 25th Session, *Draft Report of the Committee on Indigenous Workers’ Contracts*, ILO Archive File D625/1001/1 (1939).

72. *See id.* at 62–65.

73. *Id.* at 74.

74. *Id.* at 67–69.

75. *See* ILC, 25th Session, *Record of Proceedings*, Fourteenth Seating, at 301–21 (1939).

76. *See id.* at 305–06, 310–11.

77. *Id.* at 303–04.

firmer stance relative to the abolition of penal sanctions, noting that in consequence “the system of penal sanctions will be maintained for a number of years longer, in spite of the fact that the injustice of the system has been fought for almost a quarter of a century,” and suggested the penal labor system was “slavery in disguise.”<sup>78</sup> Clauson, the British government representative, indicated that he “entirely disagree[d] with” Wirjosandjojo’s “way [of] look[ing] at this matter,” arguing that as the loss to the employer might be as serious as that resulting from theft, about which there was no dispute as to the reasonableness of criminal sanctions, failing to fulfill one’s contractual employment duty might also be appropriately criminalized.<sup>79</sup> Clauson also suggested that if the convention called for immediate abolition, no one would ratify it.<sup>80</sup> In response, Nimbkar, the Indian workers’ representative, praised the Indian government for “tak[ing] the lead on this question of upholding the civil liberties of the downtrodden people of the world,” and expressed his “shoc[k]” at Clauson’s argument, which he characterized as “absurd.”<sup>81</sup> In addition, Nimbkar highlighted the racism of the existing approach, and emphasized that it was used to “depriv[e] the worker of his right to strike” in particular.<sup>82</sup> Ultimately, despite the contentious nature of the debates, the result was unanimous approval of the existing text.<sup>83</sup>

What can be discerned from this later stage of the discussions? Most centrally, progress was enabled by changing fora: while the CENL had, if anything, become deeply conservative, the ILC’s tripartite process provided a forum in which workers and more progressive governments had a greater voice. While the outcome was still a compromise, it was a compromise on better terms than might otherwise have been secured.

#### 4. Conclusion

The final work of the ILC and the Committee on Indigenous Workers’ Contracts led to two further treaties being agreed in 1939. The first was the Contracts of Employment (Indigenous Workers)

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78. *Id.* at 304.

79. *Id.* at 306.

80. *See id.*

81. *Id.* at 311.

82. *Id.* at 312.

83. *See id.* at 313.

Convention.<sup>84</sup> Both the Recruitment of Indigenous Workers Convention and the Contracts of Employment (Indigenous Workers) Convention laid out detailed schemes aimed at better regulating aspects of the overarching conditions of work of a category of workers at the time labeled “indigenous persons.”<sup>85</sup> While broadly positive, both conventions were likely overall too fine-grained in an area subject to extensive discretionary authority, power imbalances, and abuse to be of much use in practice. At the same time, both conventions were in general motivated by a desire to move colonial labor from an exceptional position, towards one more closely parallel to that applied in non-colonial contexts, and as such were at least indicative of a constructive direction of travel.<sup>86</sup>

The most theoretically important of the initial three treaties agreed to complement the FLC was the 1939 Penal Sanctions (Indigenous Workers) Convention.<sup>87</sup> It was also the briefest of the three treaties, the core of its substance being contained in a single article, which required “all penal sanctions for any breach of contract to which this Convention applies [to] be abolished progressively and as soon as possible” and “all penal sanctions for any such breach by a non-adult person whose apparent age is less than a minimum age to be prescribed by law or regulations [to] be abolished immediately.”<sup>88</sup>

The 1939 Penal Sanctions Convention was the most significant of the relevant conventions in that it attempted to do something broader:

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84. Contracts of Employment (Indigenous Workers) Convention, 1939, ILO No. 64, [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312209](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312209) [<https://perma.cc/F2XL-RN4J>] [hereinafter Indigenous Workers Convention].

85. On this curious early history of reference to “indigenous persons” in international law, see LUIS RODRÍGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989)* 1–52 (2005).

86. A second convention focused on contracts, the Contracts of Employment (Indigenous Workers) Convention (ILO Convention No. 86), was agreed upon in 1947. Like its predecessor, Convention 64, Convention 86 generally attempted to support less abusive labor relations in the colonial context, with attention to maximum periods of service in particular. See Indigenous Workers Convention, *supra* note 84; Contracts of Employment (Indigenous Workers) Convention, 1947, ILO No. 86, [https://normlex.ilo.org/dyn/nrmlx\\_en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312231](https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312231) [<https://perma.cc/K7NJ-7NC4>].

87. Penal Sanctions (Indigenous Workers) Convention, 1939, ILO No. 65, [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312210](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312210) [<https://perma.cc/8KBT-G7ZY>].

88. *Id.*, art. 2.

to fundamentally rewrite, in a certain way, the understanding of labor relationships. As the CENL's discussions on the issue revealed, colonial authorities were keen not to lose penal sanctions as a means of compelling labor. Despite the weakness of the progressive realization clause in the final convention, the convention made clear that penal sanctions were on the wrong side of developing international norms.

The theoretical advance represented by the 1939 Penal Sanctions Convention was not matched by practice, however. Agreement on the convention as such had taken nine long years, prolonging the period in which legal systems that clearly constituted forced labor might continue. The years after agreement on the 1939 Penal Sanctions Convention would continue to see slow progress, moreover. Eight years after its agreement, in 1947, only two states, Great Britain and New Zealand, had ratified the convention.<sup>89</sup> While that was enough to bring the Convention into force in 1948, clearly, more pressure remained necessary. Perhaps more seriously still, the 1939 Penal Sanctions Convention ultimately advanced a constrained understanding of penal sanctions—focused only on the most direct penal sanctions, rather than penal sanctions that might follow on from civil liabilities. The impacts of the long process and attenuated result here are discussed further in Section V.

### III. THE RIGHT TO FREEDOM OF ASSOCIATION

Forced labor was not the only issue on the agenda of those concerned with labor rights in the mid-twentieth century, of course. Another major issue, perhaps the most central of all, was freedom of association. It was not possible to produce an international agreement on freedom of association prior to the Second World War. In the new rights-supportive atmosphere that followed the war, however, a major new treaty became possible: the Freedom of Association and Protection of the Right to Organise Convention of 1948 (“Freedom of Association Convention”).<sup>90</sup>

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89. See *Ratifications of Co65 – Penal Sanctions (Indigenous Workers) Convention, 1939* (No. 65), [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312210:NO](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312210:NO) [<https://perma.cc/8KBT-G7ZY>].

90. See *Freedom of Association and Protection of the Right to Organise Convention, 1948*, ILO No. 87,

How did the ILO get to the Freedom of Association Convention? The way was paved by substantial pressure earlier in the century. During the First World War years, the American Federation of Labor called for the international protection of freedom of association,<sup>91</sup> as did an international conference convened by the French Confédération Générale du Travail and the British General Federation of Trades Unions in Leeds in November 1916.<sup>92</sup> In February 1919, leaders of socialist parties convened an “International Labour and Socialist Conference” in Berne, organized by the Belgian socialist and Second International leader Emile Vandervelde, the British Minister of Labour Arthur Henderson, the French socialist Albert Thomas, and Samuel Gompers, the leader of the AFL.<sup>93</sup> The conference called, among other things, for full respect for freedom of association (as well as for the establishment of an international labor office).<sup>94</sup> The same month the League of Nations established a fifteen person body, the Commission on International Labour Legislation, tasked with developing a new, permanent organization focused on international labor standards and developing the basic outline of an international set of minimum standards.<sup>95</sup> The right of association was among the nine key issues the new body was tasked with pursuing.<sup>96</sup> Most significantly, the preamble to the ILO’s 1919 Constitution included “recognition of the principle of freedom of association” as essential to address “injustice, hardship and privation” and thereby to provide for “the peace and harmony of the world” generally.<sup>97</sup>

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[https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C087](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087) [<https://perma.cc/C8UV-32PV>] [hereinafter Freedom of Association Convention].

