



Lund University

European Master's Degree in Human Rights and Democratisation

A.Y. 2017/2018

Profiting from Punishment?

Prison Privatization in a Globalized World

Alexander Breysen

Supervisor: Radu Mares

Acknowledgements

Writing this dissertation would not have been possible without the European Master's Programme in Human Rights and Democratization (E.MA), which has truly been a wonderful adventure. There are many people who have been a part of this experience and made it feel interesting and valuable. I am extremely grateful for that. First, I would like to thank my magnificent friends from Venice and Lund, with whom I have had the pleasure to conduct countless fascinating conversations and to share a great deal of amusing moments during this year. I would also like to express my gratitude to my parents, my sister, my brothers and my friends at home who have always been supportive throughout the period of this research and patiently provided me with encouragement and direction when I was unable to find it myself. In addition, I would like to show special appreciation and gratitude to the staff of Lund University and my thesis supervisor in particular, Radu Mares, who has guided me through the process and provided me with insightful comments and useful advice, both in class and outside class.

This dissertation is the final outcome of the years that I have been studying at the Catholic University of Leuven, followed by the European Inter-University Centre for Human Rights and Democratization. For this reason, I would like to thank the wonderful E.MA staff in Venice, with special reference to George Ulrich, Wiebke Lamer and Chiara Altafin, whose tireless efforts have largely contributed to the smooth organization of this programme, and experience. Their support and guidance has truly been indispensable. Finally, I hope that this dissertation could serve as a source of inspiration for other students and researchers who have a particular interest in the field of human rights and democratization.

Abstract

As recent decisions by policy makers show, there is now little doubt that a pivotal shift is being generated as the correctional system is propelled swiftly down the road of privatization. The privatization of correctional facilities has recently become subject to a growing body of academic research that seeks to understand and address this issue. While some argue that prison privatization can achieve correctional goals more effectively and at a lower cost, others maintain that it is profit-motivated, adversely affects prisoners' rights and undermines the criminal justice system. The effects of prison privatization have been largely underestimated. Whereas it may be true that the adoption of free market policies have generated economic growth and increased socio-economic well-being in some countries, it is an indisputable fact that they have also resulted in corruption, severe austerity measures and economic crises which in turn have led to growing inequality and poverty on a global scale. Moreover, privatization policies have led to the growing inclusion of private entities in sectors that were traditionally administered by the state. This raises doubts about the regulatory ability of the state, because it becomes unclear whether the state is still competent to fulfill its international legal obligations to safeguard human rights in an increasingly globalized world. Thus, the privatization of public services can paradoxically become an obstacle for states to guarantee the protection of human rights for those people who are adversely affected by it. However, there exists little consensus and empirical evidence to support these claims. This research project aims to fill this gap in the literature by focusing on the political and legal aspects of prison privatization.

Table of Contents

Acknowledgements	3
Abstract	4
Table of Contents	5
1. Introduction	7
2. Prison Privatization in a Globalized Context	10
2.1. From Keynesianism to Neoliberalism	10
2.2. The Rise of the Private Prison Industry	13
2.2.1. The United States	14
2.2.2. The United Kingdom	15
2.2.3. Australia	17
2.2.4. France	17
2.3. Reforming Prisons Through Privatization: Two Models	18
2.3.1. British Model	19
2.3.2. French Model	20
2.4. Main Reasons Behind Private Sector Involvement in Prison Industries	21
2.4. Prison Labour	24
2.5. Privatization and Human Rights	26
3. Forced Labour in Private Prisons: International Legal Framework	31
3.1. International Human Rights Law	31

3.1.1. The Slavery Convention	31
3.1.2. The Universal Declaration of Human Rights	32
3.1.3. The International Covenants	34
a) The International Covenant on Civil and Political Rights	34
b) The International Covenant on Economic, Social and Cultural Rights	36
3.2. International Labour Standards	36
3.2.1. The ILO Forced Labour Convention (No. 29)	36
3.2.2. The ILO Abolition of Forced Labour Convention, 1957 (No. 105)	39
3.2.3. The ILO Declaration on Fundamental Principles and Rights at Work	41
3.3. Soft Law Instruments	41
3.3.1. The Nelson Mandela Rules	42
3.3.2. The UN Guiding Principles	44
3.3.3. The Sustainable Development Goals	47
4. Conclusion	49
5. Bibliography	52

1. Introduction

“Globalized markets are neither inherently a friend nor a foe of human rights. While increased economic openness is often associated with increased national wealth, and can promote progress on other measures of well being, such as nutrition or education, we simply cannot answer in the abstract the ultimate effects of markets and globalization on human rights and social justice for any particular society.”¹

In April 2018, a class-action lawsuit that was filed in the State of Georgia accuses CoreCivic, the largest private corrections company in the United States, of forcing detained immigrants to perform labour services for which many were paid only \$1 per day, in violation of labour rights. The lawsuit, filed on behalf of three former immigration detainees at CoreCivic’s Stewart Detention Center in Georgia, claims that those who refuse to participate in the voluntary work scheme are being threatened with solitary confinement and deprivation of basic human necessities, such as food and sanitation facilities. Meredith Stewart, senior attorney for the Southern Poverty Law Center (SPLC), which jointly filed the lawsuit, said that “CoreCivic is placing profits above people by forcing detained immigrants to perform manual labor for next to nothing, saving millions of dollars that would otherwise provide jobs and stimulate the local economy.”² One month later, in May 2018, a federal judge ruled that the former immigration detainees are allowed to bring a lawsuit against CoreCivic for presumed labour rights violations.³

As recent decisions by policy makers show, there is now little doubt that a pivotal shift is being generated as the correctional system is propelled swiftly down the road of privatization. For instance, the United Kingdom’s Ministry of Justice adopted the highly contested Transforming Rehabilitation Program in 2013, which includes a series of policies that aim to deregulate and privatize the correctional sector in favor of companies, including multinational corporations. The general idea behind this program is to create an institutional structure which promotes and supports

¹ Jeffrey L Dunoff, ‘Does Globalization Advance Human Rights? (Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets)’, *Brooklyn Journal of International Law*, 25 (1999), 138.

² Roque Planas and Elise Foley, ‘Immigrants’ Lawsuit Accuses Private Prison Contractor’ (*Huffington Post*, 2018) <<https://www.business-humanrights.org/en/usa-private-prison-co-corecivic-to-face-lawsuit-alleging-use-of-forced-labour-of-immigrants-at-detention-centre#c171922>> accessed 6 May 2018.

³ Kate Morrissey, ‘Judge allows case over alleged forced labor in immigration detention to move forward’ (*San Diego Union Tribune*, 2018) <<https://www.business-humanrights.org/en/usa-private-prison-co-corecivic-to-face-lawsuit-alleging-use-of-forced-labour-of-immigrants-at-detention-centre#c172733>> accessed 13 June 2018.

private profit and free market competition in the correctional sector.⁴ Regardless of these recent events, it remains unclear, both in theory and practice, whether this rise in prison privatization actually leads to a more effective achievement of correctional goals. There is thus far little consensus about the nature and effects of privatized prison systems. Moreover, the growing inclusion of private actors in sectors that were initially administered by the state also raises doubts about the legal impacts of prison privatization on human rights. For instance, it becomes increasingly uncertain whether states are still fully competent to fulfill their international human rights obligations to protect those people affected by the corporate sector. Thus, paradoxically, the privatization of public functions may become an obstacle for the state's duty to protect the human rights of those people who are adversely affected by it.

This dissertation seeks to understand and address the prevalent, yet hardly recognized issue of forced labour in private prisons. In particular, it will examine to what extent prisoners detained in private correctional facilities are protected against forced labour under international human rights law. In doing so, it is imperative to first consider the extent to which this model of prison privatization has been shaped by broader political, social and economic transformations over the past few decades, which may help us to better understand the scale of its use and the underlying motives. It can also provide useful insights into how and why similar practices and policies have been adopted across a range of different countries. Then, this study will turn to the international legal framework in an attempt to analyze which instruments are in place to protect prisoners detained in privately operated prisons against the use of forced labour. After all, prison labour is being used by private companies that are first and foremost profit-motivated.

