

Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective

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Abstract Forced labour has been regulated since 1930 on the basis of the ILO Convention on Forced Labour, and since 1957 on the basis of the ILO Abolition of Forced Labour Convention. In 2000 forced labour was included as one form of exploitation covered by the UN Trafficking Protocol, which situated trafficking into a context of transnational organised crime. In 2014 the ILO adopted a Protocol on Forced Labour, making a link between trafficking and forced labour. The aim of this article is to explore how forced labour came to be regulated and defined in these four treaties. The 1930 ILO Convention came about in a specific historical and political context, yet the 1930 definition remains in use even though the interpretation of forced labour, particularly as it relates to trafficking, has changed. This article focuses on the issue of trafficking for the purpose of forced labour within the context of migration and labour exploitation, and discusses the relevance of historical definitions of forced labour in the current discourse that sees human trafficking mainly as a security threat. It argues that a rigid interpretation of forced labour is not always useful in understanding forms of labour exploitation, at least in a contemporary European migratory perspective. The article calls for a broad interpretation of forced labour, which takes into account also subtle forms of control and coercion.

Introduction

During the past decade, the phenomenon of trafficking in human beings has been the subject of increased attention internationally, regionally and nationally, and has been the focus of a growing body of research in social sciences and law. A large part of the research on trafficking in persons has focused on trafficking for sexual exploitation.

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Research on trafficking for labour exploitation, i.e., for the purpose of forced labour, has received less attention [17].¹ Trafficking in women for sexual exploitation accounts for the majority of cases detected globally, but the number of reported cases of trafficking in both men and women for the purpose of forced labour has increased in recent years [43, 84, 85]. The vast majority of all victims of trafficking identified in the European Union are female (80 %) while the majority of victims of labour exploitation in Europe are male (77 % in 2010) ([12]: 10). Recent data shows that while trafficking for sexual exploitation remains predominant in Europe, there has been a clear increase in cases of trafficking for labour exploitation [11].²

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (henceforth the Trafficking Protocol) of 2000, provides the first internationally agreed-upon overarching definition of trafficking in human beings. The Trafficking Protocol is the first comprehensive international treaty on trafficking and was developed with a criminal justice perspective, although it aims at a comprehensive approach towards trafficking.³ There has been some criticism against the criminal justice focus of the treaty,⁴ but as Gallagher points out “there is no way the international community would have a definition and an international treaty on trafficking if this issue had stayed within the realms of the human rights system” ([14]: 4).

The Trafficking Protocol incorporates a broad definition of trafficking in human beings.⁵ Until the development of the Protocol, the term “trafficking” had primarily been associated with sexual exploitation and prostitution [58]. The Trafficking Protocol, by including “forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”, broadened the understanding and agreement of what constitutes trafficking. The only comprehensive international definition of forced labour, in turn, stems from the 1930 ILO Convention on Forced Labour.⁶ The 1930 Convention was drafted for a specific purpose in a certain historical setting. The

¹ The distinction between the different forms of exploitation is not necessarily clear-cut, for instance when a victim of labour exploitation is exploited also sexually. An additional subject of debate is whether sexual exploitation or forced prostitution should be regarded as a form of forced labour. For the purposes of this paper, trafficking for the purpose of forced labour excludes forms of sexual exploitation and prostitution although it is recognized that sexual exploitation may feature in situations of forced labour, and that coerced prostitution may be defined as forced labour. For a discussion of different views on prostitution, see e.g., [68]: 20–37; [54]; [64].

² In several European countries there has been a rising trend in trafficking for labour exploitation and growing awareness of this phenomenon, as is also indicated by increasing research into the topic (e.g., [3, 10, 15, 55, 59, 60, 65, 71, 76, 77, 87, 63]).

³ The so-called 3 P’s of prevention, protection and prosecution, with partnerships added later on as a fourth P.

⁴ Haynes argues that the original intent of the Trafficking Protocol was to protect and prioritise victims, but it mutated into one on crime prevention, with a focus on the exploiter ([19]: 42). Howard and Lalani see that the Protocol frames trafficking as a “problem of boundaries and state sovereignty, in spite of the human rights content of the Protocol itself” ([21]: 9).

⁵ “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (Art. 3a).

⁶ 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” (Art. 2.1).

concept was incorporated into the definition of trafficking in human beings and today remains the only internationally agreed-upon definition of forced labour.

In the context of trafficking in human beings, a definition of forced labour that is almost 100 years old is being applied, a definition that had been developed for a different purpose in a different historical context. Trafficking in human beings and forced labour can both be seen as historical and social constructs. In previous research on trafficking for forced labour, legal practitioners have testified that the definition of forced labour is difficult to grasp and apply in cases of trafficking related to the exploitation of migrant workers (see [46, 47]; see also [34]). This article aims to understand how the original definition of forced labour arose and whether the historical definition is still relevant today or whether it needs to be reinterpreted. It also aims to uncover how the regulation and definition of forced labour have evolved over the years in view of the contemporary discourse that sees human trafficking mainly as a security threat. The article further aims to explore whether the earlier definitions, which emphasise force and control, are relevant to contemporary situations of trafficking in a globalised world characterised by (mass) labour migration. This article therefore focuses on the issue of trafficking for the purpose of forced labour within the context of international labour migration. It does not attempt to provide a new definition of forced labour, nor does this article attempt to provide concrete guidelines for practitioners on exactly how forced labour and trafficking should be understood in the context of migration and labour exploitation.

This article analyses how the need to regulate forced labour was framed and argued, first in the 1930 ILO Convention, and then in the 1957 ILO Abolition of Forced Labour Convention. This is followed by an analysis of the need to regulate and define trafficking in human beings in the 2000 Trafficking Protocol. In addition, the recent ILO Protocol of 2014 to the Forced Labour Convention is included in the analysis to provide a recent overview of how ILO has attempted to merge the notions of trafficking and forced labour. How was forced labour and the need to control or regulate it contextualised in 1930, 1957 and in 2000? How was forced labour defined? What do these very different contexts mean for the possibilities for a universal definition? The focus of this article is on the 1930 and 1957 Forced Labour Conventions and the 2000 Trafficking Protocol. In order to explore these core questions, key documents relating to the negotiations on the 1930 and 1957 ILO Forced Labour Conventions, as well as the negotiations on the 2000 Trafficking Protocol and the 2014 ILO Forced Labour Protocol, are analysed.⁷

The analysis seeks to uncover certain historical discourses in the documents. The analysis builds on a constructionist approach that sees trafficking and forced labour as products of societal discussions and social realities (e.g., [70]). In this sense, the analysed documents are seen as historical representations of ideas and ideologies, which can be analysed through their contextualisation. The texts have been read as giving an account of the emergence of an understanding of forced labour and

⁷ The analysis only focuses on the discussion on the definition of the terms, and thus does not cover an analysis of the complete treaties. The materials consist of selected official documents from the negotiations on the 1930 and 1957 Forced Labour Conventions and the 2000 Trafficking Protocol as well as the 2014 ILO Forced Labour Protocol. The materials include e.g., the treaty texts, meeting reports, reports from working groups, and explanatory reports. The main materials total about 1200 pages. All documents are available online at the ILO and UNODC websites.

trafficking for forced labour, and the discourses that were used in regulating these two phenomena. Key themes and important arguments have been selected from the texts and form the basis for the presented results.

