

U.C.L.A. Law Review

Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labor Convention

Adelle Blackett with Alice Duquesnoy

ABSTRACT

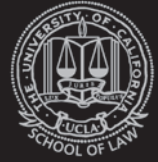
Slavery is not a metaphor, yet the implications of the centuries-long transatlantic slave trade, and the literature on the Black Atlantic, are mostly ignored in the fast and furious international legal invocations of modern slavery, particularly involving various forms of labor exploitation along global value chains and global care chains. This Article calls for a recalibration, arguing that transnational labor law is deeply historicized, rooted in the persisting presence of a racial capitalism that is too easily relegated to a distant past. It addresses mass incarceration and prison labor in the United States, both as it relates to the development of international treaties on slavery and forced labor, and as it has been monitored by the International Labour Organization's supervisory body, the Committee of Experts on the Application of Labour Standards. The ILO–U.S. dialogue on racial disparities in forced labor in prisons offers a rare instance in which the distinctly intertwined histories of slavery and the persistence of racial capitalism through prison labor are engaged. The dialogue supports the act of historical memory that operates in the work of those who understand mass incarceration and prison labor as part and parcel of the persistent afterlives of slavery through racial capitalism.

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I wish also to acknowledge the able editorial support of the *UCLA Law Review* and my research assistant, Lian Francis, B.C.L./J.D. candidate at McGill University. I am indebted to conveners Tendayi Achiume, Aslı Bâli and organizers of the 2020 *UCLA Law Review* Symposium,



Transnational Legal Discourse on Race and Empire, where this Article was presented, to discussant Aziza Ahmed, and to participants for insightful feedback. I am also grateful to conference organizer César Rosado Marzán, discussant Darrell Miller and participants at a 2019 conference at Chicago-Kent College of Law, “13th Amendment and Racial Justice”; and to organizer Karen Engle, respondent Bedour Alagraa and participants attending my guest lecture on “Racial Capitalism’s Challenge to International Labor Law: Addressing Prison Labor in the U.S.” in the Fall 2020 Rapoport Center for Human Rights and Justice, University of Texas’s Colloquium entitled “Inequality, Labor, and Human Rights: The Future of Work in the Age of Pandemic.” Of course, the usual disclaimers apply, and any errors remain my own.

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INTRODUCTION

Slavery is not a metaphor, yet the implications of the centuries-long transatlantic slave trade, and the literature on the Black Atlantic, are mostly ignored in the fast and furious international legal invocations of modern slavery.¹ But to accept that “[c]apitalism and racism . . . did not break from the old order but rather evolved from it to produce a modern world system of ‘racial capitalism’ dependent on slavery, violence, imperialism, and genocide,”² is to begin to understand why, rather than an aberration that can be addressed through strategies of criminalization by protective statecraft, slavery is part of how capitalism advances across uneven terrain. Moreover, as Stuart Hall insists, “racial discourses constitute one of the great, persistent classificatory systems . . . for the representation of, and the organization of practices around . . . the fact of difference.”³ Both acknowledgements are part of a broader sensing of the deeply intertwined character of Third World Approaches to International Law (TWAIL) and Critical Race Theory (CRT): To grapple with the presence of the past, and frame counter-hegemonic futures, they need each other.⁴

1. See Adelle Blackett, *Slavery is Not a Metaphor*, 66 AM. J. COMPAR. L. 927, 933 (2018) (reviewing CONTEMPORARY SLAVERY: POPULAR RHETORIC AND POLITICAL PRACTICE (2017)) (challenging the contemporary tendency to invoke the language of slavery to address a broad range of forms of human exploitation with little or no engagement with the centuries-long transatlantic slave trade and its legacies); see also Tapji Garba & Sara-Maria Sorentino, *Slavery is a Metaphor: A Critical Commentary on Eve Tuck and K. Wayne Yang’s “Decolonization is not a Metaphor,”* 52 ANTIPODE 764 (2020) (challenging the subordination of Blackness in Tuck and Yang’s work, reducing slavery to nothing but a metaphor); Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 LAW & HIST. REV. 99 (2017).
2. Robin D. G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), <http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> [<https://perma.cc/SAD2-CBNB>]; see also CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (1983) (theorizing racial capitalism).
3. STUART HALL, THE FATEFUL TRIANGLE: RACE, ETHNICITY, NATION 46 (2017).
4. See Tendayi Achiume, Asli Bâli, *Race and Empire: Legal Theory Within, Through and Across National Borders*, 67 UCLA L. REV. 1386 (2021) (canvassing the “renewed momentum” amongst both TWAIL and CRT scholars to engage with empire and the construction of race). Specifically reflecting on TWAIL in the context of labor law, see also Adrian Smith, *The Bloody Life of Labour Power Commodification and the Fugitive Movement of the Disloyal We*, TWAILR: REFLECTIONS (Aug. 3, 2019), <https://twailr.com/the-bloody-life-of-labour-power-commodification-and-the-fugitive-movement-of-the-disloyal-we> [<https://perma.cc/2FPV-NFW4>]; Obiora Chinedu Okafor, Titilayo Adebola & Basema Al-Alami, *Viewing the International Labour Organization’s Social Justice Praxis Through a Third World Approaches to International Law Lens: Some Preliminary Insights*, in INTERNATIONAL LABOUR OFFICE,

This Article argues that transnational labor law is deeply historicized, rooted in the persisting presence of a racial capitalism that is too easily relegated to a distant past. This Article extends a narrative that reads slavery into the idea of a necessarily transnational labor law.⁵

This Article seeks to offer a distinct touchdown point in the century-old international organization that was established at the Paris Peace Conference in 1919,⁶ and whose constitutional vocation is to seek universal and lasting peace through social justice: the International Labour Organization (ILO). The tripartite ILO that includes governments, employers, and workers in the fabric of its representative structure, outlived the beleaguered League of Nations to become the first specialized agency of the United Nations in 1946.⁷ The ILO's 1944 constitutional annex, the Declaration of Philadelphia,⁸ is one of the earliest international instruments to articulate nondiscrimination principles. But the ILO Centenary Declaration on the Future of Work⁹ is silent on the feature that W.E.B. Du Bois said would characterize the twentieth century and that has resurged in this moment of deep discontent in the twenty-first century: race or the "frightful chasm at the color-line."¹⁰

ILO100: LAW FOR SOCIAL JUSTICE 101 (George P. Politakis, Tomi Kohiyama, Thomas Lieby, eds., 2019).

5. Adelle Blackett, *Theorizing Emancipatory Transnational Futures of International Labor Law*, 113 AJIL UNBOUND 390 (2019) (framing the idea of labor law in a manner that reads slavery into its core narrative). This work shares an intellectual kinship with projects on the spirit of Bandung and migration as decolonization. See e.g., Luis Eslava, Michael Fakhri & Vasuki Nesiiah, *The Spirit of Bandung*, in *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* 3 (Luis Eslava, Michael Fakhri & Vasuki Nesiiah eds., 2017); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).
6. Treaty of Peace with Germany Versailles, June 28, 1919, 225 Parry 188, 2 Bevans 235, 13 AJIL Supp 151, 385 (entered into force Jan. 10, 1920).
7. Protocol Concerning the Entry Into Force of the Agreement Between the United Nations and the International Labour Organization, art. 1, Dec. 19, 1946, 1 U.N.T.S. 183 (entered into force Dec. 14, 1946).
8. CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION, April 1, 1919, 15 UNTS 40 (entered into force June 28, 1919) [hereinafter ILO Constitution] at Annex, Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia), 10 May 1944.
9. *ILO Centenary Declaration for the Future of Work*, INT'L LABOUR ORG. (June 21, 2019), https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meeting_document/wcms_711674.pdf [<https://perma.cc/V79U-V5AS>].
10. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 96 (1903). The "color-line" reflected the deep and hardened separation of worlds between Black and white society, particularly in the U.S. South. Underscoring the causal nature of "relentless color-prejudice" that rendered African Americans a "segregated servile caste," Du Bois advocated for nothing less than the full equality "rights which the world accords to men." *Id.* at 91, 70, 100.