91. See Markku Ruotsila, ‘*The Great Charter for the Liberty of the Workingman*’: *Labour, Liberals and the Creation of the ILO*, 67 *LABOUR HIST. REV.* 29, 33 (2002).

92. See ANTONY ALCOCK, *HISTORY OF THE INTERNATIONAL LABOUR ORGANISATION* 16 (1971); Reiner Tosstorff, *The International Trade-Union Movement and the Founding of the International Labour Organization*, 50 *INT’L REV. SOC. HIST.* 399, 403–05. (2005). A 1917 conference in Berne urged the same. See *id.* at 411–12.

93. See Jasmine Van Daele, *Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization*, 50 *INT’L REV. SOC. HIST.* 435, 441 (2005).

94. See *id.*

95. See *id.* at 453.

96. See ALCOCK, *supra* note 92, at 35.

97. ILO Constitution (1919), Preamble,

[https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:KEY,en,ILOC,/Document](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:KEY,en,ILOC,/Document) [<https://perma.cc/QJN7-YKWG>].

In January 1926, largely in response to the growing strength of the Fascist Party in Italy, the ILO's Governing Body decided to put freedom of association on the organization's agenda, commencing at the 10<sup>th</sup> Session of the ILC in 1927.<sup>98</sup> While the labor suppression taking place in Italy was particularly troubling, the situation was hardly positive elsewhere either, as many states maintained tight controls over freedom of association in the period.<sup>99</sup>

The ILC appointed a Committee on Freedom of Association to come to an initial determination as to what might be done on the matter of freedom of association.<sup>100</sup> The first issue of major debate was the proposal by Tzaut, the Swiss employers' representative, that the questionnaire should ask not only about individuals' right to combine but also about their right "not to combine."<sup>101</sup> The proposal was narrowly adopted.<sup>102</sup> A second major subject of debate arose following the suggestion by Olivetti, the Italian employers' representative, that workers' ability to combine should only be allowed "in accordance with the law."<sup>103</sup> Elvin, one of the British workers' representatives, observed that the amendment would allow "present restrictions on the right [to freedom of association] to be maintained or even to be increased."<sup>104</sup> Olivetti's amendment was rejected by a narrow vote.<sup>105</sup> However, a proposal by the Hungarian government representative, Marffy-Mantuano, that language stipulating "in a legal form" should be added to the reference to workers' ability to combine was narrowly approved.<sup>106</sup> A final issue of debate was the proposal by Gerard, the Belgian employers' representative, that "the interests of the community" be recognized in addition to "public order" as a grounds on which associations' actions might be limited.<sup>107</sup>

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98. See ALCOCK, *supra* note 92, at 74–75.

99. See *id.* at 76.

100. See generally ILC, 10th Session, *Commission on Right of Association, Minutes*, ILO Archive File D 610/500/1/1 (1927).

101. *Id.*, Nineteenth Sitting, at 343–44.

102. *Id.*, Third Sitting, at 8, and Appendix VI, at 645, 654.

103. *Id.*, Appendix VI, at 646.

104. *Id.*, *Fourth Sitting* at 5.

105. See *id.*, Appendix VI, at 646.

106. *Id.*, Appendix VI, at 646–47.

107. *Id.*, Sixth Sitting, at 8.

The ILC commenced its consideration of the questionnaire prepared by the Committee on Freedom of Association on June 11, 1927.<sup>108</sup> Several workers' representatives emphasized the fundamental importance of the right.<sup>109</sup> Once again, debate principally turned around the workers' desire to delete three aspects of the proposed language as it stood: the reference to "the right not to combine"; the suggestion that workers' organizations' formation would only be respected where they "observ[ed] the legal formalities"; and the suggestion that the actions of trade unions should not be permitted where "contrary to the interests of the community," which, it was suggested, would impose too broad and vague a restriction.<sup>110</sup> The first proposal was defeated, but the second succeeded, following a close vote.<sup>111</sup> Ultimately, the workers' group did not consider the proposed questionnaire sufficiently strong, however, and hence voted against proceeding on the issue for the moment.<sup>112</sup>

The next important step came at the twenty-sixth ILC in 1944, at which the Philadelphia Declaration was issued, repositioning the ILO as a human rights organization, in harmony with the new discourse of international norms developing at the time.<sup>113</sup> Among other things, the Philadelphia Declaration declared that "freedom of expression and of association are essential to sustained progress."<sup>114</sup> In addition, the Philadelphia Conference produced numerous resolutions and recommendations, including the Social Policy in Dependent Territories Recommendation, which among other things guaranteed "the rights of employers and employed alike to associate for all lawful purposes" and required states to take "all measures practicable under local conditions . . . to promote effective equality of treatment in employment" and to

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108. *Id.*, Sixteenth Sitting, at 264.

109. *See id.*, Sixteenth Sitting, at 268–84, 339–56.

110. *Id.*, Sixteenth Sitting, at 270, 237–44, 280–81, 283–84.

111. *See id.*, Sixteenth Sitting, at 270, 237–44, 280–81, 283–84.

112. *See id.*, Sixteenth Sitting, at 374–75, 384–86.

113. *See* ILO, *Declaration of Philadelphia* (May 10, 1944). Earlier, at a 1941 conference at Columbia University, the Dutch workers' representative, Jacobus Oldenbroek, supported the position pushed by an advisor to the Dutch workers' delegation from the Dutch East Indies, calling for full respect for the right of freedom of association everywhere and for the establishment of trade unions in the colonized world. A resolution in support of those principles was adopted by the majority at the conference. *See* DANIEL MAUL, *HUMAN RIGHTS, DEVELOPMENT AND DECOLONIZATION: THE INTERNATIONAL LABOUR ORGANIZATION, 1940-70* 46 (2012).

114. *Declaration of Philadelphia*, *supra* note 113, § 1(b).