Labour migration and trafficking

This article focuses on trafficking in human beings for the purpose of forced labour within the context of migration and labour exploitation. In a contemporary European setting, trafficking for forced labour can be seen to take place largely in the context of migration. Trafficking is thus also closely related to globalisation and its consequences although it is important to note that not all trafficking or forced labour is international in nature, or related to migration.⁸ The number of international migrants in the world has grown over recent years and is expected to increase even more in the near future [42]. The labour force is rapidly growing in less developed countries while the demand for migrant labour is likely to increase in the developed world (ibid.). As the population especially in Europe continues to age, the need for immigrant workers is expected to increase. Irregular migrants are recruited for the jobs for which native workers are unavailable. Migrants are vulnerable and cheap, and they lack rights and benefits ([20]: 157).

In an era of neoliberal globalisation, migration and labour questions can be seen as two sides of the same coin, with a global oversupply of labour being exploited and even “superexploited” by capitalist development [88]. A connection exists between the growth of trafficking, increased trade liberalisation and contradictory state barriers to the transnational movement of labour in the global economy ([6]: 551). Trade liberalisation and restrictive immigration policies create a disequilibrium which, combined with labour market failures, stimulates migration flows, with trafficking embedded within this disequilibrium and these market failures (ibid.: 549). The factors that trigger migration are the same factors that push victims into human trafficking ([19]: 10).

The increase in irregular migration into the EU is at least partly the result of labour market demand for cheap and flexible labour. Subcontracting, temporary work and the casualization of labour move work further from the formal to the informal economy. At the same time, there is political pressure to close the external borders to unwanted migrants. This leads to an on-going separation of immigrants into two: those who are needed and wanted, and those who are considered risky and thus not welcome (see e.g., [2, 8, 18, 19]). Trafficking and exploitation can therefore be seen as the consequences of migration pressures in a world of closed borders ([56]: 174).

However, restrictive immigration policies do not seem to constrain the flow of immigrants; instead, they serve to facilitate the exploitation of the migrant and would-be migrant ([6]: 598). The more vulnerable the migrant, the more risk there is for exploitation and, ultimately, for human trafficking ([4]: 11). Illegal migration

⁸ There are of course also numerous other manifestations of contemporary forced labour and trafficking. In-country trafficking accounts for 34 % of trafficking flows world-wide ([85]: 8). Globally most victims of forced labour are exploited in the location where they usually live, indicating that movement can be an important vulnerability factor for certain groups of workers, but not for others ([36]: 17).

patterns and restrictive immigration policies increase the likelihood that migrants will fall victim to trafficking [56]. A moderate increase in legal migration opportunities is unlikely to reduce trafficking (ibid.: 186). Bravo argues for a liberalisation not only of capital and products but also of humanity, since the failure to liberalise creates vulnerability to exploitation especially among labour migrants, who when attempting to cross state-created barriers, become vulnerable to traffickers ([6]: 550; see also [69] for a discussion on migration and rights).

An additional contention is caused by the fact that many victims of trafficking have migrated voluntarily. This voluntary nature of the migration may place the blame on the migrant while at the same time legitimising the migrant's exclusion from assistance or victimhood (see [52]: 69). Victims of trafficking may therefore be excluded from the position of "ideal" victims in a traditional criminological sense (see [9]; also [52, 66, 68], 238–239). Furthermore, the "modern slavery" discourse portrays only some as deserving victims and others as undeserving of rights and freedoms [61]. The division between "deserving victims" and illegal or unwanted migrants becomes increasingly blurred because of the expansion in labour migration. Victims of trafficking are deprived of political agency, since with agency they would become risky beings: they would become migrants [5]. The migrant may thus be regarded both as *a* risk (to the State) and being *at* risk (of exploitation) ([52]: 60). From a victim-centred perspective, therefore, exploited migrant workers (be they defined as victims of trafficking for forced labour or "merely" as victims of labour exploitation) are vulnerable bodies deprived of their own political agency and thus the target of humanitarian interventions and pity, but as migrants, trafficked persons are considered a risk and a threat to the security and integrity of states [5, 62].

This dichotomy of the vulnerability of the victim on the one hand, and the threat to the integrity of the state on the other, colours much of the current discussion on trafficking (see e.g., [8, 19, 68, 62]). This is particularly the case concerning trafficking for forced labour and labour exploitation, which – at least in a European (mass) migration setting – take place right at the centre of global labour migration. Shamir argues that the individualistic, victim-centred approach, which treats trafficking as an exceptional crime, fails to deal with the specific conditions that render workers vulnerable to exploitation ([72]: 80). Instead of seeing trafficking as the exception, it should be seen as one manifestation of the exploitation of (migrant) labour in a world where migrants lack agency and rights. In this sense, then, trafficking is no longer a question only of the vulnerable falling prey to unscrupulous (sex) traffickers but a complex question of globalisation, migration, agency and rights. The distinction between "real victims" and "economic migrants", however, fails to acknowledge that all trafficking is a by-product of labour and migration (see [19]: 50). The current understanding of what exactly constitutes labour trafficking – or trafficking for the purpose of forced labour – is coloured by rather rigid definitions and stereotypical images, which in the current interpretation fail to take into account the complex situation of the abused migrant worker and much of the context in which exploitation occurs: trafficking for forced labour taking place in the context of the general exploitation of migrant workers. Hence, the poorer the working conditions of the most vulnerable, the greater the risks of and opportunities for serious forms of exploitation. A historical analysis of the emergence of the concepts of forced labour and trafficking can assist with the current challenges of interpretation and implementation. In doing so, it is important to place the definitions in the relevant social and political contexts in which the definitions emerged.

The regulation of forced labour in 1930

From slavery to forced labour

Both conceptually and historically, the regulation of forced labour is closely related to the abolition of slavery. The 1926 Slavery Convention was the first international treaty against slavery and the slave trade and includes a provision also on the prevention of compulsory or forced labour (Art. 5).⁹ In preparing the Convention, the issue of forced labour was considered particularly difficult and controversial, since forced labour was practiced in many colonies [57].

When colonial powers formally ceased to use slaves, slavery was largely replaced by other coercive labour practices. Forced and coercive forms of labour were widespread in the colonies even after the formal abolition of slavery, with forced labour justified as a “regrettable necessity” by colonial officials ([66]: 103). Colonial administrations continued to use forced labourers e.g., for the growing of cash crops, in railway construction, in portage, and during times of conflict, while in other circumstances so-called communal labour was used by local chiefs and rulers to carry out public works for the common benefit ([57]: 135–40; [22, 66]). At the time, forced labour had already been regulated to some extent¹⁰ but the existing regulation was not considered sufficient. ILO established an expert commission in 1926 to study the question of forced labour. The Committee of Experts on Native Labour was first tasked to consider “what exact aspects of native labour” should be covered by the regulation ([16]: 623). Some years later the ILO decided to take up the issue of forced labour with the aim of coming up with principles underlying its regulation ([22]: 4). This illustrates where the focus of the efforts lay at the time: in regulating the (ab)use of native labour in the colonies and in allowing for some exceptions.

Protecting the rights of the “native peoples” while enabling their continued abuse

The discussions between States preceding the 1930 Convention show that forced labour was justified largely through its *economic value*, although the value of the work was mostly falling into the hands of those exacting the labour rather than those performing it ([22]: 239–40). At the same time, forced labour was considered by some to be *economically wasteful* compared to free and voluntary labour and the *quality of labour* performed under compulsion was considered poor ([22]: 239–43).