As Du Bois recognized, the “color-line” must be understood in historical terms, through its relationship to the global institution of slavery.¹¹ The global history has specific manifestations in the United States,¹² which incarcerates a larger share of its population than any other country in the world.¹³ This affirmation is not meant to exceptionalize America;¹⁴ it is part of the broader recognition that incarceration rates are significant and heavily racialized in much of the industrialized world, as part of the global legacy of slavery and colonialism, including the settler colonialism of the territory that is now the United States.¹⁵ In the U.S. context, African Americans represent only 13 percent of the U.S. population, but constitute 37.9 percent of the incarcerated population.¹⁶

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11. See generally DU BOIS, *supra* note 10; W.E.B. DU BOIS, *THE WORLD AND AFRICA AND COLOR OF DEMOCRACY* (2014); ERIC EUSTACE WILLIAMS, *CAPITALISM AND SLAVERY* (1994); SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2014).
 12. A pivotal manifestation is the uprising against police brutality, incarnated in the contemporary Movement for Black Lives. This ongoing reckoning with the murderous effects of white supremacy has been referred to as the “Third Reconstruction” period. See Jeremy Scahill, *Scholar Robin D. G. Kelley on How Today’s Abolitionist Movement Can Fundamentally Change the Country*, INTERCEPT (June 27, 2020, 7:00 AM), <https://theintercept.com/2020/06/27/robin-dg-kelley-intercepted/?ref=hpvr.com> [https://perma.cc/B354-R4NY]. For other scholarship on the first reconstruction period, from 1863–1877, see generally REBECCA E. ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* (2018). The second reconstruction was the civil rights movement of the 1950s and 1960s. For an account of the unfinished character of that movement see MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1968).
 13. The U.S. incarceration rate is 655 per 100,000 people of any age. *World Prison Brief Data: United States of America*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-states-america> [https://perma.cc/9BCU-P7NH].
 14. See e.g., MUGAMBI JOUET, *EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND EACH OTHER* (2017).
 15. This is true, for example, in Canada, where incarceration rates of both Indigenous and Black people show alarming structural patterns of overrepresentation. See *Annual Reports*, OFF. OF THE CORR. INVESTIGATOR OF CAN., <https://www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx> [https://perma.cc/954U-YCRJ]. According to the 2018–2019 Annual Report:
 The Indigenous inmate population has steadily increased from 19% of the total inmate population in 2008–09 to 28% in 2018–19—a narrative that is, unfortunately, well-known. The Black inmate population increased from 7% in 2008–09 to 10 percent in 2015–16, but has been slowly reversing. Black inmates currently now represent 8% of the total in-custody population.
 OFF. OF THE CORR. INVESTIGATOR, 2018–2019 ANNUAL REPORT 79 (2019). Moreover:
 In 2016–17, while only accounting for approximately 5% of Canada’s overall population, Indigenous offenders represented 23.1% of the total offender population (26.8% of the in-custody population and 17.2% of the community population). Over-representation is even worse for Indigenous women, who as of March 31, 2019, accounted for 41.4% of all federally incarcerated women.
Id. at 64.
 16. *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/DKS3-R5L3].

Du Bois, and generations of African American leaders following him, have understood the central need to take their struggles to the international stage.¹⁷ Carol Anderson's pivotal scholarly work has turned close and careful attention to the challenges that characterized African American struggle for a thick notion of human rights—as opposed to a threadbare vision of civil rights—through internationalism at the United Nations.¹⁸ Similarly, leaders of the NAACP understood the perils of focusing the civil rights challenge on discrimination in restaurants and theaters without “attack[ing] problems of employment and the like which affect the lives and destinies of persons who are not financially able to go’ to those establishments.”¹⁹ But the early strategic decisions at the height of the Cold War and McCarthyism led away from rather than toward close attention to labor rights, despite active U.S. involvement in the ILO even before it joined the organization in 1934.²⁰ Anderson's work, focused on the post-World War II period, does not contain a single indexing reference to the ILO. This Article is part of the complementary research on decolonizing labor law²¹ that seeks to bring the ILO—and alternative visions provided by pan-African and decolonial actors like Du Bois to the ILO—more fully into view.

This Article focuses on a discrete and little-noticed dimension of the United States's engagement with the ILO's vast normative universe of 190 ratifiable international labor conventions, six ratifiable protocols to existing international

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17. My current research chronicles pan-Africanists' entreaties to the ILO. See, e.g., Adelle Blackett, *On the Presence of the Past in the Future of International Labour Law*, 43 DALHOUSIE L.J. 947, 954–56 (2020). See also DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963, at 37–50 (2001) (addressing in particular the *Manifesto to the League of Nations*).
 18. See generally CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003).
 19. *Id.* at 18 (quoting the NAACP's executive secretary, Walter White). Furthermore, leading African American diplomat at the United Nations, political scientist Ralph Bunche, “seriously questioned the NAACP's overemphasis on civil rights and virtual neglect of economic rights.” *Id.* See also KING, *supra* note 12 (discussing the backlash faced when the movement went beyond basic civil rights to embrace full equality).
 20. One example is the participation of Columbia University law professor, Joseph P. Chamberlain, in the ILO's Committee of Experts for Native Labour (referred to in much of the archives as the Committee of Experts for Coloured Labour) from 1927–1937. While experts were appointed in their individual capacity, influential states—and, in particular, many colonial powers—made claims for representation by their nationals and Chamberlain was generally referred to as the “American member.” U.S. opinion on the development of the ILO's standard setting on forced labor was actively discussed by senior ILO officials, who acknowledged that Professor Chamberlain's nomination was made “in agreement” with the American Federation of Labour. ILO Archives, N 206/2/0/61.
 21. See, e.g., Adelle Blackett, *Decolonizing Labour Law: Contributions to an Emergent Transnational Labour Law*, 33 CAN. J.L. & SOC. 111 (2018).

labor conventions, and 207 nonbinding international labor recommendations.²² The United States has yet to ratify six of the eight conventions considered fundamental by the ILO, notably the ILO's main treaty dealing with racial and other forms of discrimination: the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).²³ But the United States's 1991 ratification of the Abolition of Forced Labour Convention, 1957 (No. 105)²⁴ provided a rare opportunity for the ILO's Committee of Experts on the Application of Labour Standards (Committee of Experts) to address a condition that historians have understood both as a legacy and—through interpretations of the Thirteenth Amendment—as a perpetuation of slavery: prison labor.

It is through the lens of the U.S. ratification of Convention No. 105 that the ILO's supervisory bodies have developed an important and little commented upon jurisprudence on slavery and race in prison labor. This Article reviews the dialogue between the U.S. administration and the ILO on prison labor and race. A core contention of this Article is that the ILO–U.S. dialogue offers a rare instance in which the distinctly intertwined histories of slavery and the persistence of racial capitalism through prison labor are engaged albeit in the more muted language of racial disparities. It continues despite the power of trafficking discourse to turn attention away from the focus on prison labor. This Article calls for renewed ILO engagement with mass incarceration and its relationship to the Thirteenth Amendment. It similarly calls for those concerned with a broad vision of the Thirteenth Amendment to pay attention to, engage with and build upon initiatives sustained through the ILO.

I. THE DEVELOPMENT OF AN INTERNATIONAL LEGAL FRAMEWORK ON SLAVERY AND FORCED LABOR

The ILO's first Director General, Albert Thomas, petitioned delegates of the League of Nations in an unsuccessful bid to claim the ILO's constitutional competence to address slavery.²⁵ For Thomas, slavery should be considered

22. For a complete list of international labor standards, see INT'L LAB. ORG., <https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12000:0::NO::> [<https://perma.cc/J3JN-4UAR>] (last visited Sept. 10, 2020).

23. The United States has ratified two of the eight fundamental conventions: the *Abolition of Forced Labour Convention*, 1957 (No. 105), and the *Worst Forms of Child Labour Convention*, 1999 (No. 182). The United States has ratified a total of fourteen international labor conventions, twelve of which are in force but none of which has been denounced.

24. Convention (No. 105) Concerning the Abolition of Forced Labour, Jun. 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959) [hereinafter *Convention Concerning Abolition of Forced Labour*].

25. *Archives of the ILO*, ILO Doc. L 27/1/1.

nothing other than conditions of work.²⁶ Instead, an ILO representative, Harold Grimshaw, was appointed by the ILO to the Mandates Section of the League of Nations that was entrusted to study slavery.²⁷ The Mandates Section's draft included references to forced labor that amply legitimized it for public purposes, in Article 5 of the Slavery Convention, 1926²⁸:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

It is agreed that:

- (1) Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes.
- (2) In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence.
- (3) In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned.²⁹

The matter of forced labor was then referred to the ILO, in keeping with the ILO's constitutional responsibility to set standards on conditions of labor. Ultimately, this has led it to have to police the public-private demarcation.³⁰ Its chair, Lord Lugard, was understood both by Grimshaw and by Columbia professor of public law, Joseph P. Chamberlain—the U.S. member of the ILO's Committee of Experts on Native Labour that assumed responsibility for the

26. *Archives of the ILO*, ILO Doc. L 27/1/1; see also Blackett, *supra* note 5 (discussing Thomas's statement).

27. *Archives of the ILO*, 1921, N 206/1/01/3; *Archives of the League of Nations*, 1922, R.61.