The bulk of this research is based on policy and legal documents. In order to understand the emergence and development of prison privatization, it is essential to consult a variety of policy documents, reports from nongovernmental organizations and other sources because they can provide useful information on the political decisions that preceded and concurred with the use of prison privatization. This includes reports from the U.S. Department of Justice and Penal Reform International. In addition, legal sources are used to address and shape the contemporary legal framework that forms the basis for the protection of prisoners' rights, especially in terms of forced labour. Among these documents are international human rights treaties, international labour conventions and soft law instruments, such as the United Nations Guiding Principles on Business and Human Rights.

The aim of this dissertation is threefold. First of all, it seeks to gain a better understanding of the political, social and economic underpinnings that have been shaping the conditions in which states have gradually shifted toward the privatization of correctional facilities. Secondly, the slight lack of research on prison privatization and forced labour makes that this study might not only extend the existing literature by taking into account more recent developments, but also promotes an interdisciplinary approach to this subject by exploring the historical and legal, as well as the political dimensions of prison privatization. Ultimately, it seeks to present evidence-based research that can help to illuminate some of the impacts and risks of the rise of the private prison industry.

2. Prison Privatization in a Globalized Context

The ongoing process of globalization that modern society is facing today involves the continuous expansion and intensification of economic, political, social, cultural and judicial relations across borders. Globalization is stimulated by the lowering of transportation and communication costs, the emergence of new information technologies, such as the internet and social media, and liberalizations in the markets for goods, services, labour, capital, and technology. Globalization often entails political decisions about deregulation, free trade, and the consolidation of markets, though it also exists within contemporary legal structures. This process influences the life styles and living conditions of people from all over the world, providing new opportunities to some, but risks to others. Individuals, governments, and transnational organizations or entities that are not confined to the framework of the nation state, like the World Bank, United Nations, European Union, and multinational enterprises, all have to find a way of dealing with the challenges that lie ahead as we are rapidly moving towards an increasingly globalized world.⁵

2.1. From Keynesianism to Neoliberalism

Neoliberalism is probably the most dominant form of globalization. In order to understand the rise of neoliberalism, it is necessary to specify what the term itself means. Neoliberalism is based upon the idea that the market is morally and practically more powerful than the state as far as the regulation of the economy goes, and its ultimate goal is to save the market from all different kinds of political interference. It is therefore not only “a one dimensional set of economic ideas directed at promoting the free market, but also [...] an ideology with broader political dimensions.”⁶ In other words, neoliberalism is a transnational policy paradigm which involves a series of ideas about economic policy associated with a political program intended to expand market economies throughout the developed and developing regions of the world.⁷ Its practical implications can best be understood as a number of interconnected policies aimed to strengthen the position of markets in

⁵ Bent J Christensen and Carsten Kowalczyk, ‘Introduction to Globalization: Strategies and Effects’, in Bent J Christensen and Carsten Kowalczyk (eds.), *Globalization: Strategies and Effects*, Springer, Berlin, 2017, 1-2.

⁶ Bojan Bugarić, ‘Neoliberalism, Post-Communism, and the Law’, *Annual Review of Law and Social Science*, 12 (2016), 314.

⁷ Hilary Appel and Mitchell A Orenstein, ‘Why Did Neoliberalism Triumph and Endure in the Post-Communist World?’, *Comparative Politics*, 48 (2016), 317.

regulating public life through promoting economic liberalization, depoliticization, deregulation and privatization.⁸

Although the origins of neoliberalism can be traced back to a long-lasting tradition of liberal economic thinking, they may be most closely associated with the economic tensions, social changes and political struggles that emerged in the 1960s.⁹ During this period, economists adamantly opposed the communist planned economy as well as the social market economy, which had become the most widespread economic model in the West since the end of the Second World War. The social market economy was mainly stimulated by the economic theories of John Maynard Keynes and was characterized by state interventionism, countercyclical policies and social security measures. Keynesianism was the response of the Western world to the global economic and financial crisis of the late 1920s and 1930s, which was commonly seen as a consequence of rampant capitalism.¹⁰ Neoliberalism, in turn, was a reaction to the social market economy model and was largely based on the ideas put forward in the anti-Keynesian analyses of Friedrich Hayek, the monetarist economy theory of Milton Friedman, and the work of the economics department of the University of Chicago, commonly referred to as the “Chicago School.”¹¹

The Chicago School viewed neoliberalism as a restoration of the classical liberalism of the nineteenth century, which included policies of liberalization, deregulation and privatization. It stressed the dominance of markets for determining value and for distributing resources. In order to guarantee the free functioning of the market, it was imperative that there was only a limited form of government intervention. This means that the government was only supposed to act to enforce contracts, protect property rights and ensure physical safety. That is to say that the government was in fact still responsible to ensure the actual *functioning* of the free market, but only to a limited extent. The Chicago School contended that relatively unrestricted trade and free market policies would result in economic growth and socio-economic well-being.¹²

Following the collapse of Keynesianism and the oil crises of the 1970s, neoliberal ideas had become dominant in both economic and political discourses.¹³ The basic features of the social

⁸ Bugaric, ‘Neoliberalism, Post-Communism, and the Law’, 314.

⁹ Damien Cahill and Martijn Konings, *Neoliberalism (Key Concepts)*, Polity Press, Cambridge, 2017, 25.

¹⁰ Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (Pennsylvania Studies in Human Rights), University of Pennsylvania Press, Philadelphia, 2017, 45.

¹¹ Appel and Orenstein, ‘Why Did Neoliberalism Triumph?’, 317.

¹² Ibid.

¹³ Ibid.

market economy were increasingly seen as the main source of growing economic inefficiency and therefore had to be eliminated as soon as possible in order to regenerate economic growth and stability. Instead of addressing socio-economic issues through political deliberation and government intervention, neoliberal advocates now urged states to take on an impartial stance toward the functioning of the market. In other words, adopting free market policies and limited government intervention.¹⁴ Accordingly, a series of neoliberal policies were adopted by political leaders such as Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States, as well as General Augusto Pinochet in Chile. Many other countries then gradually started to follow this model of neoliberalism, sometimes because they were put under pressure by leading Western governments and risked economic and political isolation if they rejected the neoliberal doctrine.¹⁵ It is worth mentioning that Chile became the first country that entirely privatized its pension plans, with grave repercussions for the poor. When the Chilean case was later used by the World Bank as a model for other countries to follow, it became a negative symbol of neoliberalism in the anti-globalization movement.¹⁶

In 1989, the British economist John Williamson stated that “Washington does not always practice what it preaches to foreigners.”¹⁷ Following this view, he wrote a paper in which he presented a list of ten neoliberal key reforms for Latin American countries that were dealing with foreign debt.¹⁸ Williamson called these neoliberal policies the Washington Consensus, because he “thought more or less everyone in Washington would agree they were needed more or less everywhere in Latin America.”¹⁹ Indeed, the Washington Consensus proved to be a source of inspiration for international financial institutions located in Washington, such as the International Monetary Fund (IMF) and the World Bank, to decide on the main direction of economic policy, especially for countries applying for debt reduction. The general idea was to abandon protectionism and eliminate government intervention in favor of the liberalization, deregulation and privatization

¹⁴ Alessandro Bonanno, *The Legitimation Crisis of Neoliberalism: The State, Will-Formation, and Resistance*, Springer Nature, New York, 2017, 96-97.

¹⁵ Appel and Orenstein, 'Why Did Neoliberalism Triumph?', 317.

¹⁶ Nowak, *Human Rights or Global Capitalism*, 46.

¹⁷ Grzegorz Nycz, 'Questioning the Neoliberal Paradigm: A Critique of the Washington Consensus in Historical Perspective', *Ad Americam. Journal of American Studies*, 11 (2010), 79.