⁹ A supplementary convention on slavery was adopted in 1956, which broadened the understanding of slavery from more traditional notions of slavery to include also analogous practices and institutions, such as debt-bondage and serfdom ([66]: 151–2). The prohibition of slavery also became a key feature of international human rights law (Art. 4 of the 1948 Universal Declaration on Human Rights and Art. 8 of the 1966 International Covenant on Civil and Political Rights).

¹⁰ Already the founding document of the League of Nations (the Covenant of the League of Nations), although not prohibiting forced labour, called on its Members to secure and maintain fair and humane conditions of labour for men, women, and children (Art. 23). Forced labour was, however, explicitly prohibited in areas still under colonial rule (the so-called Mandates B and C) “except for essential public works and services” and then only for adequate remuneration (Covenant of the League of Nations; [22, 57, 79]). The Slavery Convention of 1926 outlined additional important principles regarding the use of forced labour.

The discussions also show many undercurrents of *colonialism and patronising views* at play. For instance, the use of forced labour was rationalised by some through its perceived educational value on the “primitive mentality” of the people in the colonies ([22]: 236). Forced labour was also framed in patronising terms as a question of “the working conditions of subject peoples who are under the administration of races alien to themselves” ([22]: 1). Several arguments, however, also highlight the negative social and societal effects of forced labour. Compulsory work was considered to have *degenerating effects on those subjected to it* ([22]: 236), since compulsion in itself was considered humiliating. Forced labour was also considered to be a channel for demoralising and negative effects on the native populations ([22]: 234–5).

The ILO Convention of 1930 was drawn up largely as a response to *protect the rights of indigenous peoples and to curb the use of exploitative labour practices* for the benefit of the colonies and local chiefs. As Miers has pointed out, following the Slavery Convention the idea was accepted that infringements by a government of the rights of its own citizens should be matters of international concern, although some colonial governments opposed such restrictions ([57]: 116; see also [66]: 105). France, Portugal, Belgium and Italy were concerned that the Convention would allow the ILO to interfere in colonial labour policies and consequently watered down the text ([57]: 141–3). In this sense the Convention can be considered to be flawed, and portrays how national political interests influence the emergence and development of international treaties.

Security and protecting labour markets

The time was also ripe for the development of general standards of human rights in the workplace. The extension of such rights was not wholly altruistic on behalf of the colonising and developed countries: the regulation of forced labour was also considered a *security issue*. The documentation from the second discussion on forced labour highlights the emergence of the extension of rights to “an increasing class of workers who are practically untouched by the international labour Conventions it has hitherto adopted, and whose conditions of labour frequently involve such injustice, hardship and deprivation that they will increasingly tend to produce unrest so great the peace and harmony of the world may be imperilled” ([23]: VI). The regulation thus aimed also at protecting the workers of the industrialised world from the competition of the unorganised colonial workforce (see [57]: 146–8). There were *national interests* at stake with colonial powers wanting on the one hand to benefit from the continued (ab)use of native labour, and on the other hand to protect their own labour markets.

Coming to agreement on the definition of forced labour

The 1930 Convention did not criminalise forced labour. It only suppressed the use of forced labour, while regulating certain accepted forms of forced labour. The Convention also provides guidance on the circumstances under which forced labour can be exacted,¹¹ but it does not outline exactly what constitutes unaccepted forms of forced

¹¹ Compulsory military service; normal civic obligations; prison work; work in cases of emergency; and minor communal services that are considered part of normal civic obligations (Art. 2.2).

labour,¹² and what to do about them (other than suppress them as soon as possible¹³).

The 1930 Convention defines forced or compulsory labour¹⁴ as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Art. 2.1). The definition consists of three parts: 1) work or service, 2) menace of any penalty, and 3) lack of a voluntary offer.

During the discussions, some Governments suggested the deletion of the words “under the menace of any penalty for its non-performance” from the suggested definition, but the Committee of Experts on Native Labour considered this to be an essential part of the definition of forced labour ([23]: 136). The discussions highlight the circumstances in which an individual does not offer himself (or herself)¹⁵ voluntarily for labour, and in this way how the labour can be characterizing as forced or compulsory. However, from a legal perspective, it was argued that it is the legal sanction for the non-performance of labour which distinguishes forced or compulsory labour from voluntary labour ([23]: 136–7). Thus, if there is no legal sanction for the non-performance of the labour, it is either voluntary or it is exacted illegally under circumstances which would probably constitute an offence which would be punishable in any case (ibid.).

It is interesting to note that the penalty referred to in the definition was argued not to mean only punishments ordered by legal bodies. The term “penalty” was not to be interpreted in a strict sense to mean punishment inflicted only by a court of justice. The Committee on Forced Labour¹⁶ noted that *any penalty or punishment inflicted by any person or body* was meant by the use of the word “penalty” ([24]: 11).

The concept of a lack of a voluntary offer on the part of the worker raised debate. During the elaborations of the Convention it was noted that a worker may enter voluntarily into a contract, only to realize that he (or she) was mistaken about the nature and conditions of the work or that he (or she) was deceived by the recruiter. There were suggestions to include not only the non-voluntary character of the work into the definition, but also recognition of situations in which a worker *cannot withdraw himself (or herself) from the work voluntarily* ([24]: 10). The fear was that much forced labour would otherwise escape from the scope of the Convention. The final definition of forced labour did not include explicit references to such situations.

The analysis of the discussions during the development of the 1930 Convention on forced labour reveal the historical dimension of the definition. On one hand, it was in the interest of (some) colonial powers to continue (ab)using native labour in the colonies. On the other hand, the rights of the “native peoples” were to be protected from exploitation, while at the same time safeguarding the rights of workers in the

¹² Private forced labour, however, is not allowed: the Convention prohibits all forced or compulsory labour for the benefit of private individuals, companies or associations (Art. 4).

¹³ The ILO Forced Labour Protocol of 2014 notes that the transitional period during which forced labour could be applied in line with the 1930 Convention has expired.

¹⁴ At the time it was agreed that forced labour and compulsory labour would not be separated, as already the Slavery Convention used both terms ([23]: 134).

¹⁵ The original texts only refer to men but for the purposes of this article both genders have been included.

¹⁶ The Committee on Forced Labour was established to discuss the Report on Forced Labour which had been prepared by the ILO with the assistance of the Committee of Experts on Native Labour ([24]: 3).

developed world. The definition of forced labour focuses on the non-voluntary nature of work, and the use of penalties in exacting the labour, whereas the situations where a person cannot quit working were not included in the definition. While the definition of forced labour can be considered relevant still today, it needs to be reinterpreted in a contemporary social and historical context, where forced labour is no longer a state-sponsored (colonial) activity, but mainly a form of exploitation by private actors.

The 1957 abolition of forced labour convention

Forced labour as a political concern

Forced labour was raised anew within the framework of the United Nations in 1947 by the American Federation of Labor when it accused the Soviet Union of arbitrarily sentencing dissidents and others to forced labour camps ([57]: 320). The Federation called upon the UN to conduct a comprehensive survey on the extent of forced labour and to adopt a revised Convention to eliminate forced labour ([25]: 3). However, the aim was not purely to denounce forced labour itself, but to oppose the economic and social model of the Eastern Bloc, most notably the Soviet Union, and to condemn the human rights abuses in these countries [51]. In addition to the Cold War and its division of countries into two blocs, the discussions were coloured by the memory of the Nazi concentration camps. Forced labour became framed also as a human rights issue thanks to human rights and anti-slavery organisations, which argued that economic and social inequalities as well as ethnic differences reinforce forced labour (ibid.). The social and political context in which the ILO Convention of 1957 was developed was thus largely influenced by the memories of the Second World War and the Cold War but also by the rising human rights discourse.