28. Slavery Convention art. 5, Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927). PROTOCOL AMENDING THE SLAVERY CONVENTION OF 1926, *adopted by the United Nations*, Dec. 7, 1953, 182 U.N.T.S. 51.

29. Slavery Convention, *supra* note 28.

30. See Faina Milman-Sivan & Yair Sagy, *On the International Labour Organization and Prison Labour: An Invitation for Recalculation*, 159 INT'L LAB. REV 505 (2020).

standard-setting for years before the United States joined the organization—as considering forced labor to be “necessary” for local public purposes.³¹

The colonial roots of the standard-setting at the ILO are unmistakable. The ILO entangled itself in a fraught process of building a “native labour code”³² (tellingly also regularly referred to as a “colored” labor code) that was essentially shaped by colonial administrators and that permeates the forced labor instrument. Neither the international legal definition of slavery nor the international legal definition of forced labor shows any rootedness in the legacies of the racialized unfreedom of transatlantic slavery.³³

The ensuing ILO Forced Labour Convention, 1930 (No. 29), defined forced labor as follows³⁴:

1. For the purposes of this Convention the term *forced or compulsory labour* shall mean 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.
2. Nevertheless, for the purposes of this Convention, the term *forced or compulsory labour* shall not include—
 - (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
 - (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
 - (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
 - (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

31. See *Correspondence between Chamberlain and Grimshaw*, 1 June 1929 & 14 June 1929. ILO Archives, ILO Doc. N 206/2/0/61.

32. LUIS RODRÍGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM AND INTERNATIONAL LAW: THE ILO REGIME, 1919–1989*, at 43 (200).

33. See Blackett, *supra* note 21.

34. Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930 39 U.N.T.S. 55 (entered into force May 1, 1932).

(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.³⁵

In a climate in which metropolitan territories were compelling productive activity from native labor, Article 1 of the widely ratified treaty called on ILO members “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”³⁶ This has led to jurisprudential developments³⁷ that attempt to frame the nature of voluntariness of labor in the private sector, as work performed under conditions that closely approximate free labor conditions on the basis of wage levels, social security, and occupational safety and health. But the historical and, of course, textual legacy is that Convention No. 29 exempts state authorities imposing forced labor on its subjects from its scope, and therefore, from scrutiny.

In light of this history, it is not surprising that Convention No. 29 has been interpreted by the ILO’s supervisory body in a manner that imposes strict conditions on prison labor in private prisons, but leaves prison labor in public prisons entirely untouched.³⁸

Although the United States never joined the League of Nations, it played a unique role in shaping the development of both instruments.³⁹ The United States ratified the Slavery Convention, 1926, subject to the following reservation:

Subject to the reservation that the Government of the United States, adhering to its policy of opposition to forced or compulsory labour except as punishment for crime of which the person concerned has been duly convicted, adheres to the Convention except as to the first subdivision of the second paragraph of Article 5, which reads as follows:

(I) Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes.⁴⁰

35. *Id.*

36. *Id.* art. I.

37. For a discussion, see Faina Milman-Sivan, *Prisoners for Hire: Towards a Normative Justification of the ILO’s Prohibition of Private Forced Prison Labor*, 36 *FORDHAM INTL L.J.* 1619 (2013).

38. *Id.* See also Milman-Sivan & Sagy, *supra* note 30.

39. See Blackett, *supra* note 21.

40. Slavery Convention, *supra* note 28.

The United States's accession to the League's Slavery Convention was considered within the ILO to be "an event of first-class international importance."⁴¹ The United States's decision to include a double-negative reservation regarding forced labor—as Chamberlain informed the ILO, at the behest of the American Federation of Labour,⁴² was in particular considered to be of "very great interest" to the ILO.⁴³ Chamberlain wrote a confidential memorandum to the Committee, dated May 1, 1930, suggesting the United States could ratify Convention No. 29 if enough interest could be mustered via the American Federation of Labour to do so, except for the reference in Article 2(c) "that the said person is not hired to private individuals." He explained the state "custom" of contracting the labor of prisoners to "private concerns" and considered that the Federal government has "no legal control" over them.⁴⁴ He mused that the system was on the decline and under vigorous attack, but still very present. While the provision in the convention would therefore give it an immediate practical importance in the United States, he considered it unlikely that it could be adopted unless the clause were omitted.⁴⁵

The provision was not omitted. The United States has not yet ratified ILO Convention No. 29.

The Abolition of Forced Labour Convention, 1957 No. 105⁴⁶ emerged alongside the United Nations 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.⁴⁷ Its focus—in Article 1—is five post-World War II practices, namely, forced or compulsory labor:

41. Letter From Professor Joseph P. Chamberlain, Columbia University, to H.A. Grimshaw, INTERNATIONAL LABOUR OFFICE (Mar. 4, 1929) (on file with the ILO Archives, N 206/2/0/61) [hereinafter Letter From Chamberlain to Grimshaw].

42. *Id.* Chamberlain explained in his letter that:
 So far as the territory under the jurisdiction of the United States is concerned, the provisions in respect to forced labor could not take effect. The 13th Amendment of the Constitution prohibits slavery or involuntary servitude, and the decisions of the court assimilate "involuntary servitude" to forced labor, as the term is used in the Treaty. Therefore, the reservation seems to me to be little more than a declaration of the constitutional law of the United States.

Id. That said, he added that the genesis of the reservation was in the American Federation of Labor, in keeping with its strongly held position that "labor is not a commodity." *Id.*

43. *Id.*; see also Blackett, *supra* note 21.

44. Letter From Chamberlain to Grimshaw, *supra* note 40.

45. *Id.*

46. Convention Concerning Abolition of Forced Labour, *supra* note 24.

47. See Economic and Social Council Res. 608 (XXI) (Sept. 7, 1956) (entered into force Apr. 30, 1957).

- (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.⁴⁸

The United States was actively involved in the drafting process, and sought to insert a link between forced labor and trade restrictions. Worker representatives from the United States issued statements supporting the conventions adoption by the ILO, while employers abstained.

Most recently, the ILO adopted a Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), which repeals the transitional provisions of the Forced Labour Convention, 1930 (No. 29).⁴⁹ It affirms in its preamble that “the context and forms of forced or compulsory labour have changed and trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination”⁵⁰ Protocol No. 29 also includes a capacious insistence on the need to identify the root causes of forced labor.⁵¹

A. U.S. Ratification of Convention No. 105

Despite the United States’s active participation in the adoption of the convention at the ILO, ratification of Convention No. 105 in domestic law took decades. Moreover, in one of the most disruptive and financially devastating moments in the ILO’s history, the United States withdrew from the organization on November 6, 1977. At the time, U.S. Secretary of State Henry Kissinger mentioned that the “appallingly selective” approach to finding violations of forced

48. *Id.*

49. Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), 53 I.L.M. 1227 (entry into force Nov. 9, 2016).

50. *Id.*

51. It also adopted the nonbinding Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), which turns Members’ attention to taking “the most effective preventive measures,” including in paragraph four, “addressing the root causes.” International Labour Organization [ILO], *R203–Forced Labour (Supplementary Measures) Recommendation*, at ¶ 4 (May 28, 2014). It recommends in paragraph eleven that migrants subject to forced or compulsory labor, “irrespective of their legal status in the national territory” should be provided with “temporary or permanent residence permits and access to the labour market.” *Id.* ¶ 11. It encourages international cooperation. *Id.* ¶ 14.

labor in some countries rather than others was one of the reasons the United States withdrew, although the focus was the ILO's decision to grant observer status to the Palestine Liberation Organization at the annual International Labour Conference in June 1975.⁵² The United States rejoined soon thereafter, in 1980, as the struggles of Solidarność in Poland intensified and the ILO's potential role in confronting the Soviet model became clear.

When it rejoined, the United States established a consultative process to issues related to the ILO, in keeping with the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) that it ratified in 1988. The U.S. President's Committee on the ILO included the Secretaries of State and Commerce, the President's National Security Advisor, the Assistant to the President for Economic Policy, and the Presidents of the AFL-CIO and the United States Council for International Business (USCIB). The President's Committee on the ILO adopted three ground rules for U.S. ratification of ILO conventions that were incorporated into a 1988 U.S. Senate resolution. That resolution states the following:

[T]here is agreement by the U.S. Government agencies concerned, the AFL-CIO, and the U.S. Council for International Business: that each ILO convention will be examined on its merits on a tripartite basis; that if there are any differences between the convention and Federal law and practice, these will be dealt with in the normal legislative process; and that there is no intention to change State law and practice by Federal action through ratification of ILO conventions, and the examination will include possible conflicts between Federal and State law that would be caused by such ratification.⁵³

The President's Committee on the ILO established a legal subcommittee, the Tripartite Advisory Panel on International Labor Standards (TAPILS), which is chaired by the Solicitor of Labor and includes the legal advisers of the Departments

52. See Memorandum from Secretary of Labor John T. Dunlop to President Gerald Ford (Oct. 11, 1975) (on file with the Gerald R. Ford Presidential Library) (reporting that the AFL-CIO Executive Council "has now called on the U.S. Government to give the constitutionally required two-year notice of intent to withdraw from the#"); see also International Labour Office [ILO], *Comm. From the Gov't of the U.S., Rep. of the Director-General*, G.B. 198/22/11 (1975) (reproducing Kissinger's letter in full); *United Nations—United States Withdraws From the International Labor Organization*, 8 GA. J. INT'L & COMP. L. 497 (1978) (noting that despite the two-year notice, withdrawal still came as a surprise and an amendment was proposed to prevent the introduction of "inappropriate" resolutions, splitting Soviet Bloc and emerging, nonaligned states).