¹⁸ The ten neoliberal reforms included: fiscal discipline, reordering public expenditure priorities, tax reform, liberalizing interest rates, a competitive exchange rate, trade liberalization, liberalization of inward foreign direct investment, privatization, deregulation and property rights.

¹⁹ Nowak, *Human Rights or Global Capitalism*, 47.

of the market. Briefly, to establish a free and competitive market economy.²⁰ Ultimately, the Washington Consensus played a major role in spreading the neoliberal ideas to the rest of the world during the 1990s and de facto also thereafter. Neoliberalism has become “the raison d’être of contemporary global capitalism.”²¹

1.2. The Rise of the Private Prison Industry

The global shift toward neoliberalism engendered a considerable boom in the private prison industry. Countries such as the United States, the United Kingdom, Australia and France started to outsource a large number of traditionally inherent government functions to companies and other entities, and many parts of the correctional sector were privatized as well. Prison privatization can be defined as the devolution of correctional functions and services from government agencies to external nonprofit or for-profit organizations or companies.²² Although it may seem to be a modern phenomenon, the roots of prison privatization can be traced back to early modern England, where correctional facilities were managed by keepers who earned their income from exacting fees for putting offenders behind bars and from establishing contracts with commercial enterprises that benefited from prison labour.²³ During this period, according to Ignatieff, “authority in prison was thus varied according to the sobriety, dutifulness, and resolve of its enforcers. Unbounded by formal rule, it was by definition arbitrary, personal, and capricious.”²⁴ By the early nineteenth century, the state reassumed control of the management of correctional facilities.²⁵

In similar fashion, after the end of the Civil War in the United States, convict lease programs permitted individuals and companies to purchase prison labour in exchange for offering the prisoners basic necessities such as housing, food and clothing.²⁶ In reality, though, the system was

²⁰ Nycz, ‘Questioning the Neoliberal Paradigm’, 79-80.

²¹ Scott Burrows, Discussion of D Cahill, *The End of Laissez-Faire? The Durability of Embedded Neoliberalism*, Edward Elgar Publishing Inc, Cheltenham, 2014, *Journal of Sociology*, 52 (2016), 909.

²² Andrea M Lindsey, Daniel P Mears and Joshua C Cochran, ‘The Privatization Debate’, *Journal of Contemporary Criminal Justice*, 32 (2016), 310.

²³ Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution: 1750-1850* (Critical Criminology Series), The MacMillan Press Ltd, London and Basingstoke, 36.

²⁴ Ibid.

²⁵ David E Pozen, ‘Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom’, *The Journal of Law & Politics*, 19 (2003), 257.

²⁶ Lindsey, Mears and Cochran, ‘The Privatization Debate’, 310.

marked by widespread abuse and exploitation.²⁷ By the end of the nineteenth century, the use of private prisons was condemned by a broad coalition of workers who claimed that private prison labour contributed to unfair competition on the market and by reformers who argued for better prison conditions in private facilities. During the early decades of the twentieth century, the state took over the management of the correctional facilities and most other criminal justice functions. The use of privately operated prisons was phased out.²⁸ After being absent for nearly half a century, prison privatization re-emerged during the mid-1980s, starting in the United States.

1.2.1. The United States

In 1983, during the Reagan Administration (1981-1989), Thomas Beasley established the Corrections Corporation of America (CCA), now one of the leading companies in the private prison industry in the United States as well as the world, and almost instantly entered into an agreement with the state of Texas to manage an immigration detention center in Houston. Only one year later, CCA signed another contract with the state of Tennessee to administer its Hamilton County prison. Meanwhile, Wackenhut Corrections Corporations, named after its founder George Wackenhut, was permitted to build a new detention center in Denver, Colorado. Although there was considerable concern about the re-emergence of prison privatization, the United States continued its policy and these events marked the beginning of what soon would become a private prison industry.²⁹

By the end of the twentieth century, there were fourteen private companies that managed more than 150 prisons in the United States.³⁰ In 1996, there were thirteen states that had privatized at least a part of their correctional functions and by the end of 2004 that number had grown to thirty-four. In 2001, there were approximately 90,000 inmates housed in private prisons, representing 6.5 percent of the total state and federal population.³¹ This growing trend of prison privatization continued and also allowed new players to the market, such as Esmor Correctional

²⁷ Colin F Fenwick, 'Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law', *Human Rights Quarterly*, 27 (2005), 260.

²⁸ Pozen, 'Managing a Correctional Marketplace', 257.

²⁹ Nowak, *Human Rights or Global Capitalism*, 115-116.

³⁰ Pozen, 'Managing a Correctional Marketplace', 259.

³¹ Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, *Prisoners in 2001*, BUREAU OF JUSTICE STATISTICS BULL. 1, 8 (Table 9) (July 2002), available at <http://www.ojb.usdoj.gov/bjs/pub/pdf/p01.pdf>

Services.³² Moreover, as an official body of the US Department of Justice, the Bureau of Justice Statistics issued a report in 2016 in which it declared that a total of 126,272 inmates were in the custody of private prisons in 2015, representing 8% of the total state and federal prison population. These figures showed that the number of people housed in private prisons had increased with 45 percent since 2000 and that the use of private prisons by the federal prison system experienced a growth of 125 percent throughout the same period.³³ Another 2016 Justice Department report stated that “in a majority of the categories we examined, contract prisons incurred more safety and security incidents per capita than comparable BOP institutions.”³⁴ In other words, even though the number of private prisons was rising, these facilities were generally found to have more dangerous prison regimes and lower prison conditions than state-run facilities for both inmates and the security personnel.

Partially in response to the concerns expressed, the Obama administration (2009-2017) changed its policy toward a gradual decrease of private prison contracts with the ultimate purpose of phasing them out. However, this policy shift was quickly reversed when Jeff Sessions took office in February 2017 as the new Attorney General under the Trump administration (2017-present). Despite growing criticism and clear evidence of widespread abuses in private prisons, a 2018 Justice Department report stresses the effectiveness of these facilities and indicates that the government is currently planning to increase their population levels.³⁵

1.2.2. The United Kingdom

The United Kingdom³⁶ was the first European country to use fully privatized prisons. It was during the Conservative government of Margaret Thatcher (1979-1990) that the British Home Office, after visiting private prisons in the United States, began to analyze the potential benefits of prison contracting, though it was initially seen as an experiment only for remand prisons. Following these events, the British Home Office issued two so-called Green Papers in which the government’s first

³² Nowak, *Human Rights or Global Capitalism*, 115-116.

³³ U.S. Department of Justice, Bureau of Justice Statistics, Prisoners Series (2015).

³⁴ U.S. Department of Justice, Office of the Inspector General, Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons (August 2016), ii.

³⁵ U.S. Department of Justice, Federal Bureau of Prisons, Memorandum for Chief Executive Officers (24 January 2018).

³⁶ “United Kingdom” as used in this dissertation refers to England and Wales, which maintain a common prison system. Scotland and Northern Ireland have different prison systems, and are not considered here.

policies on prison privatization were outlined.³⁷ The Criminal Justice Act of 1991 then provided the initial legal basis for contracted remand prisons, but later amendments allowed the privatization of all different kinds of correctional facilities. During the period when the outsourcing of custodial functions was under discussion, policy makers were undoubtedly influenced by a number of violent incidents at the state-run Manchester's Strangeways prison in 1990, which culminated in a three-week riot and had cost the life of one man while nearly fifty others were injured.³⁸ Following these events, Wolds Prison opened its doors in 1992 and became the first privately operated prison in the UK. Two years later, there were already three private prisons and by the end of 2001, private correctional facilities housed 9.4 percent of the total prison population.³⁹

Although the Labour government of Tony Blair (1997-2010) was initially against the use of private prisons, it suddenly reversed its policy and the privatization process was further enhanced during its incumbency. This U-turn was in part a consequence of the understanding that denouncing the long-term agreements made with private contractors by the previous Thatcher government would be financially unviable, but also because the Labour government started to consider the changes in the correctional sector to be in harmony with its broader vision of criminal justice reform, namely a system that is based on the promotion of a performance culture.⁴⁰ In 2013, there were fourteen prisons managed by three private companies, G4S, Sodexo Justice Services and Serco. These facilities held an estimated 15.3 percent of the total prison population in the country under contracts with a total value of roughly four billion pounds.⁴¹ The UK therefore has the second largest market for private prisons in the world, after the United States, and the highest proportion of private prisoners.⁴²

The road toward the privatization of the correctional sector continued under the Coalition government of David Cameron (2010-2015). Harmful economic conditions caused by the global financial crisis have resulted in the implementation of austerity measures through unparalleled reductions in public spending. By contrast, as the number of opportunities for private investment considerably reduced, multinational corporations have been developing a particular interest in

³⁷ Pozen, 'Managing a Correctional Marketplace', 259.