“discourag[e] . . . discrimination in the negotiation of collective agreements or on grounds of trade union membership.”<sup>115</sup>

Contention over the appropriate approach to colonized areas—known in ILO parlance of the time as “dependent territories”—was particularly intense during the meetings of the Committee on Social Policy in Dependent Territories at the twenty-seventh ILC in 1945 in Paris.<sup>116</sup> Workers’ delegates from dependent territories, supported by organizations such as the World Federation of Trade Unions, an international trade union network broadly aligned with the Soviet Union, argued for universal labor standards.<sup>117</sup> In particular, workers’ delegates argued “that building trade unions from the bottom up and giving them real opportunities for action had to be accepted as a method of development in the dependent territories, rather than maintaining that development had to be a precondition for the establishment of trade unions.”<sup>118</sup> Employers’ representatives and colonial governments, meanwhile, pushed back, arguing workers were not ready to represent themselves.<sup>119</sup>

This took form in the discussions of the Committee on Dependent Territories through the British employers’ representative’s suggestion that collective bargaining be encouraged only “when and where conditions justify it,” which was shortly thereafter replaced by the South African government’s suggestion of language suggesting collective bargaining should be encouraged “as far as practicable and with due regard to the stage of social and economic development of the people concerned.”<sup>120</sup> The Belgian, French, Dutch, and South African employers’ representatives all supported the proposal.<sup>121</sup> It was criticized by various workers’ representatives, including those from Australia, Britain, the United States, Belgium, Chile, Nigeria, and South Africa, who suggested it was a purposeful and harmful

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115. Social Policy in Dependent Territories Recommendation, 1944, ILO No. 70, Art. 43(1). As Maul notes, while colonial powers voiced their support for the progressive views of the declaration and accompanying recommendations at the conference itself, this appears to have been motivated more by the need for enhanced normative legitimacy in the moment than true commitment. See MAUL, *supra* note 113, at 78–80.

116. ILC, 27th Session, *Committee on Dependent Territories*, ILO Archive File ILC 27-505-2-3-8 (1945) [hereinafter *Comm. on Dependent Territories*].

117. See MAUL, *supra* note 113, at 91.

118. *Id.* at 95.

119. See *id.* at 91–92, 95.

120. *Comm. on Dependent Territories*, *supra* note 116.

121. See *id.* at 2–3.

weakening of the proposed text.<sup>122</sup> The Australian, Belgian, French, Mexican, and Dutch government representatives also criticized the proposed amendment.<sup>123</sup> The proposed amendment was ultimately rejected by forty votes to twenty-six.<sup>124</sup>

The Belgian government proposed a new amendment, however, which indicated that the authorities would appoint persons to assist workers where they “believe[d] that the workers’ organisations have not arrived at the stage of development necessary to enable them to negotiate on a footing of equality.”<sup>125</sup> The Indian workers’ representative pushed back by suggesting that “such advice and guidance should not be given except on the request of the unions,” in order “to avoid governmental interference.”<sup>126</sup> The amendment was ultimately adopted, however, by fifty-nine votes to eight.<sup>127</sup>

Ultimately, the draft produced by the committee achieved relatively plain sailing through the main meeting of the ILC.<sup>128</sup> The Social Policy in Dependent Territories (Supplementary Provisions) Recommendation was thereafter issued.<sup>129</sup> Article 1(2) thereof remained on the lines the Belgian government had proposed.<sup>130</sup> While advocates of colonial workers’ rights had pushed back against more limiting progressive realization language, many ultimately accepted a formulation in which, while the development of unions and collective bargaining was encouraged, the authorities were given a key tutelary role in the process—more of a victory for governments than for workers, at the end of the day.

Several important steps were taken in 1947. A conference of the World Federation of Trade Unions in Dakar in April 1947 called for equal workers’ rights in all colonial territories.<sup>131</sup> Back at the ILO, Joseph Hallsworth, Chairman of the Workers’ Group, called for

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122. *See id.* at 3.

123. *See id.* at 4.

124. *See id.*

125. *Id.*

126. *Id.* at 5.

127. *See id.*

128. *See* ILO, 27th Session, *S Record of Proceedings*, Seventeenth, Eighteenth & Nineteenth Sittings (Nov. 1–2, 1945).

129. ILO Rec. 74, Social Policy in Dependent Territories (Supplementary Provisions) (1945).

130. *See id.*, Art 1, ¶ 2.

131. *See* MAUL, *supra* note 113, at 109.

stronger affirmation of colonial workers' rights and an end to colonial representatives' insistence that colonial workers weren't ready for self-representation.<sup>132</sup> Hallsworth's call helped lead the ILO to adopt the Right of Association (Non-Metropolitan Territories) Convention that same year.<sup>133</sup> The Convention required states to guarantee "by appropriate measures" "the rights of employers and employed alike to associate for all lawful purposes."<sup>134</sup> Colonial activists were disappointed that employers and colonial powers had prevented inclusion of a clause that would have banned discrimination on the grounds of trade union membership.<sup>135</sup> At the same time, the Convention went beyond what states were willing to accept at the time, only coming into force in 1953, after the United Kingdom ratified it in 1950 and New Zealand in 1952.<sup>136</sup> Despite the fact it was unable to garner much support, the Convention represented an important normative step, advancing the idea of freedom of association for all within the international order.

Meanwhile, following pressure from both the World Federation of Trade Unions and the American Federation of Labor, ECOSOC urged the ILO to place the issue "upon its agenda [for] consideration at the forthcoming session of the International Labour Organization."<sup>137</sup>

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132. *See id.*

133. *See* ILO, Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84), July 11, 1947.

134. *Id.*, Art. 2.

135. *See* MAUL, *supra* note 113, at 110. In addition, the Convention did not go into extensive detail as to how far the right to freedom of association should be understood to extend.

136. *See* ILO, *C084 – Ratifications of Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84)*, NORMLEX, [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312229:NO](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312229:NO) [<https://perma.cc/65AQ-X9U8>]. Only seven other states ratified the convention subsequently, the Freedom of Association Convention having immediately become much more important. On colonial powers' resistance to the convention, *see* MAUL, *supra* note 113, at 216.

137. Economic and Social Council, Fourth Session, *Resolutions Adopted by the Economic and Social Council*, Resolution 52 (IV) (Mar. 24, 1947); *see also* WFTU, *Report on the 5th session of the Economic and Social Council held at Lake Success in July and August 1947*, WFTU Archive File ARCH01666 73; ILC, 30th Session, *Report No. 7: Freedom of Association and Industrial Relations, Text of the Memorandum and Draft Resolution of the WFTU & Text of the Memorandum and Draft Resolution of the AFL* (1947); ECOSOC, Doc. E.C. 2/28 (Feb. 28, 1947); ECOSOC, Doc. E.C. 2/32 (Mar. 13, 1947); ALCOCK, *supra* note 91, at 252–3; J. Hilgert, *Article 23(4) Trade Union Rights and the United Nations policy of devolution on labour relations*, 60 LABOR HISTORY 503, 508 (2019). Take up of the issue by the ILO was heavily

The ILO subsequently moved fast, preparing a report on “freedom of association and industrial relations.”<sup>138</sup> At the thirtieth ILC in 1947 the subject was considered first by the Committee on Freedom of Association.<sup>139</sup> Among other issues, the Committee considered and rejected a proposal that would have indicated the right not to associate in addition to the right to associate.<sup>140</sup> The matter was then considered by the full ILC, resulting in the adoption of several resolutions, articulating principles relating to freedom of association and calling for adoption of a convention.<sup>141</sup>

Trade unions’ right to freedom of association was registered in the human rights context as well. While it mentioned freedom of association in general, the first draft of the Universal Declaration of Human Rights (“UDHR”), presented to the drafting committee on June 4, 1947, did not mention trade unions explicitly, nor did the draft that emerged after the First Session of the Drafting Committee.<sup>142</sup> Shortly thereafter, René Cassin, one of the members of the Drafting Committee, changed this situation by introducing text that read: “Every worker has the right to protect his professional interests. In particular, he may, either in person, or through his representatives or his trade union organization, take part in the collective determination of conditions of work, the preparation of general plans of production or distribution, and in the supervision and management of the undertaking in which he works.”<sup>143</sup> The final text of the

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supported by David Morse, Under Secretary of Labor in the US government at the time, and Director-General of the ILO beginning the following year. See MAUL, *supra* note 113, at 212.