53. Memorandum from Secretary of Labor William E. Brock to Secretary of State George P. Schultz (Dec. 30, 1985).

of State and Commerce and legal counsel for the AFL-CIO and the USCIB.⁵⁴ TAPILS continues to operate under the 1988 agreement that no ILO convention will be forwarded to the U.S. Senate for ratification if ratification would require any change in U.S. federal or state laws.⁵⁵

There are indicia that the United States did not expect to be regulated on its penal labor practices in the context of Convention No. 105. In his statement, the President of the U.S. Council for International Business stated that as the United States was examining the conformity of Convention No. 105 with U.S. law, U.S. officials exchanged with the International Labor Office on whether the convention would “contravene[] U.S. prison labor practices[] or would result in evolving legal standards.”⁵⁶ In the hearing on ILO Convention No. 105, it was reported that:

(1) The United States understands the meaning and scope of Convention No. 105 based on the conclusions and practice of the Committee of Experts on the Application of Conventions and Recommendations existing prior to ratification, which conclusions and practice, in any event, are not legally binding on the United States and have no force and effect on courts in the United States.

(2) The United States understands that Convention No. 105 does not limit the contempt powers of courts under Federal and State law.⁵⁷

Subject to understandings on these major—and of course, far from uncontroversial—points, TAPILS supported U.S. ratification. In contrast, Convention No. 29 was deemed not to be ratifiable without amending internal legislation and consideration was suspended because “the trend at the state level to subcontract the operation of prison facilities to the private sector . . . conflicts with the requirements of Convention No. 29 relating to the circumstances under which the private sector may profit from prison labor.”⁵⁸

The historical amnesia at the time of ratification of Convention No. 105 may be viewed as curious, as the ILO had made the link between Convention No. 105 and prison labor in its 1962 General Survey by the Committee of Experts on the

54. See S. FOREIGN REL. COMM. & S. ARMED SERVICES COMM., EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE TOGETHER WITH JOINT SESSIONS WITH THE SENATE ARMED SERVICES COMMITTEE (HISTORICAL SERIES) VOL. XIX, 90TH CONG., S. PRt. 110–20, 13–15 (Comm. Print 1967).

55. TAPILS may have soothed fears that international labor law would intrude upon U.S. federal or state law. See *id.*

56. *Concerning the Abolition of Forced Labor, Ex. K, 88-1: Hearing on ILO Convention No. 105 Before the Comm. on Foreign Relations*, 102nd Cong. 42 (1991).

57. *Id.* at 43.

58. *Id.* at 42–43.

Application of Conventions and Recommendations (Committee of Experts).⁵⁹ The 1962 Survey stated that “[u]nder the Abolition of Forced Labour Convention, 1957 (No. 105), ‘any form of forced . . . labour . . . as a means of racial, social, national or religious discrimination’ must be immediately abolished. This covers prison labour as well as other forms of forced labour involving discrimination.”⁶⁰ The Committee of Experts went further, to opine on the limits of an examination of legislation alone:

An examination of the legislation . . . does not always reveal whether such legislation may not in fact establish or maintain situations that are discriminatory in respect of certain groups . . . it is possible, and even probable, that various provisions with regard to which additional information has been requested from governments, in the case of countries where the Convention is in force, may conflict with the provisions of the Convention Nor should it be forgotten that the Convention was not intended to abolish all discrimination but merely to suppress forced labour as a means of discrimination.⁶¹

The Committee of Experts went further still, to identify practices of segregation associated with penalties that amount to forced labor. It cited both the Republic of South Africa and the United States (Louisiana and Virginia) for “offences” (a term it took distance from by putting the word in quotation marks) of interracial marriage, cohabitation, or infringement of provisions on racial segregation in transport.⁶² In other words, the United States was forewarned that ratification could have interpretive consequences.

But U.S. ratification of Convention No. 105 was part of an externally-focused, post-Cold War moment, in which forced labor and free market democracy were touted as mutually incompatible. Secretary of Labor Lynn Martin recalled that “ILO Convention 105 is intended to promote the elimination of one of the most pernicious assaults by 20th century governments on economic freedom and the private rights of individuals: forced or compulsory labor,” adding without apparent irony that “such State practices are completely foreign to our

59. See *infra* note 67 and accompanying text.

60. INT’L LABOUR CONF., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, ¶ 138, at 230 (1962), [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1962-46-IV\)191-289.pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1962-46-IV)191-289.pdf) [<https://perma.cc/TP74-QYHY>].

61. *Id.* ¶ 140–42, at 230.

62. *Id.* ¶ 153–54, at 232, 232 n.8–10. Canada was similarly cited for forced labor imposed against Indigenous peoples working on roads. *Id.* ¶ 146 at 231, 231 n.4. Needless to state, this General Survey was the subject of considerable controversy.

nation and other democracies”⁶³ This “modern form of slavery” was in decline worldwide, and while active ILO efforts were a contributing factor, mostly the decline in forced labor was because of the “recent emergence of democratic governments in many parts of the globe, most notably in Eastern and Central Europe, where forced labor had been a conspicuous tool of totalitarian governments, intent on economic development as well as political coercion.”⁶⁴ Ratification of Convention No. 105 would therefore give the United States credibility, enabling it to “take other governments to task for failing to comply with obligations which they have assumed under this or other ILO conventions.”⁶⁵

The use of the language of “modern” forms of slavery is particularly potent. It captures a three-dimensional move. First, the United States is able to disentangle this discourse from its own legacy of transatlantic slavery. Transatlantic slavery is not only relegated to the past; it is othered. The practices become “completely foreign” to the United States. Second, the rhetorical strength of the language of slavery is invoked. It is taken as a given that the practices to which the label of ‘modern slavery’ is attached are comparably reprehensible, morally and legally. And third, in the righteous fight against modern slavery, the United States is able to reassert its claim to leadership of the free world. Convention No. 105 was ratified by the United States in 1991, shepherded along with other instruments by Senator Daniel Moynihan.⁶⁶

B. ILO Supervision of the Implementation of Convention No. 105

The ILO’s Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts or CEACR) was established early in the organization’s history, in 1926. Comprising eminent jurists from around the world, its mandate is to examine the reports submitted by governments on ratified conventions pursuant to Article 22 of the Constitution.⁶⁷ The Committee of

63. *ILO Convention (No. 105) Concerning the Abolition of Forced Labor*, Ex. K, 88-1: *Hearing Before the Comm. on Foreign Relations*, 102nd Cong. 12, (Apr. 22, 1991) (prepared statement of Secretary of Labor Lynn Martin).

64. *Id.* at 12.

65. *Id.* at 27 (statement of Anthony Freeman, Special Assistant to the Secretary and Coordinator for International Labor Affairs, Department of State).

66. See Steve Charnovitz, *The ILO Convention on Freedom of Association and its Future in the United States*, 102 AM. J. INT’L L. 90 (2008).

67. There are also important procedures for representations to be made in cases of nonobservance. See Int’l Labour Org. Const., art. 23. See also *Applying and Promoting International Labour Standards*, INT’L LABOUR ORG., <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-en/index.htm> [<https://perma.cc/A4Y8-XV2B>].

Experts is responsible for assessing the application of international labor standards in ILO member states—over time, the CEACR has developed a robust, coherent, and consistent body of guidance to members in the form of observations⁶⁸ and direct requests.⁶⁹ Commentators have not hesitated to refer to the CEACR’s learned guidance as “jurisprudential interpretations,” although this move has been controversial and part of ongoing, indeterminate processes to rethink the entire normative oeuvre of ILO supervisory bodies.⁷⁰ Technically, though, the interpretive role remains with the International Court of Justice, which has never been seized.⁷¹

Observations and direct requests are typically granular and specific; their punch can be masked through deeply diplomatic prose.⁷² But the ILO’s dialogic approach⁷³ helps to build “communities of learning” on how to redress noncompliance with international labor standards, to promote what the ILO refers to as “decent work,” and cumulatively, to enable the emergence of a positive labor rights vision.⁷⁴ This was discernible in the ILO CEACR’s initial approach in its eight observations and ten direct requests issued between 1996 and 2017 on Convention No. 105.