³⁸ <https://www.ft.com/content/3c356914-0d9c-11e8-839d-41ca06376bf2>

³⁹ Pozen, 'Managing a Correctional Marketplace', 253, 260.

⁴⁰ Jill Annison, Lol Burke and Paul Senior, 'Transforming Rehabilitation: Another Example of English 'Exceptionalism' or a Blueprint for the Rest of Europe?', *European Journal of Probation*, 6 (2014), 8

⁴¹ <https://www.ft.com/content/3c356914-0d9c-11e8-839d-41ca06376bf2>

⁴² Nowak, *Human Rights or Global Capitalism*, 117-118.

negotiating public contracts because they include services for which there is a certain demand. It was in this context that the Ministry of Justice launched the controversial Transforming Rehabilitation program in 2013, which initiated a widespread program of competition for community-based offender services. The position of the Coalition government was quite clear and obviously based on the neoliberal idea that it was crucial to “free up funding through increased efficiency and new ways of working.”⁴³ This was to be realized by an alliance between private, public and voluntary sectors. Accordingly, there would be a national competition for correctional services in the form of Community Rehabilitation Companies (CRCs). Contracts were granted to the most successful bidders, in particular the private prison company Sodexo Justice Services, in order to start the management process of the CRCs in 2015. The 2014 Offender Rehabilitation Act provided the legal basis and contains, among other things, measures for the expansion of license requirements to offenders released from short prison sentences and a new post-sentence supervision period.⁴⁴ Criminal justice as a human and moral enterprise had become a system of profitability.

1.2.3. Australia

Prison privatization in Australia already emerged before it did in the UK. Borallon was the first private prison in the country and opened its doors in 1990 after a decision of the National Party and despite severe criticism from the Labour Party and several trade unions. Borallon was managed by Corrections Corporation of Australia, which is a subsidiary of the Corrections Corporation of America. By the early 2000s, there were nine private prisons in Australia, all of them managed by Corrections Corporation of Australia, Group 4, Australian Integrated Management Systems Corporation or Australasian Correction Management, a subsidiary of the US Wackenhut Corrections Corporation. During this period, these privately operated prisons accommodated approximately 20 percent of the entire prison population, which means that during that time Australia had an even higher proportion of private prisoners than the UK.⁴⁵

1.2.4. France

⁴³ Ministry of Justice (2013) *Transforming Rehabilitation: A revolution in the way we manage offenders*, vol. Cm 8517. London: The Stationery Office.

⁴⁴ Chris Fox, Jon Bannister and Poppy Miszczak, ‘The 2010-2015 Coalition and Criminal Justice: Continuities and Contradictions’, *Safer Communities*, 15 (2016), 114.

⁴⁵ Nowak, *Human Rights or Global Capitalism*, 118.

The process of prison privatization in France started in the late 1980s. Some officials of the government of François Mitterrand were inspired by the prison model of the United States and proposed to adopt a similar system in their own country. However, there was little agreement between different political factions and the final outcome was a partial transfer of correctional functions to the private sector. Whereas private companies were contracted to build prisons and administer a limited number of correctional services, the state remained the primary responsible for the management of correctional facilities. The first prison in France that was managed by this hybrid model opened in 1990. Since then, the situation rapidly escalated and there were 40 semi-privatized prisons in France in 2009, which housed an estimated 36 percent of the total prison population. By the end of 2012, over 50 percent of the prisoners in France were accommodated in correctional facilities using a hybrid management.⁴⁶

These developments clearly show that the use of private prisons is on the rise. Countries have been adopting prison privatization policies which allowed the private sector to play an increasingly important role in the management and provision of custodial services. In addition, some countries seemed to be curious about how prison privatization was implemented in other countries. This contributed to the rise of the prison industry, but also to its fragmentation as different models of prison privatization began to appear, as becomes clear in the case of France. This allows us to further address the different models of prison privatization.

2.3. Reforming Prisons Through Privatization: Two Models

In these last three decades, private companies have played an increasing role in the management of prison systems around the world. The devolution of correctional functions from government agencies to private enterprises has grown steadily in a number of countries, especially in leading Western governments, but the procedure is being actively considered in other countries as well. The scope of outsourced custodial functions may vary from imprisonment, rehabilitation programs, and electronic monitoring to the work of probation personnel. Indeed, the level of private involvement in the correctional sector varies and there is a whole series of outsourcing arrangements in place in different jurisdictions. Nevertheless, in principle, it is possible to make a distinction between two main types of prison privatization, namely the British and the French model.⁴⁷

⁴⁶ Sandro Cabral and Stéphane Saussier, 'Organizing Prisons Through Public-Private Partnerships: A Cross-Country Investigation', *Brazilian Administration Review*, 10 (2013), 107-108.

⁴⁷ Penal Reform International, *Global Prison Trends 2015* (2015), 24.

2.3.1. British Model

The first type of prison privatization is frequently called the “British model” and means that private companies are allowed to manage prisons in their entirety, including the maintenance of security. The role of the state is limited in this model, and most notably still involves the authority to try and sentence persons who have committed a crime. In the United Kingdom, private enterprises are often contracted by the government in order to finance, built and run correctional facilities, which sometimes guarantees that companies will receive and accommodate inmates as soon as the facility is ready to become fully operational. Private prison companies then receive payments from the government partially based on the amount of inmates they are accommodating.⁴⁸ It is needless to say that this system may not be undermined by promoting early releases or exceeding the official prison capacity. This British model is well established in the United States, the United Kingdom, Australia and South Africa, although the United Kingdom has recently returned three private prisons to the public sector.⁴⁹

However, the way in which this model is implemented may still vary between countries. For example, the authority given to private companies managing prisons is less restricted in the United States than in the United Kingdom. In the case of the former, the level of state control is extremely low and the state sometimes even ensures the private enterprises that it will provide a certain amount of prisoners, which is usually close to the full capacity of the respective correctional facilities.⁵⁰ Moreover, companies could also build prisons without a governmental contract, presuming that their services will be needed for emergency housing. These facilities are called “spec” prisons and are often discredited because they have little accountability or monitoring and provide low-quality services. The majority of “spec” prisons can be found in the United States, while other countries such as Australia and the United Kingdom do not allow this sort of facilities on the grounds of planning laws and political liability.⁵¹

2.3.2. French Model

⁴⁸ Nowak, *Human Rights or Global Capitalism*, 126.

⁴⁹ Penal Reform International, *Global Prison Trends 2015* (2015), 24.

⁵⁰ Nowak, *Human Rights or Global Capitalism*, 126.

⁵¹ David N Khey, ‘Privatization of Prison’, Wesley G Jennings (eds.), *The Encyclopedia of Crime and Punishment* (The Wiley Series of Encyclopedias in Criminology and Criminal Justice), John Wiley & Sons Inc, Hoboken, 2016, 3.