138. See ALCOCK, *supra* note 92, at 254. The threat the matter might be taken out of the ILO’s hands by ECOSOC likely prompted its speed on the matter, as well as helping to diminish opposition from the USA, which might otherwise have been hostile, especially given the simultaneous success of business interests there in pushing through the Taft-Hartley Act in mid-1947. See *id.*

139. ILC, 30th Session, *Committee on Freedom of Association*, ILO Archive File ILC 30-507-2 (1947).

140. See *id.*, Tenth Sitting, at 3-5.

141. See ILC, 30th Session, *Proceedings*, Nineteenth and Twentieth Sittings, at 299–308, 322–29 (1947); ALCOCK, *supra* note 92, at 254. Hilgert argues that the approach to trade union rights the ILO developed in the period placed those rights generally under the framework of freedom of association, understood in a more traditional liberal form. The WFTU pushed back against this, however, including by issuing their own declaration of trade union rights, rooted as Hilgert notes “in part . . . within the French notion of occupational duty and the public interest.” Hilgert, *supra* note 137, at 509–11.

142. See Hilgert, *supra* note 137, at 505.

143. See Comm’n. on Human Rights, Rep. of the Drafting Comm. to the Comm’n. on Human Rights, Economic and Social Council, U.N. Doc. E/CN.4/21 (July 1, 1947), *cited in* Hilgert, *supra* note 137, at 506.

UDHR thus contained both a general assertion of the right to freedom of association, and an assertion of the right to form and join trade unions in particular.<sup>144</sup>

A draft convention on freedom of association, prepared by the ILO on the basis of the last discussions of the Committee on Freedom of Association,<sup>145</sup> was discussed at the thirty-first ILC in 1948. The Government of South Africa attempted to introduce an amendment that would have given governments power to decide whether or not to apply the relevant standards to “population groups whose social and economic development or social and cultural institutions are analogous to those of the population of non-metropolitan territories.”<sup>146</sup> This was opposed by several other representatives, however, including Aguirre, the Ecuadorian government representative, who argued that “it was a question of discrimination under the pretext of a lower level of culture.”<sup>147</sup> The amendment was rejected by seventy-five votes to nine.<sup>148</sup> The issue of the right not to associate came up as well.<sup>149</sup> While the employers agreed to drop their proposal for conventional text on the issue, they sought in the place of that text a reference in the accompanying report to the general agreement that “nothing in the Convention already adopted . . . deprived a worker or an employer of his inherent freedom not to exercise his right of association if he so chose.”<sup>150</sup> The workers’ representatives pushed back here too, with one, Fenton, the International Representative of the American Federation of Labor and a Deputy Member of the Governing Body of the ILO, arguing the language “was based on the controversial [right to work] philosophy which characterised their point of view in the United States.”<sup>151</sup> Ultimately, the workers accepted the inclusion of the proposed language, however.<sup>152</sup>

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144. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948), arts. 20 & 23(4).

145. See ILC, 31st Session, *Report VII: Freedom of Association and Protection of the Right to Organise* (1948).

146. See ILC, 31st Session, *Comm. on Freedom of Association*, Eighth Sitting, 3, ILO Archive File ILC 31-507-2 (1948).

147. *Id.* at 4.

148. See *id.* at 5.

149. See *id.*, Thirteenth and Fourteenth Sitzings.

150. *Id.*, Fourteenth Sitting, at 2.

151. *Id.*

152. See *id.* at 3.

The issue was next discussed by the ILC.<sup>153</sup> After a brief discussion,<sup>154</sup> the Freedom of Association Convention was agreed.<sup>155</sup> The Convention guaranteed freedom to establish associations and to draw up their rules and activities, protected associations from being “dissolved or suspended by administrative authority,” and protected the right of associations to join federations.<sup>156</sup> The Convention was accepted by states fairly quickly as well, having been ratified by twelve states over the following three years, and by thirty-four in total a decade later at the end of 1958.<sup>157</sup> While the convention protected the right to freedom of association broadly and universally, colonial powers were able to insist on the inclusion of a provision allowing them to decide to which of their colonies the Convention would apply.<sup>158</sup> Throughout the 1950s the major colonial powers refused to grant real freedom of association to colonized peoples, moreover, preferring to exert as much control over local trade union movements as possible.<sup>159</sup> Despite the limitations in practice, the Freedom of Association Convention was a major milestone, laying out a progressive vision under which existing realities might be criticized and in accordance with which reforms might be urged. Notably, however, the Freedom of Association Convention was agreed in a context generally separated from the ILO’s discussions on forced labor, as discussed further below.

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153. See ILC, 31st Session, *Record of Proceedings* (1948).

154. See *id.*, Fifteenth Sitting (1948), 229–35. See also ALCOCK, *supra* note 92, at 254–58.

155. As Jouhaux put it, it was “certain that the present Convention . . . contains a number of gaps, a number of defects, and a number of points liable to misinterpretation. Nevertheless, as it was found that some countries were not applying freedom of association in their territories (or were applying it subject to restrictions), we considered it essential that the Conference should take positive action on a first Convention.” ILC, 31st Session, *Record of Proceedings*, Fifteenth Sitting, at 229 (1948).

156. Freedom of Association Convention, *supra* note 17, arts. 2–5.

157. By the end of 1951 the Convention had been ratified by the United Kingdom, Norway, Sweden, Finland, the Netherlands, Mexico, Iceland, Austria, Pakistan, Denmark, France, and Belgium. It came into force in July 1950. By the end of 1958, it had been ratified by Guatemala, Cuba, the Philippines, Uruguay, Myanmar, Ireland, Honduras, Russia, Ukraine, Belarus, the Dominican Republic, Israel, Poland, Germany, Romania, Albania, Hungary, Tunisia, Egypt, Luxembourg, Italy, and Panama as well. See ILO, *Ratifications of Co87 – Freedom of Association and Protection of the Right to Organise Convention, 1948*, NORMLEX, [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312232:NO](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232:NO) [<https://perma.cc/UGU6-YMZN>].

158. See Freedom of Association Convention, *supra* note 17, art. 12.

159. See MAUL, *supra* note 113, at 214–17.

#### IV. RENEWED ATTENTION TO LABOR COERCION(S)

In addition to freedom of association, renewed attention was devoted to the subject of coercive labor following the Second World War. This took three principal forms: further attention to the need for the abolition of penal sanctions; attention to various forms of slavery or servitude which it was felt had not been sufficiently clearly addressed by the 1926 Slavery Convention; and renewed attention to “forced labor,” albeit from a different perspective and with a different focus. The initiatives in these different areas are discussed in turn below.