68. Observations contain comments on fundamental questions raised by the application of a particular Convention by a state. These observations are published in the annual report of the Committee of Experts.

69. Direct requests relate to more technical questions or requests for further information. They are not published in the report but are communicated directly to the governments concerned.

70. See, e.g., Janice R. Bellace, *Pushback on the Right to Strike: Resisting the Thickening of Soft Law*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 181 (Adelle Blackett & Anne Trebilcock eds., 2015); Claire La Hovary, *The ILO’s Supervisory Bodies’ ‘Soft Law Jurisprudence,’* in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW, *supra*, at 316.

71. Advisory opinions were not infrequent, however, before its predecessor, the Permanent Court of International Justice. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183 (1997).

72. See Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 702 (2006).

73. Laurence Boisson de Chazournes, *A ‘Dialogic’ Approach in Perspective*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW, *supra* note 70, at 65 (defining an “approach characterized by the involvement of various non-State actors in decision-making processes”); see also Francis Maupain, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* 7 (2013) (explaining the “social dialogue” function of the ILO).

74. See generally ADELLE BLACKETT, *EVERYDAY TRANSGRESSIONS: DOMESTIC WORKERS’ TRANSNATIONAL CHALLENGE TO INTERNATIONAL LABOR LAW* (2019) (discussing transnational communities of learning).

II. THE EARLY FOCUS: SENTENCING, PRISON LABOR, AND RACE

A. The Entry Point: Article 1(d) as a Punishment for Having Participated in Strikes

The CEACR's initial entry point for review of the United States under Convention No. 105 was not on race, but rather on the relationship between strike action and prison labor. More specifically, the CEACR sought to ascertain, by Direct Request in 1996, whether persons jailed for contempt of court in connection with an unlawful strike could be made to work, in contravention to Article 1(d) of Convention No. 105.⁷⁵ The CEACR inquired on the basis of the first three reports submitted by the United States under the Convention, and it persisted in seeking this information in the Direct Request from 1998.⁷⁶ It seemed unsatisfied by the U.S. government's reply that these persons would be considered pretrial detainees who, under U.S. law and practice, are not subject to prison labor. The CEACR was focused on the North Carolina General Statutes, which contained a provision in which "strikes by public employees are declared illegal and against the public policy of the State."⁷⁷

By the 1999 Direct Request, it noted that the U.S. government provided information on the U.S. Supreme Court's decision that the union's failure to obey an injunction regarding unlawful strike-related activities constituted criminal contempt.⁷⁸ Apparently not satisfied with the U.S. government's suggestion that the court does not appear to have sentenced any union members or officials in *Bagwell* to jail for contempt, the Committee of Experts continued to solicit more information about whether union members or officials "might" be so sentenced and if so, subject to prison labor. By 2004, the response chronicled in the Direct Request became considerably more detailed. The U.S. government had been

75. *Direct Request (CEACR)—Adopted 1996, Published 85th ILC Session (1997)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2154992 [https://perma.cc/P49L-KPFB].

76. *Direct Request (CEACR), adopted 1998, published 87th ILC session (1999)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2168413 [https://perma.cc/PTU6-PMBJ].

77. *Direct Request (CEACR)—Adopted 1998, Published 87th ILC session (1999)*, INT'L LABOUR ORG., citing 18 USC 2385, https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2168413 [https://perma.cc/PTU6-PMBJ].

78. *Direct Request (CEACR)—Adopted 1999, Published 88th ILC Session (2000)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2184713 [https://perma.cc/35GY-82YK]. The Committee of Experts referenced *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994).

called to address the ILO's annual International Labour Conference in the tripartite Conference Committee on the Application of Standards in 2002.⁷⁹

The U.S. government sought to assure the ILO's learning community that although technically possible, TAPILS had found that the imprisonment of strikers for contempt of court was but a rare occurrence.⁸⁰ Since they would be considered pretrial detainees rather than ordinary prisoners, they could not be required to work. The U.S. government added that TAPILS could not find a single instance in which, in practice, an individual jailed was required to work.⁸¹ Through the subsequent exchange and reporting, the Committee of Experts was able to stress a crucial point: it is concerned not only with the law, but with the practice.⁸² In the 2004 Observation, the Committee of Experts added that if community service could be exacted from a person without prior convictions, as the Government intimated, "in so far as it may involve an obligation to perform work or service, [community service] comes under the definition of compulsory labour."⁸³ And by its 2005 Direct Request, it was raising the same issue in respect to the legislation of other states.⁸⁴ It seems to have taken over a decade, but in its 2009 Observation, the Committee of Experts could point to a publication of the North Carolina Sentencing and Policy Advisory Commission, offering the public policy explanation of the state's use of work for free for public or nonprofit agencies alongside the repeated absence of any case in which the provisions were applied to striking public sector workers. The Committee of Experts recalled the "chilling effect that a general prohibition of strikes linked to criminal penalties involving compulsory labour may have on public sector workers who might otherwise decide to engage in strikes" and repeated its call for the provisions to be amended or repealed.⁸⁵ Both in 2017, and as recently as its Observation adopted

79. *Direct Request (CEACR)—Adopted 2004, Published 93rd ILC Session (2005)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2235098 [<https://perma.cc/656M-EWP4>] [hereinafter *2004 Direct Request*]. The Conference Committee process entails a personal appearance by government representatives, who face public questioning and comments on its law and practice.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Observation (CEACR) Adopted 2004, Published 93rd ILC Session (2005)*, INT'L LABOUR ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2238092,102871,United%20States%20of%20America,2004](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:P11110_COUNTRY_ID:P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2238092,102871,United%20States%20of%20America,2004) [<https://perma.cc/J9ZZ-Z5TF>] [hereinafter *2004 Observation*].

84. Missouri and Nevada. The issue is a consistent feature of observations including observations in 2005.

85. *Observations (CEACR)—Adopted 2009, Published 99th ILC Session (2010)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_

in 2020 and published in 2021 in advance of the June 2021 International Labour Conference, the Committee of Experts observed that “it has been raising this issue for more than a decade” and reiterated its instructions to the U.S. government to bring this law in conformity with Convention No. 105 “and the indicated practice”.⁸⁶

B. Raising Mass Incarceration and Race: Article 1(e) as a Means of Racial, Social, National, or Religious Discrimination

It was on the occasion of its 2004 Direct Request that the Committee of Experts first cited statistics on incarceration. It repeated statistics in detail, including that of the over 2,000,000 persons held in state or federal prisons, under 162,000 were in custody of federal prisons.⁸⁷ Over 1,225,000 were in state prisons, and close to 700,000 were in local jails.⁸⁸ It went further, chronicling how many persons worked in privately-owned prisons, and paving a path that would become important for subsequent, more precise assessments of the racialization of incarcerated people.⁸⁹ And in its 2005 Direct Request, the Committee of Experts turned its attention to the racialization of incarcerated people, in reference to Article 1(e) of Convention No. 105. It wrote the following:

The Committee notes from the US Department of Justice Bureau of Justice Statistics Bulletins of April 2003 and November 2004 that on 30 June 2002 as well as on 1 July 2003, the number of inmates in state or

COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2306064,102871,United%20States%20of%20America,2009 [https://perma.cc/5GR6-T22W].

86. *Observations (CEACR)—Adopted 2017, Published 107th ILC Session (2018)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3344050 [https://perma.cc/22DP-3Y7P]; *Observations (CEACR)—Adopted 2020, Published 109th ILC Session (2021)*, Int’l Labour Org., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:4046588 [https://perma.cc/29QW-S9MY].

87. *2004 Direct Request*, *supra* note 79.

88. *Direct Request (CEACR)—Adopted 2004, Published 93rd ILC Session (2005)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2236595,102871,United%20States%20of%20America,2004 [https://perma.cc/2P48-HYLW] (citing the U.S. Department of Justice Bureau of Justice Statistics Bulletin of November 2004).