Prohibiting forced labour as a means of political coercion

The UN survey on the extent of forced labour showed that a system of forced labour as a means of political coercion existed in certain countries. People were found to have been sentenced to forced labour for political or ideological opinions, especially if they opposed or were suspected of opposing the established political order ([25]: 7). Furthermore, forced labour was also found to concern not only so-called indigenous workers, but also those of “fully self-governing countries”, especially in the form of *coercive methods of recruiting, heavy penalties for breaches of contracts of employment and restrictions on freedom of employment and movement*, all relating to what was defined as the promotion of the country’s economic progress ([25]: 9).

There were discussions on the need for a new convention on forced labour, since it was argued that forced labour practices had emerged that were “not foreseen when the Forced Labour Convention of 1930 was framed”, particularly forced labour as a means of political coercion or for economic purposes ([25]: 16). The discussions concerning the Convention show that the *revision of the definition* of forced labour lay at the core of the new Convention. The discussion on exactly how the definition of forced labour

should be revised reveals several interesting positions by States. Some argued that despite changed historical circumstances, the original definition should remain intact ([26]: 14) while others suggested several new elements in order to clearly outline what constituted prohibited forms of forced labour. From a contemporary perspective, it is noteworthy that India suggested the prohibition of “traffic in human beings and beggar and other similar forms of forced labour” ([26]: 4), although this was not included in the final text.

Economic dependence of employees and discrimination

The issue of duress arising from the *economic dependence of employees on their employers* was also raised in the discussions ([26]: 15). The most comprehensive proposal was tabled by the USSR, itself being at the centre of the controversy around the use of forced labour as a means of political coercion and punishment. The discussions show that the USSR wanted a comprehensive and radical instrument, which would abolish all existing forms of forced labour anywhere ([27]: 4). The USSR consequently suggested a wholly new definition of forced labour, which would include the exaction of work also based on “personal and economic dependence of the worker on the employer” ([26]: 17). The USSR also wanted to clearly define what exactly constitutes forced labour, and despite obvious political motivations in presenting the arguments, many of the points raised are important today. The USSR argued that work is forced labour when there is use of economic dependence, including debt bondage and other servitude; when the worker is paid so poorly or rarely that the worker has no “genuine possibility of *ceasing to work for an employer at any time*”,¹⁷ and where the worker is *discriminated* against in “recruitment, working conditions or trade union activity on grounds of race, sex, nationality, religion or trade union membership” and as a result of the *discrimination* is able to access only certain occupations (ibid.).

The USSR proposal was included in the draft version of the convention as a sixth form of prohibited forced labour: forced labour as a consequence of how the worker is paid, e.g., by *deferring or postponing payment* and thereby depriving the worker of a genuine possibility of terminating the employment, or where work is exacted from the worker in the form of bondage for debts or through systems of peonage ([27]: 13). Some States but most notably employers’ representatives opposed the inclusion of deferring payment, and it was deleted after a vote. The discussions show that the majority of states considered payments to be part of industrial relations rather than an element of forced labour, with some arguing that this approach had “nothing whatsoever to do with forced labour” and instead only attempted to provide a completely new definition of forced labour ([27]: 19–22).

The 1957 ILO Abolition of Forced Labour Convention in the end defines the following prohibited means of forced labour: as a means of political coercion, as a method of mobilising and using labour for purposes of economic development, as a means of labour discipline, as a punishment for having participated in strikes, and as a means of racial, social, national or religious discrimination (art. 1).

¹⁷ Author’s emphasis.

The lack of a voluntary offer

The issue of what constitutes a “voluntary offer” raised considerable debate. Some countries argued that any service which is not offered in a “completely voluntary manner” should count as forced labour, and that the individual should have *the right to stop working at any time*, while others suggested including situations where the voluntary offer is motivated by fear ([26]: 13–15). Other countries suggested the deletion of the reference to a person offering himself “voluntarily”, since a person under threats of penalty is unable to exercise his own will (ibid.: 15). None of these arguments were included in the final text.

The 1957 Convention emerged in a very specific historical and social setting: the need to address the gross violations that took place in the context of World War II concentration camps, the Cold War and Soviet labour camps. The Convention did not revise the 1930 definition of forced labour but included additional forms of forced labour. The discussions on the economic dependence of the worker on the employer and the lack of possibility to cease working and non-payment of wages are still relevant for a contemporary understanding of forced labour and trafficking. Although the context of forced labour is different today, the 1957 Convention paved the way for an understanding of the more subtle forms of control used in forced labour.

The 2000 UN protocol on trafficking in human beings

Towards the regulation of trafficking in human beings

The social and political context in which the 2000 UN Protocol on Trafficking in Human Beings came about was on one hand coloured by a discussion on the harms of sexual exploitation and prostitution lasting well over a decade, and on the other, on the perceived threat of increasing organised crime at the end of the 20th century. Trafficking was first discussed at the turn of the 19th century in the wake of the rise of the modern human rights movement, with a focus on the sexual exploitation and prostitution of white women and children [7]. The concept of so-called white slavery (or white slave traffic) emerged from claims that there was extensive coercion of (British) girls and women into prostitution abroad, where innocent white women fell into the hands of dark men ([53]: 113). As such, the phenomenon was viewed in highly xenophobic and parochial terms ([49]: 127). The discussion was also largely centred around the abolition of prostitution. The prohibition of (white) slave traffic did not take into consideration other aspects of trafficking, such as trafficking for the purposes of forced labour and keeping otherwise voluntary workers in slavery-like conditions [7]. The suppression of the white slave traffic became the focus of some early international treaties.¹⁸ The emergence of the modern human rights movement around the middle of the 20th century and the following evolution of the women’s human rights community

¹⁸ These include the 1904 International Agreement for the Suppression of the White Slave Traffic, the 1910 International Convention for the Suppression of the White Slave Trade, the 1921 International Convention for the Suppression of the Traffic in Women and Children, the 1933 International Convention for the Suppression of the Traffic in Women of the Full Age, and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

brought trafficking in human beings anew to international attention ([7]: 6–7). Concern over trafficking re-emerged in the wake of the growing global movement for women's human rights in the 1970s (*ibid.*: 11).¹⁹

Crime became a global concern already in the interwar period. The speculation regarding the “worldwide crime wave” centred on the perceived negative effect of the First World War on crime rates, increased migration, and unemployment [50]. The perceived threats posed by trafficking in drugs and women helped place (transnational) crime high on the international public agenda (*ibid.*). Knepper argues that the “narrative of traffickers and terrorists that would guide international efforts for decades to come” was established already at the time of the League of Nations ([50]: 169). Towards the end of the century the geopolitical situation caused by the collapse of the socialist world, the development of technological advances, and related growth in international business and communications all contributed to making transnational organised crime a “threat to the world order” ([73]: 463). This was the backdrop for the development of the United Nations Convention against Transnational Organized Crime,²⁰ which was the “first serious attempt by the international community to invoke the weapon of international law in its battle against transnational organized crime” ([13]: 976). Through its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Convention for the first time also defined trafficking in human beings as a crime and a security concern, thus expanding the earlier prostitution-focused and human rights approaches to human trafficking. In addition, also the related issue of illegal migration and the fear of smuggling of migrants coloured the discussion of trafficking.²¹

From a focus on sex, women and children to a broader understanding of trafficking

The negotiations show that there were several interests involved in defining what elements of trafficking to include. In the first session of the ad hoc Committee, Argentina presented a proposal focusing on trafficking in women and children, but

¹⁹ The first exclusive treaty on women's human rights, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), included the suppression of “all forms of traffic in women and exploitation of the prostitution of women” (Art. 6). The reference to *all* forms of trafficking has been interpreted to also include forced labour ([14]: 65). The Convention on the Rights of the Child (CRC) of 1989 is the only contemporary international human rights treaty in addition to CEDAW that refers explicitly to trafficking (*ibid.*). The CRC covers trafficking in children for any purposes or forms (Art. 35).