The second main type of prison privatization is often referred to as the “French model” and is characterized by private companies that are permitted to provide funding for the construction of a new prison and manage certain functions such as maintenance, healthcare, catering or the provision of rehabilitation programs.⁵² It is in fact a mixed system of public-private partnerships in which custodial functions are administered by the state while all other functions are transferred to the private sector. Security personnel is usually not employed and managed by private companies under this system, although there are some exceptions.⁵³ This model originally emerged in France and has since then been implemented in several other countries such as Brazil, Chile, Germany and Japan as well.⁵⁴ From a human rights point of view, this might seem to be the most appropriate system because the responsibility of maintaining order and security within the prison walls remains with the state. However, it has been demonstrated that this distribution of responsibility and power between state employees and private personnel results in difficulties which may negatively influence the performance and management of correctional facilities. It is especially the division between security functions and administrative functions that hinders the process of establishing a uniform policy and clear correctional objectives, and private enterprises are not keen on investing in public-private partnerships with an unsettled division of labour and powers.⁵⁵

Furthermore, the terms of the contract are an integral part of the manner in which private prisons are managed. The contract should therefore clearly describe the quality and level of performance, the expected outcomes such as recidivism risk factors, and which kinds of monitoring mechanisms that will be put in place. When companies are allowed to privately operate correctional facilities, it is imperative that they respect and uphold the protection of prisoners’ rights. Moreover, the contract is supposed to set out the details on disciplinary measures that will be used if the private company does not afford proper services or does not fulfill its contractual obligations. For example, in the United Kingdom, Securicor, now a subsidiary of G4S, did not receive its funds for up to £1 million because the company failed to meet the specific terms of its contract.⁵⁶ Such

⁵² Penal Reform International, *Global Prison Trends 2015* (2015), 25.

⁵³ Correctional officers are employed by private companies in Brazil and some security functions are outsourced in Japan.

⁵⁴ Penal Reform International, *Global Prison Trends 2015* (2015), 24-25.

⁵⁵ Nowak, *Human Rights or Global Capitalism*, 127.

⁵⁶ Khey, ‘Privatization of Prison’, 3.

measures may be an inducement for the company to enhance its prison management and fulfill its obligations, including its human rights obligations.

1.4. The Main Reasons Behind Prison Privatization

There is a large number of interrelated factors that have contributed to the rise of the private prison industry. First of all, the international community has been seeing a dazzling growth of the world prison population that has already been occurring since the 1970s. Notwithstanding the general decline in crime rates, the world prison population increased by almost 20 per cent between 2000 and 2015. This means that the growth in prison populations has even exceeded the rate of global population growth throughout the same period. The amount of imprisoned women and girls worldwide increased by 53 percent between 2000 and 2017.⁵⁷ In addition, the Institute for Criminal Policy Research reckons that there were more than 10.35 million prisoners held in custody around the world in 2016, either awaiting trial or having been found guilty and sentenced. The real number might even exceed 11 million because the data is somewhat incomplete and does not contain the prison populations of countries such as Somalia and North Korea, nor persons in police detention.⁵⁸

The reasons for these growing trends in prison populations are manifold and can often be related to changes in criminal justice policies such as stricter sentencing laws, the war on drugs, efforts to eliminate illegal immigration⁵⁹ as well as social, cultural and economic factors like unemployment and inequality.⁶⁰ Moreover, governments have gradually taken on a “tough on crime” approach, which is based on the simple idea that higher rates of imprisonment and longer sentences should discourage and prevent people from committing crimes, both within and outside the prison.⁶¹ Although this method continues to be adopted all over the world, it has recently been suggested that there is plain evidence that the tough on crime approach does not necessarily discourages offenders from recommitting a crime, perhaps even the opposite. In other words, “the crux of the matter is that tougher sentences hardly deter crime, and that while imprisoning people temporarily stops them from committing crime outside prison walls, it also tends to increase their criminality after release. As a result, “though on crime” initiatives can reduce crime in the short run

⁵⁷ Penal Reform International, *Global Prison Trends 2018* (2018), 7.

⁵⁸ Roy Walmsley, *World Prison Population List*, Institute for Criminal Policy Research, 2016, 2.

⁵⁹ Pozen, ‘Managing a Correctional Marketplace’, 268.

⁶⁰ Penal Reform International, *Global Prison Trends 2018* (2018), 8.

⁶¹ *Ibid*, 7.

but cause off-setting harm in the long run.”⁶² It is therefore crucial that states adopt and implement a series of law and policy changes which aim to minimize the rates of imprisonment, recommend alternative and sustainable measures, and set out a new vision on prisoner rehabilitation.⁶³

The increase of the world prison population has led to a widespread problem of prison overcrowding, which, in turn, caused serious difficulties in maintaining adequate prison conditions. For instance, between 1973 and 1990 in the United States, federal courts found that there were forty prisons in violation of the Constitution’s prohibition of cruel and unusual punishment due to overcrowding and deteriorating conditions of confinement. In similar fashion, in the early 1980s in the United Kingdom, almost 30 percent of the prison population was living in a one-man cell with at least one or two other inmates. These circumstances have in turn resulted in an increasing demand for extended prison capacity and improved prison conditions. Policy makers who had to deal with these severe problems of prison overcrowding considered prison privatization to be an appropriate response to these demands.⁶⁴ The 1988 Green Paper issued by the British government stated that private contractors could lend “a new dimension of urgency and flexibility to the prison building program.”⁶⁵ By allowing private companies to build and run correctional facilities, many countries have tried to resolve this problem of prison overcrowding.

Although there are a few countries where the prison population has recently become smaller, the global movement toward over-incarceration and prison overcrowding relentlessly continues.⁶⁶ A report issued by the UN High Commissioner for Human Rights in 2017 clearly describes the causes and consequences of mass incarceration and prison overcrowding and concludes that “violence and abuse are by-products of situations where people are detained in overcrowded conditions and where prison personnel are forced to work in situations of overcrowding. Poor and inadequate conditions contribute to difficult and tense relationships among detainees and between detainees and personnel, which increase the risk of ill-treatment in places of detention.”⁶⁷ The report also

⁶² David Roodman, ‘Impact of Incarceration on Crime: Reasonable Doubt: A New Look at Whether Prison Growth Cuts Crime’ (*Open Philanthropy Project*, 2017) <<https://www.openphilanthropy.org/blog/impact-incarceration-crime>> accessed 25 April 2018.

⁶³ David Roodman, *The Impacts of Incarceration on Crime*, Open Philanthropy Project, 2017, 129-131.

⁶⁴ Pozen, ‘Managing a Correctional Marketplace’, 262-264.

⁶⁵ Pozen, ‘Managing a Correctional Marketplace’, 264.

⁶⁶ According to the report *Global Prison Trends 2018* by Penal Reform International, Russia and Mexico’s prison populations decreased. However, in the case of the latter, it is thought to be a sign of a deeper criminal justice problem.

⁶⁷ UN Human Rights Council, *Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of over incarceration and overcrowding*, Report of the United Nations High Commissioner for Human Rights (21 August 2017) A/HRC/36/28, Paragraph 35.

recommends states to take measures in order to protect the human rights of all imprisoned individuals and to pay special attention to vulnerable groups which are affected differently and face more serious challenges by prison overcrowding.⁶⁸

Prison privatization is also largely influenced by economic motives. In order to establish economic development, governments are inclined to outsource custodial functions because privatization would lead to cost savings and reduce correctional expenditures. Growing prison populations have led to financial problems and governments find it increasingly difficult to maintain expensive correctional services. Indeed, governments have been gradually entrusting private companies with the task of administering correctional facilities because they ensure low-cost and quality detention services.⁶⁹ Considering that private prison companies are profit-motivated, it is contended that they can carry out imprisonment tasks and achieve correctional goals in the most cost-efficient manner. This argument is mainly based on the premise that the creation of a competitive market in terms of custodial functions will push contractors to reduce costs and respond to changing consumer demands. In this respect, competition is the driving force behind the effective and favorable functioning of the market.⁷⁰ Still, if private correctional facilities make their profit from criminal society, then, from a corporate point of view, a decrease in crime rates is simply bad business.