89. This information was repeated in the 2005 Direct Request. *See Direct Request (CEACR)—Adopted 2005, Published 95th ILC session (2006)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2250307,102871,United%20States%20of%20America,2005 [https://perma.cc/2YDZ-S8ZL].

federal prisons and local jails per 100,000 residents of each population group was more than twice as high for those of Hispanic origin than for “White” residents (excluding Hispanics); for “Black” residents (again excluding Hispanics) the corresponding rate was over seven times the “White” incarceration rate in the case of men, and about five times in the case of women.⁹⁰

The Committee of Experts went further, drawing into its comments the work of Human Rights Watch to underscore the following powerful statistical information and insist on the magnitude of the racial disparity in sentencing, which “bears little relationship to racial differences in drug offending,” writing as follows:

The Committee also has noted that, based on the National Corrections Reporting Program, 1996, and Bureau of Census, 2000 data, the Human Rights Watch organization states in its April 2003 backgrounder on “Incarcerated America” that “[t]his racial disparity bears little relationship to racial differences in drug offending. For example, although the proportion of all drug users who are [B]lack is generally in the range of 13 to 15 percent, [B]lacks constitute 36 percent of arrests for drug possession. Blacks constitute 63 percent of all drug offenders admitted to state prisons. In at least fifteen states, [B]lack men were sent to prison on drug charges at rates ranging from twenty to fifty-seven times those of white men.” Since a prison sentence normally involves an obligation to perform labour, the Committee hopes that the Government will be in a position to comment in its next report on the abovementioned figures and any measures taken or contemplated to ensure that there is no racial, social, or national discrimination in the imposition of prison sentences involving an obligation to perform labour.⁹¹

The Committee of Experts followed up immediately in its 2006 Direct Request and reproduced a governmental acknowledgement in a report by the U.S. Sentencing Commission in its 2004 report on the 1984 Sentencing Reform Act that “[c]oncern over possible racial or ethnic discrimination in federal sentencing remains strong” and that the matter must be addressed and eliminated.⁹² It seemed unmoved by the government’s indication in its report that “U.S. law and

90. *Id.*

91. *Id.*

92. *Direct Request (CEACR)—Adopted 2006, Published 96th ILC Session (2007)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2269560,102871,United%20States%20of%20America,2006 [https://perma.cc/57YG-YMFW] [hereinafter *2006 Direct Request*].

policy clearly prohibit racial discrimination in the criminal justice system,” and its suggestion that procedural mechanisms in U.S. law allow for redress on equal protection grounds—individually and via the Attorney General—to be sought for racially discriminatory prison sentencing.⁹³ The Committee of Experts became more directive in its request. It asked for statistical data and other information from the government, and added the following:

The Committee hopes that the Government will supply information concerning the application of the revised DMC statistical method under the Juvenile Justice and Delinquency Prevention Act, as well as the use of the DMC Relative Rate index tool by the Office of Juvenile Justice and Delinquency Prevention, including information about how these tools are being used to help determine the extent to which discrimination accounts for racial disparities in the sentencing and confinement of youth offenders and otherwise affects justice system decision-making, and how they may also be used to help identify its sources.⁹⁴

While the language remains understated given the magnitude of the disparities exposed, it increasingly names the existence of discrimination, calling for the U.S. government to determine the “extent” of the discrimination.

III. THE TURN TO TRAFFICKING

No sooner than the Committee of Experts raised the issue of race in the Direct Requests did the U.S. government turn the Committee of Experts’ attention to the issue of trafficking in persons. This directional turn was of course foreseeable, following the Committee of Experts’ elaboration of a general observation concerning human trafficking in 2001,⁹⁵ intended to elicit reporting by Members on the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.⁹⁶ While the CEACR noted that trafficking in persons “affects developing countries, countries in transition and

93. *Id.*, para. 8.

94. *Id.*, para. 10.

95. ILO, International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations* paras. 72–81 (2001). [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2001-89-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2001-89-1A).pdf) [https://perma.cc/A2F9-P9HH] [hereinafter *2001 CEACR Report*].

96. G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2020).

industrialized market economy countries,”⁹⁷ it added that countries might be affected as origin countries, destination countries, or both.⁹⁸

The first appearance of a reference by the United States to the Trafficking Victims Protection Act of 2000 (TVPA)⁹⁹ is in the 2004 Observation,¹⁰⁰ followed by the CEACR’s 2006 Direct Request.¹⁰¹ Through the reference, the U.S. government emphasized that the Trafficking Victims Protection Reauthorization Act of 2003 (2003 TVPRA) and the Trafficking Victims Protection Reauthorization Act of 2005 (2005 TVPRA) created new federal crimes, including the crime of forced labor in the new section 1589 in Title 18 of the U.S. Code.¹⁰² The U.S. government proclaimed that this strengthened penalties for trafficking-related offenses, and offered victims expanded services and protections.

The turn to trafficking by the U.S. government offered an immediate opportunity to shift the focus. Rather than find itself on the defensive, the U.S. government held out a way through which its positive role in preventing forced labor could be highlighted. It held out the promise of refocusing the discussion, introducing datasets that had nothing to do with prisons at all, and that reshaped the approach to forced labor—the trafficking focus¹⁰³—in which it was a valiant actor combatting a global problem. Its approach, in other words, brought it back to the role it anticipated it might play in the world on ratification of Convention No. 105: a moral leader in the eradication of a problem that it perceived mostly to be prevalent elsewhere but certainly also a role in which the state was less the problem than part of the solution.

Initially, the ILO turned to broad datasets, including congressional findings on trafficking incorporated into the TVPA. Those findings suggested that approximately 50,000 women and children were trafficked into the United States on an annual basis.¹⁰⁴ The ILO asked the U.S. government to provide more information, given that its information from earlier reports suggested 79 prosecutions, and 127 investigations.¹⁰⁵ One reads through the lines that the

97. See 2001 CEACR Report, *supra* note 94, para. 76.

98. *Id.*

99. Victims of Trafficking and Violence Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466.

100. See 2004 Observation, *supra* note 83.

101. See 2006 Direct Request, *supra* note 92.

102. See 18 U.S.C. § 1589 (2012).

103. See Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609 (2014); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006).

104. See 2006 Direct Request, *supra* note 92, para. 12.

105. *Id.*

Committee of Experts would expect to see more details of precisely how proactively the U.S. government is redressing trafficking. But it also bites the bait: the number of antitrafficking task forces have increased. It asks for more information. Starting in 2007, the Committee addresses human trafficking in respect of the United States in depth in its reports on the application of conventions and recommendations. The 2014 Protocol to Convention No. 29's specific reference to trafficking falls within the fertile territory of the ILO's detailed attention to the U.S. government's decision to "maximize" its ability to enforce laws on the trafficking of persons.¹⁰⁶

IV. COEXISTENCE OR CROWDING OUT?

Trafficking discourse did not simply replace the focus on racial disparity in mass incarceration. In fact, in the 2008 Direct Request, the Committee of Experts' focus on racially discriminatory distinctions and the exaction of compulsory labor was the first matter addressed. The U.S. government sought to advance a textual argument, namely that in the U.S. prison context, forced labor is not the means of racial discrimination for purposes of Article 1(e) of the Convention. Based on that reading, it argued that "additional inquiries into the causes of disproportionate rates of arrest, conviction, and incarceration of African-American males are outside the purview of Article 1(e) of the Convention and therefore are not relevant to U.S. compliance with the Convention."¹⁰⁷

The Committee of Experts was undeterred. It pointed out that "the scope of the Convention is broader than that suggested by the Government."¹⁰⁸ The Committee of Experts turned to its 2007 General Survey of Convention No. 105, the fruit of a comprehensive process based on reporting by ILO Members, under Article 19 of the ILO Constitution.¹⁰⁹ In that General Survey, the Committee of Experts clarified that Article 1(e) of Convention No. 105 requires the following:

106. *Direct Request (CEACR), Adopted 2008, Published 98th ILC Session (2009)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2294330 [https://perma.cc/8GSZ-ZWEX].

107. *Direct Request (CEACR), Adopted 2008, Published 98th ILC Session (2009)*, INT'L LABOUR ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2302730,102871,United%20States%20of%20America,2008](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2302730,102871,United%20States%20of%20America,2008) [https://perma.cc/763A-J86P] [hereinafter *2008 Direct Request*] (quoting the U.S. government's response in its Committee of Experts 2008 Direct Request).

108. *Id.*

109. A particularity of the mechanism is that members are required to report at regular intervals, at the request of the Governing Body, on measures they have taken to give effect to the provisions of certain Conventions or Recommendations, whether or not they have ratified them. Indeed, they are asked to indicate any obstacles that may have prevented or delayed the ratification of

Article 1(e) requires the abolition of any discriminatory distinctions made on racial and other grounds “in exacting labour” for the purpose of production or service, and that situations in “which punishment involving compulsory labour” is meted out more severely to certain groups defined in racial and other terms, fall within the scope of the Convention.¹¹⁰

The 2007 General Survey on Forced Labour, as well as the 2012 General Survey on the fundamental conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, added that Convention No. 105 applies “even where the offence giving rise to the punishment is a common offence which does not otherwise come under the protection of Article 1(a), (c) or (d) of the Convention.”¹¹¹

The Committee of Experts acknowledges limits to its scope under Convention No. 105. Both in 2007 as in 2012, the General Surveys remind that Convention No. 105 “does not deal with the substance of discrimination on the above grounds” as its purpose is “limited to the suppression of forced or compulsory labour as a means of discrimination.”¹¹² That distinction is posited without elaboration. Both in 2007 and in 2012, the Committee of Experts emphasizes that the instances of legislation of this nature was rare.¹¹³ But in its observations and direct requests to the United States, it has kept its focus on overrepresentation.