²⁰ The World Ministerial Conference on Organized Crime was held in Naples in November 1994. Trafficking in human beings for the purposes of both sexual and labour exploitation was raised in the general debate. While the focus was still on sexual exploitation and minors, coerced labour was also mentioned ([80]: paragraph 33). One of the recommendations of the conference was the initiation of a process to develop an international instrument against organized transnational crime (*ibid.*). As a parallel process, Argentina had been pushing for the inclusion of trafficking in minors into the negotiations on an additional protocol to the Convention on the Rights of the Child in Geneva, but was dissatisfied with the slow progress. Argentina succeeded in raising the issue also in Vienna, and the annual session of the United Nations Commission on Crime Prevention and Criminal Justice in Vienna discussed a proposal for a separate Convention on the issue of trafficking in minors [81]. The Argentine proposal was eventually merged with other proposals to include trafficking in women. The United Nations General Assembly established an ad hoc Committee in 1998 with the aim of drafting a Convention against transnational organised crime, including an instrument addressing trafficking in women and children [82].

²¹ The parallel UN Protocol on Smuggling of Migrants focuses on strengthening border measures and enforcement for the prevention of smuggling of migrants.

the United States suggested that the instrument should be broader, including “trafficking in persons for the *purpose of forced labour*, prostitution or other sexual exploitation” ([83]: 331, author’s emphasis). The US also emphasised the specific protection of women and children *as victims of organized crime* (ibid.). Almost all participating countries preferred this broader scope, but with special attention given to women and children as originally envisioned at the outset of the negotiations (ibid.: 322).

The United States was at the time in the process of developing its own national legislation on trafficking, which was more strongly focusing on labour exploitation than sexual exploitation. Several high-profile cases of recruitment and severe exploitation of migrant workers in street peddling and sweatshop labour had been uncovered in the late 1990s, revealing serious deficiencies in anti-trafficking laws in the US ([48]: 38-40). The negotiations show that also other participants, such as the ILO, suggested the inclusion of forced labour and other forms of exploitation ([83]: 334). It is worth noting that the understanding of trafficking was broadened to incorporate a crime affecting not only women and girls, but also men and boys.

Emphasis on force, coercion and organised crime²²

The documents from the negotiations of the Protocol show that considerable time was spent during the negotiations *trying to define the terms used*, especially “sexual exploitation” and “forced labour”. A number of countries supported a broad definition of both terms so as to ensure that the Protocol would cover all forms of exploitation ([83]: 333, footnote 5). Based on a US suggestion – much in line with the 1930 ILO definition – a first draft was prepared, outlining that forced labour “shall mean all work or service extracted from any person under the threat [or],²³ use of force [or coercion] and for which the person does not offer herself or himself with free and informed consent” (ibid.: 340).²⁴ The US suggestion did not include the 1930 use of “menace of a penalty” but instead included *force or coercion*. During the discussions, many countries preferred the word “coercion” over “force”, which they felt was broader, while others wanted to exclude the word “coercion”.

At a later stage of the negotiations, a working group of the Committee provided an alternative definition of forced labour (ibid.: 342).²⁵ Also this definition emphasised the use of force or coercion. The suggested definition focused not on the voluntary offer, but instead outlined the elements of the menace of a penalty through the very concrete notions of *force or threat of force, coercion*, fraud, debt and debt-bondage and misrepresentation (deceit), leading to a situation where the person believes that he or

²² This section only focuses on the definition of trafficking for the purpose of forced labour. The scope and definition of trafficking for sexual exploitation were the subjects of lengthy negotiations (see e.g., [14, 68]).

²³ In the documentation, brackets were used by the UN Secretariat to identify language that had been questioned by one or more of the negotiators, and that thus required further consideration.

²⁴ The same exceptions as in the 1930 ILO Convention (prison labour, military service, emergencies, normal civic obligations and minor communal services) were initially included in the definition.

²⁵ ‘Forced labour’ shall mean labour or services obtained through force or the threat of force, or the use of coercion, or through any scheme or artifice to defraud, including one where the status or condition results from a debt or contract made by that person and the value of the labour or services as reasonably assessed is not applied towards the liquidation of the debt or the fulfilment of the contract (i.e., debt bondage), or by any means or plan or pattern, including but not limited to false and fraudulent pretences and misrepresentations, such that the person reasonably believes that he or she has no alternative but to perform the service ([83]: 342).

she *does not have any alternative but to work or perform the required service*. In the end, however, the detailed definitions of the forms of exploitation were left out of the Protocol.

Delegations also discussed whether there should be additional exceptions to the term “forced labour” besides those listed in the ILO 1930 Convention in view of trafficking for *forced labour being linked to the activities of organised criminal groups* ([83]: 240, footnote 8). In the end it was decided that it would be up to the national legislation of each State Party to decide on the exceptions (ibid.). The issue of *consent* raised considerable debate during the negotiations.²⁶ In brief, the discussions focused on whether or not the victim’s initial consent should be considered irrelevant (see [83]: 344, footnote 26). In the end, it was agreed that the consent of the victim of trafficking to the intended exploitation is irrelevant when any of the defined means have been used (Art. 3b).

Although forced labour was in the end not redefined during the negotiations for the Trafficking Protocol, many participants emphasised the use of force or coercion in defining trafficking for the purpose of forced labour. It is clear that the context in which forced labour was discussed was very different from that of 1930 and 1957. Forced labour was considered a consequence of trafficking, taking place within the context of the threat of transnational organised crime and the protection of borders from these criminal elements, as well as from unwanted migrants.

The ILO protocol of 2014 to the forced labour convention

Awakening to the link between forced labour and trafficking

Over the years it became evident that the Forced Labour Convention of 1930 was created in a specific historical setting and purposes and that there was an explicit need to incorporate trafficking for labour exploitation into the understanding of forced labour. In 2012 the International Labour Conference decided to analyse whether there was a need to complement the ILO’s forced labour conventions to address prevention, victim protection and compensation as well as human trafficking for labour exploitation [37]. An expert meeting was organized in early 2013 to provide recommendations in this regard. The meeting found gaps in prevention, protection and remedies concerning victims of forced labour and a need to clarify the relationship between trafficking and forced labour [39]. It suggested that a Protocol and a Recommendation to support it be drawn up to enhance the work to address trafficking for labour exploitation (ibid.).