##### 1. *The 1955 Abolition of Penal Sanctions (Indigenous Workers) Convention*

In 1949, the General Assembly asked the Trusteeship Council to take up the issue of penal sanctions, observing along the way the clash between penal sanctions and human rights.<sup>160</sup> The Trusteeship Council referred the issue to the ILO’s Governing Body, which in turn referred it to the Committee of Experts on Social Policy in Non-Metropolitan Territories.<sup>161</sup> With the sole exception of the South African and Portuguese representatives, the members of the Committee of Experts called for immediate steps to abolish penal sanctions, and suggested a new treaty, demanding immediate rather than progressive abolition of penal sanctions, should be agreed in support of such an end.<sup>162</sup>

In 1952, the need for a new, more urgent convention on the abolition of penal sanctions was placed on the ILC’s 1954 agenda.<sup>163</sup> At the thirty-eighth ILC in 1955 the Abolition of Penal Sanctions (Indigenous Workers) Convention received widespread support.<sup>164</sup> Once again, penal labor sanctions had been condemned, this time with greater urgency than before. As with the earlier discussions, however, the final convention only addressed “penal sanctions” as such, leaving states free to employ—or at least, not clearly outlawing—subtler

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160. *See id.* at 193.

161. *Id.* The Committee of Experts on Social Policy in Non-Metropolitan Territories found penal sanctions continued to be used extensively in Belgian, Portuguese, and British colonial Africa. *Id.*

162. *See id.* at 193–94.

163. *See id.* at 194.

164. *See id.* at 196; *see also* Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955, ILO No. 104.

regimes of criminalization that would exert a similar, albeit more indirect, coercion to work.

## 2. *The 1956 Supplementary Convention on the Abolition of Slavery*

In 1949 the General Assembly asked ECOSOC to address the problem of slavery,<sup>165</sup> and ECOSOC in turn issued a resolution instructing the Secretary General to establish “a small committee” to address the issue.<sup>166</sup> In 1950, the Ad Hoc Committee on Slavery issued its first report.<sup>167</sup> In it, the committee noted it had considered addressing and amending the definition of slavery given by the 1926 Slavery Convention, but that it ultimately felt “the 1926 Convention was satisfactory as regards slavery and the slave trade, but that its scope might be extended to include other institutions or customs resembling slavery, and to take into account such new forms of slavery and servitude as might have developed since 1926.”<sup>168</sup> The committee issued a second report, informed by its research, in 1951.<sup>169</sup> This time, while the committee again indicated that “there [was] not sufficient reason for discarding or amending the definition of slavery contained in Article 1 of the International Slavery Convention of 1926,” it clarified its reasoning further, indicating that “slavery is so various in its forms that it hardly admits of a strict definition and . . . there is little prospect of formulating a definition of it which will be so precise and comprehensive as to embrace all types of servitude in all societies.”<sup>170</sup> In other words, the existing definition of slavery was insufficient, but no ready alternative was apparent, so it was better to leave the existing definition in place while suggesting a broader scope to the concept in other ways.

The committee launched into this task by defining a range of “servitude[s],” including “debt bondage”; “the practice whereby a woman is given in marriage, without the right to refuse, at a price or

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165. *See* G.A. Res 278 (III), UN Doc. A/RES/278(III) (May 13, 1949).

166. ECOSOC Res. 238 (IX): The problem of slavery, UN Doc. E/RES/238(IX) (July 20, 1949).

167. *See* Report of the First Session of the Ad Hoc Committee on Slavery to ECOSOC, UN Doc. E/1660 (Mar. 27, 1950).

168. *Id.* ¶¶ 7, 28.

169. *See* Report of the Ad Hoc Committee on Slavery (Second Session), UN Doc. E/1988 (May 4, 1951).

170. *Id.* ¶¶ 10–11.

under conditions which give to the husband, to his clan or family, a right of disposal over her or over her children”; “mui tsai,” or “the sale of a child’s working capacity . . . when the conditions of the transfer were such as to permit the exploitation of the child regardless of its welfare”; “serfdom”; and “requiring an individual, or groups of individuals, to perform services for another individual, or for the collectivity.”<sup>171</sup> Ultimately, the committee recommended the agreement of a new convention, to supplement the 1926 Slavery Convention.

Following the work of the Ad Hoc Committee, the Secretary-General delivered a report on slavery to ECOSOC in 1953.<sup>172</sup> In 1954, the United Kingdom proposed a supplementary draft convention.<sup>173</sup> In accordance with a suggestion made by the Anti-Slavery Society, the text of Article 1 was amended to indicate that the new convention would require “the complete abolition or abandonment of” all the “institutions and practices” covered, “where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention” of 1926—indicating the ambiguity that still persevered as to the precise coverage of that convention.<sup>174</sup> In 1956, the Supplementary Convention on the Abolition of Slavery (“Abolition of Slavery Convention”) was agreed.<sup>175</sup> Overarchingly, the convention directed its primary attention to “debt bondage,” “serfdom,” forced marriage and the forced transfer of women, and

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171. *Id.* ¶¶ 13–19. Relative to the last point, the committee noted “these practices differ from those usually referred to as ‘forced labour’ in that they involve the status of the persons concerned.” *Id.* at 19.

172. *See* ECOSOC, Slavery, the Slave Trade, and Other Forms of Servitude, UN Doc. E/2357 (Jan. 27, 1953).

173. *See* ECOSOC, Slavery: Consultations Concerning the Desirability of a Supplementary Convention on Slavery and Its Possible Contents, UN Doc. E/2540/Add.4 (Apr. 12, 1954).

174. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Sept. 7, 1956), art. 1 [hereinafter Supplementary Convention]; *see also* ECOSOC, Commentary on the Drafting of a Supplementary Convention on Slavery and Servitude, UN Doc. E/AC.43/SR.4 (Feb. 9, 1956); ECOSOC, The Draft Supplementary Convention of Slavery and Servitude Submitted by the Government of the United Kingdom and Comments Thereon (Memorandum by the Secretary-General), UN Doc. E/AC.43/L.1 (Dec. 2, 1955); ECOSOC, Draft Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, UN Doc. E/2824 (Feb. 15, 1956); Jean Allain, *The Definition of Slavery in International Law*, 52 HOWARD L.J. 239, 267–8 (2009).

175. Supplementary Convention, *supra* note 174.

practices whereby “a child or young person . . . is delivered . . . to another person . . . with a view to the exploitation of the child or young person or of his labour.”<sup>176</sup>

The Abolition of Slavery Convention was agreed in a relatively expeditious manner, following proceedings that were far less contentious than those which led to the 1957 Abolition of Forced Labour Convention, discussed below. The Abolition of Slavery Convention also managed a remarkable balancing act between criticizing and affirming the definition of slavery provided by the Slavery Convention, essentially highlighting the ambiguity of that definition by showing explicitly that the practices covered might or might not constitute slavery, but nonetheless should be abolished. Overarchingly, the lack of controversy over the Abolition of Slavery could be traced to the fact it targeted practices that could broadly be understood as traditional and associated with pre-modern economies, in contrast to the clear imbrication of modern economic systems with forced labor.

### 3. *The Mudaliar Report and the 1957 Abolition of Forced Labour Convention*

In 1947, a petition by the American Federation of Labor, with the support of the US government and aimed at the Soviet Union, called on ECOSOC to commission the ILO to undertake a comprehensive study of forced labor.<sup>177</sup> As Kott has put it, the subsequent years of “discussion of forced labor unfolded as nothing less than an ‘American crusade.’”<sup>178</sup> This initiative faced some headwinds, not only due to resistance from the USSR, which argued that forced labor was “the basis of the capitalist economy” in the United States,<sup>179</sup> but also due to resistance from colonial powers, who were aware of the criticism they might face on the forced labor front and reluctant to have the area of

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176. *Id.*, art. 1.