In the 2008 Direct Request, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) got directly involved, albeit with a distinct focus. It submitted a communication to the Committee of Experts on the government’s report,¹¹⁴ based on independent research, that highlighted the

the Convention in question. See JEAN-MICHEL SERVAIS, *INTERNATIONAL LABOUR LAW* (6th ed. 2020).

110. ILO, International Labour Conference: Eradication of Forced Labour, Report III (Part 1B) General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), at 81, [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2007\)1B.pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2007)1B.pdf) [<https://perma.cc/8SGV-4HVV>] [hereinafter 2007 General Survey]; 2008 Direct Request, *supra* note 107.

111. 2007 General Survey, para. 191; see also ILO, International Labour Conference, Report III (1B): Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization (2012), https://www.ilo.org/ilc/ILCSessions/previous-sessions/101stSession/reports/reports-submitted/WCMS_174846/lang--en/index.htm [<https://perma.cc/L5E5-5CVH>] [hereinafter 2012 General Survey].

112. 2012 General Survey, *supra* note 111, at 140.

113. *Id.* at 116; 2007 General Survey, *supra* note 111, at 93.

114. In keeping with ILO practice, the Committee of Experts submitted it to the U.S. government for any comments that it might have.

presence of racial disparities within job assignments at federal correctional facilities. In particular, incarcerated African Americans tended to be assigned low skilled and low paid work, incarcerated Hispanic people were also more likely to be assigned unskilled work, compared to incarcerated white people.¹¹⁵ The AFL-CIO not only raised litigation strategies, but also underscored how these practices undermined the goal of rehabilitation. This incursion by the AFL-CIO might be understood as seeking to respond to the concern to ensure that even on a narrow reading of Article 1(e) of Convention No. 105, the concerns about racialization in prison labor find their place before the ILO's supervisory mechanisms. But the AFL-CIO's intervention falls short of the thicker engagement with the problem of mass incarceration along racial lines that the Committee of Experts' comments suggest.

The 2008 Direct Request is a particularly attentive set of comments that underscores overrepresentation in sentencing for cocaine offenses. By referencing the one hundred-to-one drug quantity ratio, the Committee of Experts is able to explain how crack cocaine offenders are sentenced three to six times longer than powder cocaine offenders, and the predominance of African Americans within the former demographic.¹¹⁶ The Committee of Experts notes that African Americans constitute only 12.3 percent of the U.S. population, but 81.8 percent of federal crack cocaine offenders in 2006 (versus 27 percent of powder cocaine offenses, federally).¹¹⁷

Also in the 2008 Direct Request, the Committee of Experts called on the U.S. government to comment on the allegations, to provide statistical information, and to supply updated information on litigation cited in the AFL-CIO's submission and beyond.¹¹⁸ The Committee of Experts went considerably further, to express the hope that the government would actually adopt legislation and otherwise take steps to act on recommendations of the USSC, and to bring its law and practice into conformity with Convention No. 105.¹¹⁹

The strong language coexists with a discussion of trafficking in persons in the 2008 Direct Request. It is particularly noteworthy that the Committee of Experts seemed still to focus its comments on obtaining updated information. Moreover, it cited information available through the Attorney General's Annual Report to Congress for Fiscal Year 2007, and the series of recommendations it includes for

115. See 2008 Direct Request, *supra* note 107.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

Fiscal Year 2008.¹²⁰ The Committee of Experts seemed particularly struck by the preface, which calls for a series of actions to be taken to “rescue victims” from the problem of human trafficking.¹²¹ Among them figure creating a pathway to citizenship for trafficking victims who are qualified to hold the T non-immigrant status visa. A panoply of other recommendations is listed, including increased interagency efforts to combat trafficking for labor exploitation.¹²² The Committee of Experts only noted the information provided by the government on measures to improve its efforts to combat trafficking.

The introduction of trafficking discourse by the United States seemed to replace the government’s focus on racial discrimination. The ILO’s approach was different. By the time of the 2009 Direct Request, racial discrimination in the exaction of compulsory prison labor was the exclusive focus of the Committee of Experts’ comments. The Committee of Experts reaffirmed its jurisdiction over significant racial disparities in the U.S. criminal justice system. It reaffirmed that where the punishment involves compulsory labor that does not come under Articles 1(a), (c), or (d) of the Convention, “but the punishment involving compulsory labour is meted out more severely to certain groups defined in racial, social, national or religious terms, this situation falls within the scope of the Convention.”¹²³

More specifically still, the Committee of Experts considered that the U.S. government provided little information on the matter. Undeterred, the Committee of Experts turned to federal and state government internet sites to identify information.¹²⁴ The Committee of Experts called on the U.S. government to comment on the measures, supply information on the laws, and even encouraged the government to enact the Justice Integrity Act federally. The focus: “to ensure that racial discrimination at the sentencing and other stages of criminal justice process does not result in the imposition of racially disproportionate prison sentences involving compulsory labour” so as to bring U.S. law and practice in

120. *Id.*

121. *Id.*

122. *Id.*

123. *Direct Request (CEACR)—Adopted 2009, Published 99th ILC Session (2010)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENTS_YEAR:2306071,102871,United%20States%20of%20America,2009 [https://perma.cc/5H2Y-TFMG].

124. *Id.* The Committee of Experts cited law reform initiatives federally, Wisconsin’s Commission on Reducing Racial Disparities in the justice system, racial impact legislation introduced in Connecticut, a requirement for a “minority impact statement” in Iowa, the institution of the Illinois Disproportionate Justice Impact Study Commission, and the Minnesota Sentencing Guidelines Commission. *Id.*

conformity with the Convention.¹²⁵ The Committee of Experts also noted “with interest” the government’s indication that the Deputy Attorney General was asked to form and chair a working group on federal sentencing and corrections policy, which is expected to formulate a new cocaine policy that eliminates the sentencing disparity between crack and powder cocaine offenses.¹²⁶ It called for the U.S. government to report on action.

The strong focus on racial discrimination alone was retained in the 2012 Direct Request, which cited the Committee on the Elimination of Racial Discrimination (CERD), to which the United States is bound since it ratified the Convention on the Elimination of Racial Discrimination in 1994.¹²⁷ CERD had also expressed concern over the persistent racial disparities in the criminal justice system. The U.S. government was encouraged to “take the necessary measures” federally, and to “pursue and strengthen its efforts” at the state level.¹²⁸ CERD also noted “with interest” that President Obama signed the Fair Sentencing Act of 2010 into law on August 3, 2010, establishing new federal cocaine sentencing standards. The change was a sign of some measured success.

The penultimate direct request came in 2013. The initial concern raised by the ILO, on sanctions involving compulsory labor for participation in strikes, came back. Despite the U.S. government’s insistence that court records at the state level in North Carolina suggest that not a single instance of an individual being convicted for an illegal public sector strike, the Committee of Experts quoted the North Carolina law in detail, which pointed to a policy of putting “all able-bodied prison inmates” into prison labor.¹²⁹ But racial discrimination in the exaction of compulsory prison labor was also present, albeit in abridged form. The Committee of Experts urged the government to “pursue its efforts” to redress racial discrimination to ensure that it does not yield racially disproportionate

125. *Id.*

126. *Id.*

127. U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

128. *Direct Request (CEACR)—Adopted 2012, Published 102nd ILC Session (2013)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3065411,102871,United%20States%20of%20America,2012 [https://perma.cc/MD5X-4JY2].

129. *Direct Request (CEACR)—Adopted 2013, Published 103rd ILC Session (2014)*, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3134147,102871,United%20States%20of%20America,2013 [https://perma.cc/LK7G-W4FK].

sentencing involving compulsory labor, and that it is not meted out more severely for certain racial groups.¹³⁰

Several years passed since the CEACR issued its 2013 Direct Request. In 2017, the Committee of Experts' Observation¹³¹ reiterated concerns about racial disparities in sentencing, but in a very different world. It welcomed initiatives from the previous administration, including the Clemency Initiative and Project in 2014. It encouraged the U.S. government to pursue and strengthen those initiatives, both federally and at the state level.¹³² Its most recent direct request was adopted in 2020 and published in 2021 in advance of the June 2021 International Labour Conference.¹³³ The Committee of Experts noted information submitted by the US Department of Justice, showing the "significant overrepresentation of African Americans and Latinos/Hispanics within US prison populations" and that a prison sentence "normally involves an obligation to perform labour".¹³⁴ While it also noted "that, despite the absence of legislative action, various practical measures and policy initiatives were being taken at the federal and state levels to reduce racial bias within the criminal justice system."¹³⁵ The Committee "strongly encouraged" those efforts to be strengthened, in keeping with its focus on ensuring

130. *Id.*

131. See *Observation (CEACR)—Adopted 2017, Published 107th ILC session (2018)*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3316111 [https://perma.cc/A55S-A5HG].