Before the negotiations for the Trafficking Protocol, trafficking was of marginal interest to the ILO, presumably because of the earlier limited focus of trafficking as only involving sex work ([72]: 127). However, the ILO had pondered the linkages between trafficking and forced labour since the adoption of the Trafficking Protocol. In 2001 the Committee of Experts of the ILO²⁷ made note of the then new Trafficking

²⁶ See e.g., [14, 68] for a detailed account of the issues relating to consent.

²⁷ The ILO Committee of Experts was set up in 1926 to examine the growing number of government reports on ratified conventions. It is composed of 20 eminent jurists appointed by the ILO Governing Body for three-year terms. The Committee’s role is to provide an impartial and technical evaluation of the state of application of international labour standards. (<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-it/index.htm>).

Protocol and its definition of trafficking. The Committee was concerned that so few countries had so far raised the issue of trafficking in their reports relating to the implementation of the Forced Labour Convention. The Committee at the time saw trafficking – and presumably thus also trafficking for the purpose of forced labour – as linked to organized crime ([29]: 28, paragraphs 76–77). The ILO Global Report of the same year asked whether trafficking should be seen as a form of illegal migration, and saw labour trafficking as a “contemporary form of debt bondage” ([30]: 48, paragraphs 145 and 148). Thus, during the first years of the new millennium, the ILO largely framed trafficking as a crime and a problem of (illegal) migration.

The second ILO Global Report on forced labour and trafficking in 2005 makes more detailed and explicit observations on trafficking for forced labour, and suggests that both trafficking and forced labour should be criminalized as separate offences ([31]: 7, paragraphs 22–23). Instead of presenting trafficking as an organized crime issue, it frames trafficking as a labour market problem. The report sees forced labour in the context of trafficking as “one of the most blatant failures of labour markets, and even of global governance, to address the needs of arguably the most vulnerable and least protected human beings in the world today” (ibid.: 63, paragraph 289). As a phenomenon, trafficking was becoming firmer incorporated within the remit of the work of the ILO.

Trafficking as subordinate to forced labour

In 2007 the ILO Committee of Experts made a major positioning of the Trafficking Protocol and Convention No. 29 by stating that trafficking is included in the definition of forced labour. The Committee found it “clear that trafficking in persons for the purpose of exploitation *is encompassed by the definition of forced or compulsory labour*” ([33]: 41, paragraph 77 (author’s emphasis); reiterated e.g., in [37]: 30, paragraph 299; [39]: 4, paragraph 17). Thus trafficking, or rather trafficking and the consequent exploitation of the trafficked persons, is considered by the ILO to be subordinate to forced labour.

The new binding Protocol to the Forced Labour Convention was adopted in 2014 by the ILO and includes prevention, protection, remedies and sanctions against perpetrators. Countries are also expected to prepare national action plans to better address forced labour. The Protocol on Forced Labour notes that the context and forms of forced labour have changed but it does not redefine forced labour. Instead it reaffirms the original definition of forced labour (Art 1.3). The original language for the Protocol on Forced Labour suggested by the ILO²⁸ did not include such a confirmation; instead, the text was added during the negotiations. The employer’s representative (who served as vice-chairperson)²⁹ was very active in the negotiations and proposed the amendment of the suggested text to confirm the definition of the 1930 Convention on Forced Labour in order to clarify that the definition of forced labour covered trafficking in persons by ([40]: 36–37, paragraph 329).³⁰ There was also a discussion on whether the

²⁸ “The measures referred to in this Article shall include specific action against trafficking in persons for the purposes of labour or sexual exploitation.”

²⁹ The ILO has a tripartite structure with government, employer, and worker representatives participating in deliberations and negotiations.

³⁰ “Confirming the definition of forced or compulsory labour contained in Convention No. 29, the measures referred to in this Article shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.”

Protocol on Forced Labour should define trafficking since it is not explicitly mentioned in Convention No. 29, but this was left undefined.

It is interesting to note that the employer's representative strongly argued for an understanding that trafficking is covered in the 1930 definition of forced labour. He referred to a "*general misperception* that the definition of forced labour in Convention No. 29 did not encompass human trafficking" (ibid.: paragraph 338, author's emphasis) and explained that the definition from 1930 was still valid and included trafficking in persons (ibid.: paragraph 350) although he later clarified that it was "trafficking which led to forced labour" that fell within the scope of Convention No. 29 (ibid.: paragraph 352). In the end, the employer representative's proposal was adopted with slight amendments.³¹ The discussion on the definition and on the link between trafficking and forced labour confirms that there still exists confusion regarding the current interpretation of forced labour and the link between trafficking and contemporary forms of forced labour, especially in a context coloured by labour migration.

Discussion: how to understand forced labour today in the context of trafficking in a globalised world

Based on the negotiations on the four treaties discussed above, three main themes emerge: the relevance of historical definitions to contemporary exploitation of migrant labour and the need to reinterpret the definition of forced labour; a securitised discourse of trafficking and its influence on the understanding of the rights of exploited migrant workers; and the discussion on whether direct force and coercion are relevant in defining forced labour and trafficking or whether more subtle forms of control should be considered sufficient.

The relevance of historical definitions to contemporary exploitation of migrant labour

The analysis of the documents relating to the 1930 ILO Convention point to a specific historical context and political aims as the basis for regulating and defining forced labour. Despite discussions both during the elaborations of the 1957 ILO Convention and the 2000 Trafficking Protocol, the 1930 definition of forced labour remains in use. Even so, it seems that the understanding of the phenomenon of forced labour has changed over the course of the past century, as has the interpretation of forced labour, particularly as it relates to trafficking.

It is evident that the original aim of regulating forced labour in 1930 stemmed from an attempt to outline the accepted and allowed elements of forced labour: the exceptions and the circumstances under which it could still be exacted especially in the colonies. The 1930 definition and understanding is therefore not wholly applicable to contemporary situations of trafficking, which are intertwined with questions of migration and exploitation of (migrant) labour in an increasingly globalised world. The

³¹ "The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour."

historical discussions also indicate that political interests and compromise are central to international treaties and their negotiations. The 1930 negotiations show the interests of the colonial powers in keeping forms of forced labour available. The 1957 negotiations, although influenced by the human rights discourse (see [51]), were reduced primarily to preventing forced labour as a means of political coercion. In 2000, the emphasis was on sexual exploitation and organised crime, and the exploitation of labour was of lesser political concern.

In the negotiations on the 2000 UN Trafficking Protocol, trafficking in persons was framed as a question of organised crime, with a focus on sexual exploitation of women. Forced labour was not initially included in the idea of trafficking, but was introduced into the negotiations by the US. The US had its own interests in addressing labour exploitation of migrant workers. This broadened the understanding of trafficking; otherwise we might still have an instrument on sex trafficking only, rather than a more comprehensive definition of trafficking. Despite this broad scope one may argue that until recently, most of the attention to trafficking has been placed on sexual exploitation of women rather than on forced labour or labour trafficking, which also affect men.

Both the definition of trafficking and the definition of forced labour include the element of a means to achieve exploitation. The 1930 Convention refers to “the menace of penalty” while the Trafficking Protocol lists threats, force, coercion, abduction, fraud, deception, the abuse of power or position of vulnerability or the giving or receiving of payments or benefits. The end point of exploitation is also common to both definitions. However, the differentiating element of the trafficking definition (as compared to that of forced labour) is the *act* of trafficking, defined as “recruitment, transportation, transfer, harbouring or receipt of persons” (Art. 3a). Since the Trafficking Protocol was developed within the framework of the Convention against Transnational Organized Crime, the definition presupposes that these acts are carried out by organized criminal groups. This has led to the impression that trafficking – with organized criminal groups as perpetrators – is strongly interlinked especially to illegal migration. However, this article argues that trafficking for forced labour does not necessarily entail organized crime involvement, nor is it necessarily related to *illegal* entry and *illegal* migration.