By the late 1990s, an estimated 7 percent of governments' entire budgets went to the management of the correctional sector, and direct correctional spending increased at an average annual rate of 9.2 percent from 1980 to 2006. As government resources were exhausted and the correctional expenditures increased, policy makers were looking for solutions and considered privatization as a promising option. Prison privatization became a cost cutting approach for dealing with budget shortages by applying competition in the correctional sector.⁷¹ However, there remains little evidence to support the claim of cost-efficiency, mainly because of a clear lack of research on cost-comparisons between privately and publicly operated prisons.⁷² It has been argued that once governments start to outsource custodial functions, it is likely that the practice becomes

⁶⁸ Ibid.

⁶⁹ Lindsey, Mears and Cochran, 'The Privatization Debate', 310.

⁷⁰ Yijia Jing, *Prison Privatization: A Study of the Causes and Magnitude*, Nova Science Publishers, Inc., New York, 2010, 3-4.

⁷¹ Younhee Kim and Byron E Price, 'Revisiting Prison Privatization: An Examination of the Magnitude of Prison Privatization', *Administration & Society*, 46 (2014), 259-260.

⁷² Cody Mason, *International Growth Trends in Prison Privatization* (The Sentencing Project), 2013, 10-11.

institutionalized. Thus, governments are urged to establish well-structured evaluation systems for private correctional facilities to ensure and maintain effective prison management.⁷³

Finally, the broad commitment to prison privatization was also politically motivated. For example, the Thatcher government in the United Kingdom used privatization policies as a tool to break the power of the trade unions, which had assumed a strong and vocal position in British society. It was a direct and ideological challenge to the opposition of unionized labour, in particular the Prison Officers' Association, who were seen as too powerful within the prison system and excessively protective of their members. By allowing a widespread competition for custodial functions, the government tried to undermine the authority and influence of the Prison Officers' Association.⁷⁴ By contrast, due to the fact that the position of the trade unions in the United States was relatively weak, this problem was less apparent there.⁷⁵

1.5. Prison Labour

The International Labour Organization (ILO) published a study in 1930 in which it established three main models for the organization and management of prison labour, namely contract labour, the piece-price system and the state management system. It largely focused on the different forms of contract labour through which a contractor usually acquired authority over the prisoners by paying a fee to the state. As a result, the contractor could basically extract as much labour as possible from the prisoners under its supervision without being controlled by the state. Most likely the worst form of contract labour was the convict leasing system, which was adopted in the Southern United States in the late nineteenth and early twentieth century and allowed private actors, such as corporations and plantation owners, to purchase prison labour in exchange for providing prisoners basic necessities, such as food, housing and clothing. In reality, though, the system was marked by widespread abuse and exploitation. Nevertheless, the use of the convict leasing system mainly ceased to exist by the time the study had been published. The ILO was also less worried about the piece-price and state management systems because in both cases it was the state that was responsible for overseeing prisoners during the performance of their work.⁷⁶

⁷³ Kim and Price, 'Revisiting Prison Privatization', 255.

⁷⁴ Annison, Burke and Senior, 'Transforming Rehabilitation', 8.

⁷⁵ Pozen, 'Managing a Correctional Marketplace', 271.

⁷⁶ Fenwick, 'Private Use of Prisoners' Labor', 259-260.

The recurrence of prison privatization has been most controversial in those states where work for prisoners is required by law. One of the major problems in this context is that when the correctional sector becomes fully privatized, the custodial responsibility for all prisoners as well as the obligation to ensure that prisoners carry out their duty to work is theoretically being transferred from the public to the private sector. This model bears some resemblance to the convict leasing system of the late nineteenth century and early twentieth century. However, perhaps the most notable and troublesome difference is that in the convict leasing system the contractor was supposed to pay a fee to the state in order to make use of prison labour, whereas nowadays the state pays the contractor to carry out a public service.⁷⁷

The rise of private correctional facilities has been characterized by an increase in the use of prison labour by private actors. As already mentioned above, this has been stimulated by several factors such as prison overcrowding and the exhaustion of government resources. Considering the context in which the growing inclusion of the private sector in providing public services seemed to be beneficial and the employment of prisoners was deemed necessary, it made sense for the state to adopt policies that supported the involvement of the private sector in the exploitation of prison labour.⁷⁸ For example, in 1999, private prisons companies in the United States sold \$1.6 billion worth of products that had been manufactured in prison.

From a penological position, the employment of prisoners makes a worthwhile contribution to their rehabilitation process. It is instrumental in the development of particular abilities that might be useful for prisoners in seeking work after release, as well as in arranging personal finances. The systematic involvement of prisoners in employment services can also make it easier to instill disciplined work and personal habits. From the perspective of the prison administration, the employment of prisoners is part of a larger program of prison industries and proves to be a valuable management tool to ensure the safety and security of correctional facilities. It does not only alleviate the boredom that would otherwise overshadow prison life, but it also contributes to the establishment of a peaceful and orderly prison.⁷⁹

Prisoners are mainly used for either service or industrial work, which can be carried out both within and outside the prison. Service work is related to the maintenance and management of correctional facilities, such as laundry, cooking and gardening. It can also concern the upkeep of public spaces or facilities outside the prison, like parks and roads. Industrial work applies to the

⁷⁷ Ibid.

⁷⁸ Ibid, 260.

⁷⁹ Ibid, 261.

work that prisoners perform in the so called “correctional industries”. These industries are either entirely owned and controlled by the state or they might be partially administered by private actors. In both cases, the manufactured products can be sold into the public market. However, when it is suspected that the products are made by prisoners who are exploited and unfairly remunerated for the work provided, the products can only be used for state purposes.⁸⁰

Today, there are several ways in which prison labour can be organized and managed by private actors. The first and most straightforward one is the customer model, in which the private sector buys products that are made by prisoners to sell them into the public market. The part that is played by the private sector in this context is rather limited, yet it can also be more involved in the organization and management of prison labour. The employer model represents a system in which the private company has a direct contract with prisoners and is required to remunerate them for services rendered or work done. Finally, the manpower model provides that the prison and prisoners are managed by state employees while the private company oversees the labour process: “companies lease rather than employ their prison workforces”. Every one of these models seems to be more or less analogous to the contract labour system of the 1930s.⁸¹

1.6. Prison Privatization and Human Rights

The effects of prison privatization have been largely underestimated. Whereas it may be true that the adoption of free market policies have generated economic growth and increased socio-economic well-being in some countries, it is an indisputable fact that they have also resulted in corruption, severe austerity measures and economic crises which in turn have led to growing inequality and poverty on a global scale.⁸² Moreover, privatization policies have led to the growing inclusion of private entities in sectors that were traditionally administered by the state. This raises doubts about the regulatory ability of the state, because it becomes unclear whether the state is still competent to fulfill its international legal obligations to safeguard human rights in an increasingly globalized world. Thus, the privatization of public services can paradoxically become an obstacle for states to guarantee the protection of human rights for those people who are adversely affected by it.

However, it may be equally important to consider the potential of the private sector to enhance the protection of human rights, especially when the state itself does not act in accordance

⁸⁰ Ibid.

⁸¹ Ibid, 262.

⁸² Nowak, *Human Rights or Global Capitalism*, 47.

with international human rights law. Dunoff pointed out that “globalized markets are neither inherently a friend nor a foe of human rights. While increased economic openness is often associated with increased national wealth and can promote progress on other measures of well being, such as nutrition or education, we simply cannot answer in the abstract the ultimate effects of markets and globalization on human rights and social justice for any particular society.”⁸³ Perhaps this is true in terms of prison privatization, but one of the problems is that there is simply very little known about the actual effects of its practice. Part of the explanation lies in the fact that “there is very little empathy among the general public, politicians and civil society for persons behind bars and very little knowledge about the appalling conditions in most detention facilities. Prison walls have a double function: they lock people in and at the same time they lock the public out. Most people have never seen a prison from inside and have very little interest in knowing more about this secret world. There is a general assumption that persons deprived of their liberty by the state, for whatever reason, have done something wrong and, therefore, “deserve to be locked away.”⁸⁴

It remains true that there are currently numerous people who are spending time in some sort of closed facility irrespective of whether they have committed a crime. In many cases, these innocent or forgotten prisoners are the victims of inadequate and corrupt criminal justice systems. Still, even those people who have been rightfully sentenced deserve to be treated with humanity and respect for their dignity as human beings. Being sentenced to prison and dispossessed of the right of personal liberty does not mean that other liberties and human rights are taken away. Moreover, the prison management has the responsibility to guarantee that inmates are able to enjoy and exercise their human rights in a manner that may prove to be useful for their rehabilitation and reintegration processes.⁸⁵ Article 10(3) of the Convention on Civil and Political Rights (CCPR) specifies that the purpose of rehabilitation is not only in the interest of the prisoner, but also of the general public. Proper treatment and guidance to prisoners minimizes the risk of recidivism and may ultimately reduce the overall crime rate.⁸⁶

As a matter of fact, countries with the highest standards of prison conditions, such as Denmark and Sweden, generally have the lowest level of crime, incarceration and recidivism, while countries with low standards of prison conditions, like the United States, normally demonstrate a

⁸³ Dunoff, ‘Does Globalization Advance Human Rights?’, 138.