177. See MAUL, *supra* note 113, at 203. This initiative was in part a way of pushing back against Soviet advocacy within ECOSOC at the time, which emphasized labor union freedom and equal pay for men and women. See *id.* On Soviet Union advocacy within ECOSOC generally, see HAROLD KARAN JACOBSEN, *THE USSR AND THE UN’S ECONOMIC AND SOCIAL ACTIVITIES* (1963).

178. Kott, *supra* note 20, at 326.

179. See *id.* at 328, citing ECOSOC, *Minutes*, 8th & 12th Sessions (1947).

investigation opened again.<sup>180</sup> The Governing Body of the ILO decided to press ahead, however, and in 1950 the UN and the ILO together created an Ad Hoc Committee charged with investigating forced labor, under the chairmanship of the Indian representative Ramaswami Mudaliar.<sup>181</sup>

The initial mandate of the committee tasked it with studying “the nature and extent of the problem raised by the existence in the world of systems of forced or ‘corrective’ labour, which are employed as a means of political coercion or punishment for holding or expressing political views, and which are on such a scale as to constitute an important element in the economy of a given country.”<sup>182</sup> While the intent was to give the committee a narrow focus, the committee resisted this, adopting a more global lens.<sup>183</sup> In significant part, this seems to have been motivated by the committee’s desire to avoid becoming simply a partisan tool of Cold War normative conflict.<sup>184</sup>

Still, however, the Ad Hoc Committee adopted strong conclusions relative to the USSR and various Eastern Bloc states. It complemented these with criticisms of the Belgian and Portuguese colonial empires and South Africa as well, however. Relative to the USSR, the committee concluded various aspects of Soviet “legislation constitute[d] the basis of a system of forced labour employed as a means of political coercion or punishment,” and noted that “persons sentenced to deprivation of liberty . . . are for the most part employed in corrective labour camps or colonies.”<sup>185</sup> Similar though generally more attenuated conclusions were reached relative to Bulgaria, Czechoslovakia, Hungary, Poland, and Romania.<sup>186</sup> Relative to the Belgian empire, the report called out “penal sanctions for breach of contract, which might lead to a system of forced labour for economic purposes,” as well as “certain forms of compulsory labour,” in particular “compulsory cultivation and compulsory labour in indigenous districts for public purposes” that “might . . . lead to a system of forced labour for economic purposes.”<sup>187</sup> Relative to the

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180. See MAUL, *supra* note 113, at 203–05.

181. See *id.* at 205; ECOSOC, Resolution 350 (XII) (Mar. 19, 1951).

182. ECOSOC, Resolution 350 (XII) (Mar. 19, 1951).

183. See Report of the *Ad Hoc* Committee on Forced Labour, UN Doc. E/2431 (1953), ¶¶ 9–18 [hereinafter *Ad Hoc* Committee on Forced Labour].

184. See Kott, *supra* note 20, at 326.

185. *Ad Hoc* Committee on Forced Labour *supra* note 183, ¶¶ 437–8.

186. See *id.* ¶¶ 133, 152, 213, 261, 311.

187. *Id.* ¶ 115.

Portuguese empire, the report found that while “forced or compulsory labour [was] prohibited in principle . . . there are certain restrictions and exceptions in this legislation which permit the exaction of forced or compulsory labour;” that “pressure [was] brought to bear” on locals to work “by responsible officials;” that Mozambiquan workers in the mines of South Africa might be considered subject to forced labor due to the “combined application of pressure at the recruiting stage and of the South African legislation governing breaches of labour contracts;” and that the system in “San Tomé . . . appears to be similar to . . . a system of forced labour for economic purposes.”<sup>188</sup> Relative to South (and South-West) Africa, the report concluded there was “a legislative system” that had “the indirect effect” of “channel[ing] the build of the indigenous inhabitants into agricultural and manual work and thus . . . creat[ing] a permanent, abundant and cheap labour force,” constituting “a system of forced labour of significance to the national economy.”<sup>189</sup> The committee extended a degree of grace regarding South Africa’s criminal penalization of communism, however, which it did not clearly condemn, despite the fact a strong case could be made it was similar (albeit political inverse) to the practices criticized in the communist context.<sup>190</sup>

Despite having received extensive information pointing to coercive labor in the French and British empires, the report concluded there was “no evidence of the existence, in territories administered by or associated with France, of a system of forced labour within the meaning of the Committee’s terms of reference,” nor in “the United Kingdom itself or any of the 12 territories under its administration.”<sup>191</sup> Relative to the United States, the committee went a little further, with the report noting “evidence of the existence of practices resembling forced labour” in the context of “illegal Mexican immigrants” and “certain instances of peonage”; nonetheless, the committee concluded that these did not “constitute forced labour within the meaning of [the

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188. *Id.* ¶ 291.

189. *Id.* ¶¶ 372, 375; *see also id.* ¶¶ 385–86.

190. *See id.* ¶¶ 370–71.

191. *Id.* ¶¶ 172, 509. The Committee did voice a slight note of caution relative to the emergency regulations in Malaya and the Voluntarily Unemployed Persons Ordinance in Kenya, however. *See id.* ¶ 510.

Committee's] terms of reference," as both practices were "directly outlawed in the United States."<sup>192</sup>

Overarchingly, the committee emphasized that its "enquiry ha[d] revealed the existence in the world of two principal systems of forced labour, the first being employed as a means of political coercion or punishment for holding or expressing political views, the second being employed for important economic purposes."<sup>193</sup> The former, which the committee observed was particularly "dangerous to human freedom and dignity" due to its "trespass[ing] on the inner convictions and ideas of persons to the extent of forcing them to change their opinions, convictions and even mental attitudes to the satisfaction of the State," was associated with the Soviet approach.<sup>194</sup> The latter, the committee suggested, was that which the ILO had been attempting to abolish since 1930.<sup>195</sup> In sum, therefore, both on the practical and the theoretical level, while the committee pushed back on the constrained terms of its original mandate, attempting to maintain some attention on the forms of forced labor that had been centrally contemplated by the FLC, the committee's final report still directed the weight of its normative condemnation against Soviet practices.

The center of gravity of the discussions on forced labor changed following the USSR's rejoining of the ILO in 1954.<sup>196</sup> At its 127<sup>th</sup> Session in 1954, the Governing Body of the ILO placed forced labor on the agenda of the thirty-ninth ILC, held in June 1956.<sup>197</sup> At the 1956 ILC, a report prepared by the ILO was discussed by the Committee on Forced Labour.<sup>198</sup> Overarchingly, the draft submitted by the ILO suggested that three areas be addressed: "forced labour as a means of political coercion or education or as a punishment for holding or expressing political views"; "forced labour as a normal method of mobilizing labour for purposes of economic development"; and forced

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192. *Id.* ¶ 546. The Committee did observe that "in some States the term 'vagrancy' is defined so broadly and the punishment for the offence is so severe that, if extensively interpreted and applied, it could lead to a system of forced labour for economic purposes," however. *Id.* ¶ 547.

193. *Id.* ¶ 548.

194. *Id.* ¶ 549.

195. *Id.* ¶ 555.

196. On the significance of the USSR's rejoining of the ILO generally see Harold Karan Jacobson, *The USSR and the ILO*, 14 INT'L ORG. 402 (1960).