The above analysis of the background documents to the treaties shows that, in responding to trafficking in human beings and forced labour, the international community did not regard them as one and the same phenomenon. The response to trafficking in the late 1990s centred on the transnational crime element, and forced labour was included as an outcome or intention of the trafficking. In view of how the treaties were developed, forced labour cannot be seen as the overarching category under which trafficking emerged, despite the ILO’s view that trafficking is encompassed by the definition of forced or compulsory labour [33] and that “the definition of forced labour covers most forms of trafficking” ([34]: 9–11).³² Since the UN Protocol definition of trafficking sees forced labour as one form of exploitation in the crime of trafficking, forced labour could instead be seen as subordinate to (labour) trafficking.

It is evident that the two phenomena are indeed closely related and partly overlapping rather than encompassing one or the other. The means by which a person is placed in a situation of trafficking (e.g., threats, force, deception, abuse of a position of vulnerability) and the means by which forced labour is exacted “under the menace of

³² With trafficking for the purpose of organ removal being the exception ([41]: 4).

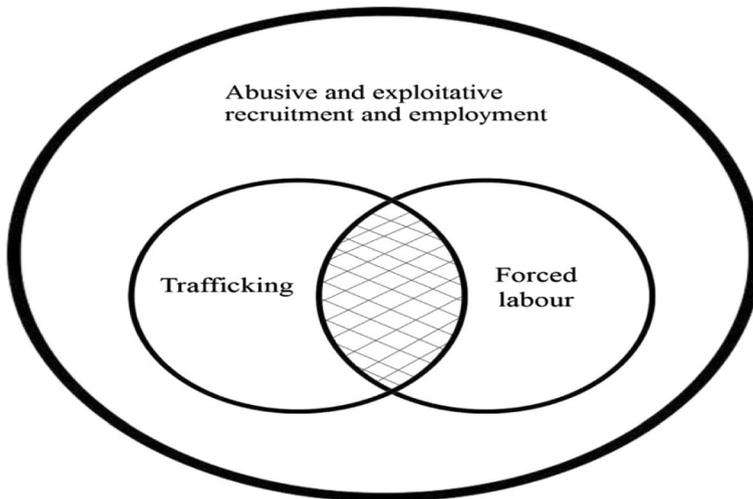


Fig. 1 Trafficking in human beings, forced labour and the exploitation of (migrant) labour (From [45]: 13)

penalty” (e.g., threats, coercion, using the person’s dependency)³³ are partly the same. However, forced labour may exist without trafficking, and similarly trafficking may exist without forced labour. Both exist within a broader category of exploitation. The overall context of both labour trafficking and forced labour in a contemporary European perspective should therefore be defined as the exploitation of (mainly migrant) labour (Fig. 1).

In the context of abusive and exploitative recruitment and employment situations, the worst forms of abuse may fulfil the crime of trafficking for forced labour. It is therefore imperative to see trafficking for the purpose of forced labour as both a crime and labour concern and to engage both law enforcement as well as labour actors (such as labour inspectors and trade unions) in the fight against (labour) trafficking.

The criminalizing and securitising discourse: forced labour and trafficking as security concerns

In the negotiations on forced labour preceding the 1930 ILO Convention, forced labour was partly framed as a security issue: if (some) rights were not extended to the colonial labour force, there was a fear of global unrest that would unsettle the “peace and harmony” of the world. At the same time, the aim of the regulation of forced labour was to allow for the continuation of exploitation of the labour of the ‘native peoples’ in the colonies, so as to support the economic development of the colonising countries. The negotiations on the 1930 Convention thus reveal protectionist goals, i.e., protecting the Western labour markets from the unorganised colonial workforce. The same protectionism is evident in the current rhetoric that sees migrant workers as a threat to

³³ In 1979 the ILO Committee of Experts reaffirmed that the penalty does not need to be in the form of penal sanctions, but might also take the form of a loss of rights or privileges ([28]: 19 paragraph 21). In 2005, the ILO elaborated on the meaning of extracting labour “under the menace of a penalty”, and listed six elements that point to a forced labour situation. These include physical or sexual violence, restriction of movement of the worker, debt bondage or bonded labour, withholding wages or refusing to pay the worker at all, retention of passports and identity documents, and threat of denunciation to the authorities ([32]: 20–1).

domestic labour markets and workers (e.g., [19, 74, 62]). Efforts to control migrant labour – and trafficking for forced labour – are thus based both on concerns for national security and on a fear of lower wages for Western labourers ([6]: 573–4). The prevention of the exploitation of (migrant) workers can therefore be seen to be only secondary to the interest of supporting the economy and protecting national workers against external competition ([19]: 38). While workers were initially to be protected from state-initiated forced labour, today the vast majority of perpetrators are private individuals and businesses.³⁴ The context of the exploitation has evolved, and also incorporates a migration dimension.

In the 1957 negotiations, forced labour was defined also as a means of discrimination. In the current understanding of forced labour in a trafficking context in a European setting most of the exploited workers are immigrants. As such, there is indeed an undercurrent of discrimination at play: they are discriminated against as immigrants in a society of closed borders, and discriminated against in terms of violations of their labour rights. Forced labour as a means of discrimination thus entails the intentional exploitation of the labour of certain groups of people.

The context of transnational organised crime and the protection of borders from perceived criminal elements and unwanted migrants framed the development of the Trafficking Protocol. This has strongly influenced the current securitised discourse that portrays trafficking as part of a broader security continuum, involving illegal migration, drug trafficking, terrorism, and organised crime (see [5]).³⁵ This also affects the way migrant labour is perceived and treated. In today's world, migrant workers become the focus of many contestations: they are on one hand wanted and needed, but on the other hand they are also a threat and a risk on many levels. The focus of the 2000 UN Trafficking Protocol on organised crime embodies this paradox: it emphasises the protection of (some) victims, while at the same time enhances the protection by States of their borders from unwanted migrants and organised crime. In the face of closing the borders to “crimmigrants” (see [1]), it becomes increasingly difficult to distinguish between “deserving” victims and “mere” exploited migrants. Haynes argues that the myth of “trafficked persons” versus “economic migrants” and the assumption that being one precludes being the other, obscures the true nature of the exploitation of migrants ([19]: 47–8). In reality, exploitation and trafficking are two sides of the same coin, taking place in the same context, with the only differences being in the degree of exploitation and in the definition.

Force and coercion or more subtle forms of control?

The definition of both forced labour and trafficking includes elements of consent or voluntariness. Already in the 1930 negotiations there were proposals to include elements that outline situations where a worker cannot withdraw himself or herself from the work ([24]: 10).³⁶ Unfortunately the idea that forced labour would include situations

³⁴ Ninety percent of the forced labourers are exploited in the private economy, by individuals or enterprises ([36]: 13).

³⁵ For a further discussion on trafficking in persons and the theory of securitisation, see e.g., [44].