⁸⁴ Nowak, *Human Rights or Global Capitalism*, 131.

⁸⁵ Ibid.

⁸⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 10(3).

high level of crime, incarceration and recidivism. Part of the explanation of these trends lies in the fact that countries may differ in their approach toward criminal justice. Societies that follow a model of retributive criminal justice mostly have a higher crime and incarceration rate and are likely to have lower standards of prison conditions. By contrast, societies that act in accordance with a restorative model of criminal justice generally have a lower crime and incarceration rate and have a tendency to ensure higher standards of prison conditions. In the latter case, countries usually follow the principle of normalization, which means that the living conditions of people behind bars should be similar, to the greatest extent possible, to life outside prison. After all, this approach might happen to be cheaper in the long run.⁸⁷

International human rights law and soft law instruments unquestionably rest upon the idea of restorative justice. States have a duty to treat prisoners with humanity and respect for the dignity to which all human beings are entitled, and to offer them all the necessary assistance and support for their social reformation and rehabilitation, as well as to provide them with the capacity to enjoy and exercise all human rights, including labour rights. This kind of treatment that is based on a system of restorative justice seems to be hardly reconcilable with the concept of prison privatization through which inmates are seen as pure assets for making profit. The devolution of correctional functions and services from government agencies to external for-profit organizations or companies may reduce costs in several ways, but these cost-cutting methods are inconsistent with the ultimate aim of prisoner rehabilitation, as specified in Article 10 of the CCPR and other human rights provisions. It is argued that “the privatization of prisons is, therefore, contrary to the right of detainees to be treated with respect for their human dignity, as held by the Supreme Court of Israel.⁸⁸ To treat prisoners as an economic commodity violates their basic human rights to human dignity.”⁸⁹

Still, this rise in prison privatization has not resulted in a consensus about the effectiveness of these facilities. In fact, the debate about privatized prisons seems to be rather divided into two groups who defend sharply contrasting positions. Privatization advocates argue that companies have the capacity to achieve correctional goals more effectively and at a lower cost, offer higher quality detention services, and deal more adequately with correctional challenges. Critics maintain that prison privatization needlessly expands the web of formal social control and undermines criminal justice, reduces the quality of detention services, and does not lead to cost-efficiency. Thus,

⁸⁷ Nowak, *Human Rights or Global Capitalism*, 132.

⁸⁸ *Ibid*, 133.

⁸⁹ *Ibid*.

regardless of the widespread presence of privatized correctional facilities, there remains little agreement about its actual merits. One explanation is the lack of empirical research on prison privatization. This does not mean that there are no systematic studies on this subject, but it is simply to say that, although some studies have been undertaken, there are still many questions about the nature and impact of prison privatization which remain unanswered.⁹⁰ Nevertheless, countries have adopted this model of prison privatization, and, as a result, companies have seriously benefited from these conditions.⁹¹ Today, only a handful of multinational corporations holds the lion's share of the market, while often neglecting the responsibilities and priorities that come with the management of correctional facilities.⁹² Hence, the international corrections-commercial complex.⁹³

The use of forced labour has also become an increasingly important issue in the context of prison privatization. For example, over this past year four lawsuits have been filed in the United States by seven people who claim that they were being threatened to solitary confinement or deprived of basic needs such as food and water if they rejected to perform labour. It is also said that the main reason behind the imposition of forced labour is profit-motivated. Moreover, it is even estimated that 62,000 detainees who currently are or were housed in a private correctional facility managed by GEO Group have been affected in various forms. All lawsuits make reference to the Voluntary Work Program, which is a US Immigration and Customs Enforcement (ICE) program that makes offenders work when they are only paid \$1 per day. This stands in clear contrast with the respect for human dignity and is a clear violation case of forced labour.⁹⁴ In response to these events, eighteen Republican members of the US Congress decided to write a letter to Attorney General Jeff Session asking to support GEO Group's activities in particular and the idea of prison privatization in general.⁹⁵ These events clearly demonstrate the two main positions toward the use of private prisons as seeking justice might become undermined by political and economic motives.

⁹⁰ Lindsey, Mears and Cochran, 'The Privatization Debate', 309.

⁹¹ Mason, *International Growth Trends in Prison Privatization*, 1-2.

⁹² Fenwick, 'Private Use of Prisoners' Labor', 255.

⁹³ Ibid.

⁹⁴ Victoria Law, 'Investigation: Corporations Are Profiting From Immigrant Detainees' Labor: Some Say It's Slavery' (29 May 2018) <<https://www.business-humanrights.org/en/commentary-voluntary-work-programs-at-us-immigrant-detention-centres-run-by-private-prison-cos-amount-to-forced-labour>> accessed 5 June 2018.

⁹⁵ Betsy Woodruff, 'Republicans Say Forced Labour is Good for Detained Immigrants in Letter Defending Private Prison' (15 March 2018) <<https://www.business-humanrights.org/en/usa-congressmen-express-support-to-private-prison-co-geo-group-in-lawsuit-over-alleged-use-of-forced-labour>> accessed 27 April 2018.

The following part will further address the legal aspects of the issue of forced labour in private prisons.

3. Forced Labour in Private Prisons: International Legal Framework

Over the course of time, forced labour has been an omnipresent feature of economic processes. It has long been perceived as a legal practice, or at least as one that was not prohibited.⁹⁶ This changed during the early decades of the twentieth century, when the prohibition of forced labour became enshrined in international law. Now, there exists a significant amount of international legal instruments that refer to the prohibition of forced labour. However, discussions about the scope and application of their provisions have caused confusion, not least because of the challenges posed by contemporary forms of forced labour, or what is frequently referred to as “modern forms of slavery.”⁹⁷ Indeed, the emergence and expansion of the private prison industry has called into question to what extent prisoners detained in private correctional facilities are protected against forced labour under international human rights law, as private prison companies are increasingly treating prisoners as an economic commodity. This issue will be addressed here.

3.1. International Human Rights Law

3.1.1. The Slavery Convention

The Slavery Convention of 1926 was the result of an over a century-long struggle to abolish slavery and the slave trade. It started at the international level with an agreement on the adoption of certain measures related to the elimination of slavery at the Congress of Vienna in 1815, which is in fact the earliest intergovernmental consensus on any aspect of human rights.⁹⁸ More than a hundred years later, the process culminated in the signing and adoption of the Slavery Convention by the League of Nations and its constituent parties. Although its main focus naturally lies on the prohibition of slavery and the slave trade, the document also includes provisions on forced and compulsory labour. For instance, the Slavery Convention states in its preamble “that it is necessary to prevent forced labour from developing into conditions analogous to slavery”⁹⁹, while slavery in

⁹⁶ Axel Marx and Jan Wouters, ‘Combating Slavery, Forced Labour and Human Trafficking: Are Current International, European and National Instruments Working?’, *Global Policy*, 8 (2017), 495.

⁹⁷ Lee Swepston, International Labour Organization, *Working Paper on Forced and Compulsory Labour in International Human Rights Law*, 2014, Preface.