132. It reported the following:
 [T]he Committee notes the Government's information on various initiatives being taken by several States to reduce racial bias within the criminal justice system. For instance, in April 2016, the MacArthur Foundation announced that it is awarding to 11 jurisdictions grants of between \$1.5 million and \$3.5 million over two years to fund state and local government projects, programs and reforms aimed at reducing their jail populations and addressing racial and ethnic disparities in their justice systems. The 11 jurisdictions include Charleston County, South Carolina; Harris County, Texas; Lucas County, Ohio; Milwaukee County, Wisconsin; New Orleans, Louisiana; New York City, New York; Philadelphia, Pennsylvania; Pima County, Arizona; Spokane County, Washington; the State of Connecticut; and St. Louis County, Missouri. Each of the 11 jurisdictions will implement plans tailored to their local context comprised of a variety of local solutions, such as alternatives to arrest and incarceration, implicit bias training for law enforcement and other system actors, and community-based treatment programs.

Id.

133. Direct Request (CEACR)—Adopted 2020, Published 109th ILC session (2021), Int'l Labour Org., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4046585:NO [https://perma.cc/HU5W-XRG3].

134. *Id.*

135. *Id.*

that the process does not result in “racially disproportionate prison sentences.”¹³⁶ It emphasized the importance of adopting legislation alongside implementing relevant policies and practices. While it acknowledged supplementary information that was provided through the Bureau of Justice Statistics, indicating that the 2018 imprisonment rate of “black residents” was the lowest since 1989, the Committee of Experts underscored that “the imprisonment rate of black men in 2018 remained 5.8 times that of white men, while the imprisonment rate of black women was 1.8 times the rate of white women.”¹³⁷

The Committee of Experts also addressed the U.S. government’s indication that Convention No. 105’s purpose is to suppress forced or compulsory labour as a means of discrimination, not to deal with discrimination. It contended that possible discrimination in the criminal justice system was outside the purview of the Convention. Yet again, the Committee of Experts reaffirmed Convention No. 105’s scope as including penal punishment that is meted out more severely to certain groups, notably on the basis of race, and renewed its call for information on measures taken in law and in practice to identify and reduce racial and ethnic disparities in the criminal justice system.

CONCLUSION: ON VIGILANCE IN TRANSNATIONAL LABOR LAW

The supervisory mechanisms at the ILO are under significant pressure, ironically at precisely the moment that their relevance in a number of initiatives has increased.¹³⁸ They are increasingly put to transnational uses, including by courts at the regional and domestic level who are applying conventions and considering ILO interpretations in their decision making.¹³⁹ Transnational labor law, as a form of multilevel governance that encompasses international, regional, domestic, and workplace levels, “loosens the grip of a unitary, centralizing framing of the ‘sovereign nation state,’ however tripartite its conception, as the sole responsible actor; and of an accompanying exclusively statist understanding of

136. *Id.*

137. *Id.*

138. See, e.g., Laurence R. Helfer, *Pushback Against Supervisory Systems: Lessons for the ILO From International Human Rights Institutions*, in ILO 100: LAW FOR SOCIAL JUSTICE, *supra* note 4, at 257 (discussing contestations over the right to strike and the freedom of association); see also Bellace, *supra* note 70 (explaining the relationship between the pushback on the right to strike and its significance for the thickening of soft law transnationally).

139. See Adelle Blackett & Anne Trebilcock, *Conceptualizing Transnational Labour Law*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 3 (Adelle Blackett & Anne Trebilcock, eds. 2020).

law.”¹⁴⁰ Under this vision of transnational labor law, the ILO is certainly not the only institutional actor. Transnational labor law takes seriously the multiple means by which international labor law can be operationalized, across governance levels, to bring social justice to the world of work.¹⁴¹ Focusing on labor in relation to transnational legal ordering¹⁴² sharpens the understanding of historical forms of marginalization, and keeps the attention on where relational power lies.¹⁴³ While in this time of deep discontent some international organizations, including the ILO and its supervisory bodies, are increasingly urged to exercise institutional humility, it is important to recall that it is precisely when institutions take positions that challenge an unequal status quo and foster social justice for the most historically marginalized that backlash is likely to follow.¹⁴⁴

The initiatives of the Committee of Experts to bring close engagement with forced labor and prison labor into focus can ill afford to escape the attention of those fighting for justice for incarcerated people. While the ILO appears to have redoubled its efforts under an administration that was potentially sympathetic, its supervisory monitoring is all the more necessary in moments when patterns of mass incarceration are hardening.¹⁴⁵ The Committee of Experts, by centering extreme “racial disparities” in sentencing and the exaction of compulsory labor, is operating an act of historical memory. The act of historical memory the dialogue enables operates in the work of those who understand mass incarceration and

140. *Id.* at 5. See also Adelle Blackett & Laurence R. Helfer, *Introduction to the Symposium on Transnational Futures of International Labor Law*, 113 AJIL UNBOUND 385, 386 n.11 (citing the *Constitution of the International Labour Organization*, 49 Stat. 2712 (1919)) (“[T]he roots of a transnational approach extend at least as far back as the ILO Constitution, which captured the cross-border effects of workplace and worker regulations in its assertion that ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.’”).

141. BLACKETT, *supra* note 74, at 173; see also David M. Trubek, *The Emergence of Transnational Labor Law*, 100 AM. J. INT’L L. 725 (2006) (book review); Ruth Dukes, *International Labour Rights: Legitimizing the International Legal Order?*, 67 U. TORONTO 544 (2017).

142. See generally TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

143. See BLACKETT, *supra* note 74, at 169.

144. See Adelle Blackett, *Beyond a Boundary: On Transnational Labour Law, Discontent, and Emancipatory Social Justice*, in ILO100: LAW FOR SOCIAL JUSTICE, *supra* note 4, at 463; See, e.g., BOB HEPPLE, *LABOUR LAWS & GLOBAL TRADE* (2005) (recalling the ILO’s positions on apartheid in South Africa); see also Gay McDougall, McGill University Faculty of Law, *Transnational Futures of International Labour Law*, YOUTUBE (Mar. 21, 2019), <https://youtu.be/gnvOiKs8uUE> [<https://perma.cc/S8PP-ZBZU>] (suggesting a general recommendation on race and labor law); Tonia Novitz, *Tripartism as Sustainable Governance*, in ILO100: LAW FOR SOCIAL JUSTICE, *supra* note 4, at 337, 348 (addressing intergenerational and intragenerational justice and the importance of sustaining mechanisms for voice).

145. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

prison labor as part and parcel of the persistent afterlife—indeed perpetuation—of slavery.¹⁴⁶ Moreover, by focusing on racialization in its engagement with forced labor, the ILO moves the understanding back in the direction urged, almost a century ago, by those committed to a vision of “native” labor that was not colonial, but rather, focused on redressing the challenge of the color line.¹⁴⁷

The ILO–U.S. dialogue on racial disparities in forced labor in prisons offers a rare instance in which the distinctly intertwined histories of slavery and the persistence of racial capitalism through prison labor are engaged. Because the risk of enabling the transgressive potential of that history is being eclipsed by a focus on so-called modern slavery, or trafficking, there is a need to focus closer attention on the persistence of the past in the present. This affects the racialization of ongoing practices of subordination, including contemporary trafficking. These developments are all transnational, and accounts of the transnational must be historicized. In other words, rather than enable a shift in gears, a focus on the legacies of the past allows any subsequent analysis of contemporary forms of slavery to proceed, at the very least, without reconstituting the errors of the past, and with due vigilance and care, operating an alternative, emancipatory discourse. The transnational requires critical, decolonial interrogation for transnational labor law’s counterhegemonic potential to be centered.

146. *Id.*; see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (2009); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. Irvine L. Rev. 297 (2013); NOAH ZATZ, TIA KOONSE, THERESA ZHEN, LUCERO HERRERA, HAN LU, STEVEN SHAFER, AND BLAKE VALENTA, UCLA INST. FOR RSCH. ON LAB. AND EMP., *GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT* (2016); Ifeoma Ajunwa and Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 Nw. U.L. Rev. 1385 (2018).

147. See Blackett, *supra* note 21.