³⁶ In later reports by the ILO Committee of Experts, it has been noted that one cannot offer oneself voluntarily under threat, and the constraints to a voluntary offer may result also from an employer's practice, e.g., where migrant workers are induced by deceit, false promises and retention of identity documents or forced to remain at the disposal of an employer ([33]: 20, paragraphs 38–39).

where the worker cannot stop working at his (or her) own will was excluded from the original definition. The fact that this was discussed already then shows a recognition of a more flexible interpretation that takes into consideration the circumstances of the work as defining forced labour, and not only the initial agreement to undertake the work or the penalties imposed on the worker. This is crucial for the contemporary understanding of forced labour: most migrants migrate willingly and voluntarily and it is the circumstances in which they find themselves in the destination country that define their situation as forced labour.

Both trafficked persons and migrant workers are individuals with the intention and strong will to change their life trajectories. What happens is that their goals are exploited and transformed into a coercive situation ([19]: 19). The voluntary offer to work or the consent to travel is irrelevant if the conditions in which the person consented or offered himself or herself are born out of desperation, and the conditions of the work in which the person ends up are exploitative. Forced labour should therefore not be defined on the basis of the worker's or victim's wish, will or consent to work, but on the basis of the forms and contract under which the labour is actually performed. The focus should be on the overall conditions that prevent the worker from leaving the exploitative conditions of employment.

Although the 2000 Trafficking Protocol negotiations emphasised force and coercion as defining forced labour, direct coercion is not necessary. Trafficking for forced labour does not necessarily need to include direct force or coercion but may instead include subtle forms of control such as salary discrimination, threats, psychological pressure, long working hours, control of the use of money, retention of passports, debt due to high recruitment and travel costs, and poor accommodation (see [46, 47, 71]). This keeps the workers in a position of vulnerability and dependency on the employer, actively preventing them from leaving their employment or seeking help. The USSR proposal in the negotiation of the 1957 Convention to include the effect of non-payment of wages show a recognition of the circumstances under which workers see no alternative but to continue working. The non-payment of wages is an effective means of hindering the worker from leaving the employment. The ILO has more recently argued that the menace or penalty imposed on the worker and the forms of coercion involved in situations where the worker is unable to freely choose to work can indeed be subtle. These more subtle forms of control and coercion include e.g., psychological threats, financial penalties, such as the non-payment of wages, and forms of deception ([32]: 5–6, paragraphs 14–15). According to the ILO, the payment of wages under the minimum level combined with exploitation of the worker's vulnerability also falls under the 1930 definition of forced labour ([33]: 72, paragraph 134). The 1930 definition of forced labour thus allows for a broad interpretation, just as the Trafficking Protocol allows for a broad understanding of the elements of vulnerability and dependency (or abuse of power). The implementation of the provision of trafficking for forced labour is therefore a question of will: who do we want to extend the right to be defined as a victim of trafficking for forced labour?

Moving away from a stereotypical notion of trafficking for forced labour

Sometimes it may be counterproductive to apply a trafficking perspective to instances of labour exploitation (see [78, 86]) due to the rigid interpretation of forced labour and

the focus on only some as deserving victims of trafficking. This article has highlighted that the definition of forced labour which was elaborated in 1930 is still used, despite the fact that it was developed in different circumstances, and despite the fact that it was not aimed at addressing the issues it is used to address today. Practitioners refer to the 1930 definition in the context of labour trafficking and find it difficult to interpret today. The analysis of the “evolution” of the definition of trafficking for forced labour indicates that the original 1930 definition cannot be interpreted too strictly in contemporary settings. Stereotypical images of forced labour and an inability to see the totality of the situation of the exploited migrants have hindered the identification of trafficking for forced labour [46, 47]. The understanding of trafficking for forced labour through stereotypical images of extreme exploitation may hinder the defining of serious forms of exploitation that (migrant) workers encounter in contemporary Europe as trafficking for forced labour (*ibid.*).

The current focus on identifying and assisting only the most extreme cases of exploitation further results in the normalisation of the harsh realities of exploitation experienced by exploited workers ([72]: 103). From a labour perspective, the difference between exploitation and trafficking is a matter of degree and not of kind. All forms of labour entail human commodification, and forced labour and trafficking are only its most extreme manifestations (*ibid.*: 110). However, situations of forced labour in contemporary contexts are easily considered as binary values: either a situation amounts to forced labour or it is not forced labour, with nothing in between ([75]: 16). In reality, however, situations of exploitation may be of different severity, and they may evolve and change over time. Labour exploitation can be conceptualized as existing along a continuum, with clear-cut forced labour cases at one end of the spectrum and more subtle forms of exploitation and coercion at the other end ([4]: 39).³⁷ All exploitation is not trafficking for forced labour. This should not, however, prevent us from identifying the different forms of abuse that take place along the continuum of exploitation.³⁸

Legislation makes a distinction between trafficking and “mere” exploitation, although victims of both wrongs feel the same shame, pain, dislocation, lack of freedom, anger and humiliation ([19]: 23). From the worker’s or victim’s perspective, then, the experience is similar. Victims of both wrongs need to be extended the same rights, regardless of how their experience is defined in legal terms. From a victim’s perspective, it is the degree of vulnerability and chance that leads from migration to trafficking and labour exploitation ([19]: 10). In order to combat both, we must empower those who are vulnerable to both forms of exploitation (*ibid.*).

What seems to be lacking from the prevailing approach to trafficking for forced labour is a rights-based approach. A labour paradigm that addresses the exploited workers’ weak bargaining power, substandard working conditions and lack of workers’ rights could help ([72]: 106). Exploited workers largely lack possibilities to improve their conditions while at work or to actively change their own situation. Protective employment laws, the elimination of practices that bind workers to specific employers,

³⁷ The continuum can also be visualized as a continuum of ideal conditions versus exploitation, with decent work at one end, and forced labour at the other [75]. Such a continuum portrays free will and voluntary labour at one end, and coercion and force at the other [59].

³⁸ In order to identify forced labour, it is important to see the totality of the situation of the exploited worker. Often only separate indicators of exploitation are seen. In identifying the different forms of abuse, concrete indicators that in detail outline the elements of exploitation may be helpful (see [32, 35, 38]).

and the prevention of contracts built on insurmountable debt could enhance migrant workers' agency and access to rights. (ibid.: 84; see also [19].)

However, there are several structural barriers to extending rights to migrant workers. Rights are costly and do not fit in the current economic neoliberal doctrine, where migrant workers who are in a precarious position give their labour but receive nothing in return ([18]: 98–9). If trafficking for forced labour is seen as a consequence of globalisation where trade liberalisation and restrictive immigration regimes together with a range of labour market practices lead to exploitation of the most vulnerable, trafficking for forced labour ceases to be seen as an exceptional situation but rather as the result of current policies (see [6, 72]: 107). What is needed is a new focus on the agency of the exploited migrant worker, one that understands that agency and exploitation are not mutually exclusive [19, 67]. One can be both an active agent making decisions, and a victim of trafficking for forced labour.

Labour migration is not likely to diminish in scale in the future. We therefore need to be able to acknowledge victims of all forms of labour exploitation, and provide protection to all in need, be they “ideal” victims or “less ideal” victims. Noting the fluidity of exploitation, a rigid interpretation of the definition of forced labour is not always useful in defining contemporary forms of trafficking for labour exploitation. Instead, a broad interpretation of forced labour is needed, one that places the lack of alternatives, rights, agency and difficulty in leaving one's employment at the centre of the understanding of what constitutes trafficking for the purpose of forced labour.

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