197. See ILC, 39th Session, *Sixth Item on the Agenda: Forced Labour* (1956).

198. See *id.*; see also ILC, 39th Session, *Committee on Forced Labour – Draft Report*, ILO Archive File ILC 39-506-2-3 (1956).

labor “as a means of labour discipline.”<sup>199</sup> The Committee on Forced Labour broadened these categories slightly, adding to the potential sources of forced labor in the first political context labor penalizing “ideological opposition to the established political, social or economic system,” and removing the term “normal” from the description of the second category.<sup>200</sup> The committee also added three additional types of forced labor to be abolished: forced labor “as a policy of racial, social, national or religious discrimination”; forced labor “as a punishment for having participated in strikes”; and forced labor “that result[ed] from delays in the payment of wages which prevented the worker from changing his employment, or from debt bondage or systems of peonage.”<sup>201</sup> For its part, the USSR sought to make clear the text would apply to “self-governing” as well as “non-metropolitan territories,” and for the text to address, in addition to those forms of forced labor contemplated so far, “labour becoming compulsory as a consequence of the personal and economic dependence of the worker on the employer.”<sup>202</sup> The proposal was voted down by 103 votes to twenty-two, however.<sup>203</sup>

The Committee on Forced Labour reported on its deliberations to the full ILC on June 27.<sup>204</sup> Despite the defeat of the USSR’s proposal, the steps the Committee on Forced Labour had taken had substantially broadened the compass of the text. In the ILC, the USSR and its allies generally voiced support for those steps, while the United States and its allies expressed skepticism with the same changes.<sup>205</sup>

The Committee on Forced Labor met again in 1957. In general, the 1957 session saw proposals to expand the compass of the treaty restricted and some trimming back of the expansions made at the last session. While the United States had proposed at the last session that “international trade and commerce in goods produced by forced and compulsory labour” should “be prohibited,” it dropped the proposal

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199. *Id.* ¶ 11.

200. *Id.*

201. *Id.* ¶ 12. The last change was resisted by some, who “pointed out that so far the Committee had been considering forms of forced labour imposed by the competent authorities,” whereas “this amendment referred to matters arising out of the employer-worker relationship.” *Id.*

202. *Id.* ¶ 8.

203. *Id.*

204. *See* ILC, 39th Session, *Record of Proceedings*, 498–529 (1956).

205. *See id.*

this time in light of the difficulties it recognized such a proposal would have posed.<sup>206</sup> A proposal by the Philippine government that penal forced labor not be allowed “if the labour was unsuitable to the prisoner’s rehabilitation or physical condition or not reasonably paid for” was withdrawn after the Philippine government was assured the UN and ILO were working on the matter.<sup>207</sup> A proposal by the government of Czechoslovakia that forced labor “for the profit of employers” be penalized along with forced labor for economic development was defeated,<sup>208</sup> as was a proposal by the Albanian and Romanian governments that governments be required to “repeal all laws which prevented workers and their organizations from exercising their rights and from fighting effectively against forced labour.”<sup>209</sup> In addition, the clause agreed at the last session forbidding forced labor “that result[ed] from delays in the payment of wages which prevented the worker from changing his employment, or from debt bondage or systems of peonage” was removed after a close vote,<sup>210</sup> though it was made the subject of a separate resolution.<sup>211</sup>

On June 21, 1957, the Committee on Forced Labour reported on its conclusions to the ILC.<sup>212</sup> As at the previous year’s session, the discussion primarily involved criticism and accusations against the USSR by the USA and its allies and the inverse.<sup>213</sup> Ultimately, however, the new convention was unanimously adopted. The final text of the 1957 Abolition of Forced Labour Convention required states:

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206. *Id.* ¶¶15–7; see also ILC, 40th Session, *Report of the Committee on Forced Labour*, ¶ 4, ILO Archive File ILC 40-504-2-3 (June 1957).

207. ILC, 39th Session, *Record of Proceedings*, ¶ 21 (1956). In reality, the issue the Philippines sought to raise remains unaddressed. See, e.g., ACLU & Univ. of Chi. Law Sch. Glob. Hum. Rts. Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, <https://assets.aclu.org/live/uploads/publications/2022-06-15-captivelaborresearchreport.pdf> [<https://perma.cc/WE4Y-Z7V8>] (June 15, 2022).

208. ILC, 40th Session, June 1957, *Report of the Committee on Forced Labour*, ILO Archive File ILC 40-504-2-3, ¶ 12.

209. *Id.* ¶ 22.

210. *Id.* ¶¶ 17–20.

211. See Kott, *supra* note 20, at 329. Positively, a proposal by the Indian and Japanese governments to delete the clause penalizing the imposition of forced labor as a punishment for participating in strikes was also defeated. See also ILC, 40th Session, *Report of the Committee on Forced Labour*, ¶¶ 13–15, ILO Archive File ILC 40-504-2-3 (June 1957).

212. See ILC, 40th Session, *Record of Proceedings*, 344–64 (1957).

213. See *id.* at 347.

to suppress and not to make use of any form of forced or compulsory labour—

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination.<sup>214</sup>

As the final text revealed, the decade since renewed attention to forced labor had been proposed by the United States in 1947, with the intention of targeting the Soviet Union in particular, had seen the scope of the proposed inquiry expand. Attention had gone from forced labor “as a means of political coercion” in particular, to also consider forced labor for economic development, then for labor discipline as well, and finally to cover forced labor applied to those with alternative viewpoints, as punishment for having participated in strikes or as a means of racial or other discrimination too.

While the final convention was broader than it might have been, as a legal matter the Abolition of Forced Labour Convention was challenging to parse: given that forced labor was already outlawed, what exactly did this new convention require, as a matter of international law? A couple answers were possible. First, the FLC did not specify by exactly what date forced labor for public purposes must be completely outlawed. The Abolition of Forced Labour Convention made clear that for most purposes, one might imagine forced labor should, as of that convention’s agreement, be considered unacceptable, however—in essence, bringing to an end the temporal flexibility built into the FLC. Second, the FLC contained (and still contains) five grounds for exception, including relative to military service, emergency, penal labor, civil duties, and communal work. All of these

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214. *C0105 – Abolition of Forced Labour Convention, 1957 (No. 105)*, art. 1, NORMALEX, [https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105) [<https://perma.cc/YRK3-PZSF>].

might be understood as narrowed by the Abolition of Forced Labour Convention's provisions.

From a purely legalist perspective the Abolition of Forced Labour Convention broadened the scope of the prohibition of forced labor, therefore. At the same time, however, from a more conceptual perspective, a case can be made that the Abolition of Forced Labour Convention narrowed understandings of forced labor. The precise manner in which the Abolition of Forced Labour Convention may have done this—complimenting various other aspects of the diverging evolutions of the ideas of forced and free labor in the period considered—is explored further below.

#### V. MULTIPLYING LABOR COERCIONS, ISOLATING LABOR FREEDOM

From one point of view, international labor/human rights law as of the late 1950s was in a strong place. Slavery had been outlawed, twice, with two different sets of emphasis; forced labor had been outlawed, twice, with two different sets of emphasis; penal sanctions had been outlawed; and freedom of association had been guaranteed.

In reality, however, the enhanced density of the international labor/human rights regime was not as positive as one might have hoped or imagined. This was the product of two developments, which had narrowed the potential inherent at the moment the FLC was prepared in two distinct ways. First, one of the major achievements of the drafting of the FLC, enabled in large part by the hard work of the NLS, was the accompaniment of that treaty by the Forced Labour (Indirect Compulsion) Recommendation.<sup>215</sup> The Forced Labour (Indirect Compulsion) Recommendation observed that forced labor was not only produced by direct but also by indirect coercion, that is, measures which created a structural situation in which individuals were under increased pressure to take up any work available, and required states to take measures to address such forms of indirect compulsion as well.<sup>216</sup> The broader, more structural mode of understanding forced labor presented by the Forced Labour (Indirect Compulsion)

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215. *R035 – Forced Labour (Indirect Compulsion) Recommendation*, 1930 (No. 35), NORMALEX, [https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12100:::12100:P12100\\_INSTRUMENT\\_ID:312373](https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12100:::12100:P12100_INSTRUMENT_ID:312373) [https://perma.cc/7VAA-RJCD].

<sup>216</sup> *Id.*

Recommendation was largely buried and forgotten following the developments of the subsequent decades, however. How exactly did this forgetting take place?

The discussions on the outlawing of penal sanctions played a role. While the ultimate outcome was positive, it is important to note that it took twenty-five years, and a substantial amount of overtly racist colonialist pushback, following the FLC, to arrive at the 1955 Abolition of Penal Sanctions (Indigenous Workers) Convention. This was particularly troubling given the fact, as noted above, that any reasonable interpretation of the FLC would have recognized such sanctions were already outlawed. The long process to achieve a battle that should have already been won sucked much positive energy out of anti-forced labor activism, preventing more positive expansions and developments of the concept.

The 1956 Supplementary Convention on the Abolition of Slavery also played a role. Ever since European colonial powers had abolished their own massive involvement in slavery and the slave trade, largely in the nineteenth century, those same powers had utilized the idea of combatting slavery as a primary means through which to justify the expansion and legitimacy of their empires. While justified in itself, attention to more traditional forms of “slavery,” “servitude” and “slavery-like practices” continued to serve to direct attention away from the forms of coercion regularized within modern economies.

By far the most important step in the general invisibilizing of indirect compulsion, however, was the United States’ post-World War II campaign against Soviet forced labor. Despite the broadening of the Abolition of Forced Labour Convention over time (thanks to the advocacy of communist and formerly colonized or semi-colonized states), both the manner in which the process leading to the convention was driven and the convention itself suggested forced labor should be understood as the product of active state policy that directly compelled individuals to work, in one way or another. What was generally lost, in this context, was attention to the idea of indirect compulsion. Such a vision was directly rejected in refusal of the Soviet Union’s proposal that “labour becoming compulsory as a consequence of the personal and economic dependence of the worker on the employer” should be considered.<sup>217</sup> More broadly, however, it was not so much that the idea

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217. ILC, 39th Session, *Committee on Forced Labour – Draft Report*, ¶ 8, ILO Archive File ILC 39-506-2-3 (1956).

was directly confronted and challenged, but rather that attention was oriented in a different direction—towards more direct and intentional forms of coercion. The end result was to roll back the parameters of the concept of forced labor as it had been imagined in 1930, limiting the potential use of the concept to address the coercion inherent in economic systems more broadly, and helping to reimagine forced labor as a more exceptional condition.

The trajectory of debates over forced and free labor between 1930 and 1957 had another major impact as well. Another notable feature of the debates leading up to agreement on the FLC was the emphasis that workers' representatives at the 1929 International Labour Conference ("ILC") placed on the importance not only of obliging states to bring forced labor to an end as such, but also of ensuring the existence of mechanisms that would make that guarantee effective in practice. To this end the workers stressed, first and foremost, the necessity of freedom of association as a means of making any struggle against forced labor effective in reality. The workers' proposals in this regard were defeated, unsurprisingly, given that states were unwilling to recognize freedom of association in general at the time.<sup>218</sup> Still, however, the workers managed to make their point, and to emphasize the need for forced labor and freedom of association to be addressed together.

The 1948 Freedom of Association Convention was and remains a milestone in the advancement of workers' rights within international law. Unfortunately, however, the Freedom of Association Convention was advanced in a manner disconnected from the development of standards on forced labor. In addition, recognition of the linkage between freedom of association and forced labor was generally rejected throughout subsequent processes focused on forced labor. This was clearest in the defeat of the 1957 proposal by the Albanian and Romanian governments to emphasize the need to "repeal all laws which prevented workers and their organizations from exercising their rights and from fighting effectively against forced labour."<sup>219</sup> Divorcing this issue from the text of the 1957 Convention helped ensure that the issues of worker freedoms and forced labor would

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218. See Roberts, *supra* note 3.

219. ILC, 40th Session, June 1957, *Report of the Committee on Forced Labour*, ¶ 22, ILO Archive File ILC 40-504-2-3.

remain conceptualized on two different tracks, to the detriment of both. For its part, the struggle to ensure full enjoyment by all of their rights to freedom of association is weakened to the extent it is not made clear that anything less fails to minimize labor coercion.<sup>220</sup> On the other side, separating the two concepts results in an impoverished understanding of forced labor, cut off from conceptions of labor freedom. This understanding has significant negative consequences, presenting labor coercion as an extreme but limited phenomenon, appropriately tackled by strong state criminal enforcement measures or the like, rather than as a structural reality best tackled through empowering workers.

## VI. CONCLUSION

This Article has explored the extensive, largely forgotten debates that took place on the subject of coercive labor in the aftermath of the FLC. First, it focused attention on the various discussions of the 1930s, highlighting the resistance imperial authorities demonstrated to the abolition of penal sanctions in the colonial or “indigenous” context, despite (and in fact because of) the overt compulsion those sanctions exerted. Next, it considered the history of efforts to guarantee the right to freedom of association in international law, which ultimately resulted in the 1948 Freedom of Association Convention. Subsequently, it turned to consider the three different tracks on which international attention to coercive labor proceeded following the Second World War, with renewed attention to penal sanctions, slavery, and forced labor.

Looked at from one perspective, the period considered saw substantial advance in international legal standards on both labor freedom and labor coercion. The 1948 Freedom of Association Convention in particular was an immense achievement. At the same time, from a broader conceptual perspective, the period saw

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220. The weakness of global respect for the right to freedom of association is indicated by the International Trade Union Confederation’s 2022 Global Rights Index Report, which observed that as of 2020 “seventy-four percent of countries excluded workers from the right to establish and join a trade union.” Int’l Trade Union Confederation (ITUC), *Global Rights Index Report: The World’s Worst Countries for Workers*, at 5 (2022). Things are even worse for the large share of global workers in the informal economy. See Clément Nyaletsossi Voule (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Advancing the rights of freedom of peaceful assembly and of association of workers in the informal economy: Rep. on the rights to freedom of peaceful assembly and of association*, U.N. Doc. A/HRC/53/38/Add.3 (June 23, 2023).

understandings of forced labor constrained in two manners. First, the idea of indirect compulsion was largely forgotten and invisibilized. Second, reflections on labor coercion were distanced from understandings of and reflections on labor freedom. Together, these developments helped make forced labor seem an exceptional, intentional occurrence, appropriately addressed by outlawing, criminal sanctions, and the like. This was a vision in stark contrast to one which recognizes coercion running throughout economic systems, stressing the need to minimize coercion through broad, structural reforms aimed at diminishing individual needs and vulnerabilities, and by enhancing worker power. Hopefully it will be possible, in the twenty-first century, to reconstruct such a broader vision of labor freedom.