⁹⁸ *Ibid.*, 5.

⁹⁹ League of Nations, Convention to Suppress the Slave Trade and Slavery (signed 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Preamble.

turn is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”¹⁰⁰

Article 5 of the Slavery Convention provides more detailed information on the issue of forced and compulsory labour. It states that “the High Contracting Parties recognize 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.”¹⁰¹ It also specifies that compulsory or forced labour may only be used for public purposes, and that the responsibility for its recourse lies within the “competent central authorities of the territory concerned.”¹⁰² Although the Slavery Convention clearly prohibits forced labour, except for public purposes, and requires states to eliminate its use, the instrument has lost some of its relevance over the course of time, considering that the context in which the Slavery Convention was adopted shows that Article 5 was meant to make reference to forced and compulsory labour in a colonial situation.¹⁰³ Nevertheless, as one of the oldest human rights instruments, the Slavery Convention still has a historical and legal meaning and continues to be a source of protection and inspiration.

Following the adoption of the Slavery Convention, the League of Nations became fully aware of the fact that that forced and compulsory labour in colonial situations could be seen as the actual forerunner of widespread slavery, though they remain different in nature. The organization therefore urged the International Labour Organization (ILO) to create another legal instrument that specifically focuses on the issue of forced and compulsory labour. In 1930, the ILO adopted the Forced Labour Convention (No. 29), which was seen as part of a broader shift toward the abolition of slavery in all its forms and taking “all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”¹⁰⁴ as was set out in the Slavery Convention. Convention No. 29 which will be discussed further below.

3.1.2. The Universal Declaration of Human Rights

¹⁰⁰ Ibid, Article 1.

¹⁰¹ Ibid, Article 5.

¹⁰² Ibid, Article 5(3).

¹⁰³ Lee Swepston, *Working Paper on Forced and Compulsory Labour*, 7.

¹⁰⁴ Ibid, 6.

The Universal Declaration of Human Rights (UDHR) is indisputably a milestone document in the establishment of the human rights regime, although its particular relevance and impact is still being heavily discussed.¹⁰⁵ The UDHR was drafted by a select group of individuals with different legal and cultural backgrounds from all regions of the world, and it was adopted by the UN General Assembly in 1948 as a “common standard of achievements for all peoples and all nations.”¹⁰⁶ It was the first concrete attempt to present a comprehensive set of fundamental human rights to which all human beings are entitled simply by virtue of being born human, regardless of their ethnic origin, religion, color, sex, language, or any other status.

Article 4 of the UDHR laid down that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”¹⁰⁷ Although it does not explicitly refer to forced labour, it might have been that the drafters regarded forced labour as a form of slavery or servitude. Indeed, this becomes clear when one takes a closer look at the official records of the negotiation process prior to the adoption of the UDHR. These records show that “both the concept of slavery and that of forced labour or involuntary servitude should be covered by the Declaration”¹⁰⁸ and it was concluded that when “slavery in all its forms would be prohibited, all the possible manifestations of slavery would have been covered; whereas forced labour was only one form of slavery.”¹⁰⁹ Hence, Article 4 of the UDHR prohibits the use of forced or compulsory labour as it is considered as a form of slavery.

Furthermore, the UDHR states in its preamble “that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive ... to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”¹¹⁰ This basically means that a state is required to take proper measures to protect the human rights of those people within its territory and jurisdiction from any infringements by third parties, not only the actions of the state itself.¹¹¹

¹⁰⁵ See, for instance, Samuel Moyn, *The Last Utopia: Human Rights in History*, Harvard University Press, Cambridge, 2010.

¹⁰⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Preamble.

¹⁰⁷ *Ibid*, Article 4.

¹⁰⁸ United Nations, Economic and Social Council, *Commission on Human Rights 3d Session: Summary Record of the 53d Meeting* (4 June 1948) E/CN.4/SR.53, 3.

¹⁰⁹ *Ibid*, 4.

¹¹⁰ Universal Declaration of Human Rights, Preamble.

¹¹¹ Adam McBeth, ‘Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights’, *Hamline Journal of Public Law and Policy*, 30 (2008), 55.

However, this also places an obligation upon non-state actors to respect human rights within the scope of their activities. This is of vital importance considering the increasingly influential role that non-state actors, such as private corrections companies, are playing in today's globalized world. These entities pose numerous risks to the protection of human rights and it is therefore crucial that "every organ of society" promotes and respects these rights. Following this view, the UDHR can serve as an efficient frame of reference for international agreement on the rights to be respected.¹¹²

Despite the fact that the UDHR is formally not a legally binding instrument, it has functioned as a model for many international and domestic laws, regulations and policies that aim to safeguard fundamental human rights. Most of the provisions contained in the UDHR have also been transformed into customary international law, which is binding on all states. Nearly all of these states are now legally required to comply with one or more multilateral conventions with respect to human rights, though this does not necessarily undermine the relevance of the UDHR, since most of these conventional obligations derive from the provisions of the UDHR itself.¹¹³

3.1.3. The International Covenants

a) The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) points out that people either have a right to do something which the state is obligated to protect or the right not to have certain things done to them. Article 8(3) of the ICCPR explicitly prohibits the performance of forced or compulsory labour, although it also states that there are some exceptions that do not fall under this prohibition.¹¹⁴ Under the ICCPR, imprisonment with hard labour may be imposed as a penalty for a criminal offense when it is formally announced by a competent court in countries where the law allows to do so. Article 8(3) also excludes from the prohibition any work or service that is required of a person who is detained as a result of a lawful court order, or of a person who is on conditional release from such detention. Following this view, it is not prohibited under the ICCPR to impose

¹¹² Ibid, 35.

¹¹³ Hurst Hannum, 'The UDHR in National and International Law', *Health and Human Rights*, 3 (1998), 145.

¹¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 8(3).

forced labour on someone who is being accused, but not necessarily convicted of a criminal offense.¹¹⁵

Furthermore, Article 10(1) of the ICCPR specifically refers to those people who are detained and states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹¹⁶ Instead of pointing out what should *not* be done to people behind bars, as most provisions in the ICCPR, Article 10(1) imposes a positive obligation, namely the adequate treatment of people who are being held in custody, on those entities that are running prisons or other correctional facilities. It somewhat aims to regulate the relationship between those who are managing these facilities and those who are in their custody, as the provision recognizes the power imbalance between these two parties.¹¹⁷ In addition, countries should ensure that the principle outlined in Article 10(1) is observed in all types of correctional facilities or other institutions where people are being detained and that lie within their jurisdiction. Accordingly, countries have certain reporting requirements, and, as is stipulated by General Comment No. 21 of the Human Rights Committee, “reports should indicate whether the various applicable provisions form an integral part of the instruction and training of the personnel who have authority over persons deprived of their liberty and whether they are strictly adhered to by such personnel in the discharge of their duties.”¹¹⁸

Finally, Article 10(3) of the ICCPR specifies that the reformation and social rehabilitation of prisoners should be the primary objective of the correctional system.¹¹⁹ This puts into question how privately operated prisons can achieve this goal whereas they are basically profit-motivated entities in the first place. Even when private prison companies do manage to provide quality detention services, the reformation and rehabilitation of prisoners seems to be so different in nature to the idea of treating prisoners as economic commodities for making private profits. It seems that the two are incapable of coexisting.

¹¹⁵ Other forms of work or service that are not considered to be forced or compulsory labour under the scope of the ICCPR are: (i) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (ii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iii) Any work or service which forms part of normal civil obligations.

¹¹⁶ International Covenant on Civil and Political Rights, Article 10(1).

¹¹⁷ Anita Mackay, ‘Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) and Australian Prisons’, *Australian Journal of Human Rights*, 23 (2017), 369.

¹¹⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)* (10 April 1992), Paragraph 7.

¹¹⁹ International Covenant on Civil and Political Rights, Article 10(3).

b) The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes some relevant provisions that refer to working conditions in general rather than to the working conditions of prisoners in particular. Article 6(1) of the ICESCR provides that “the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”¹²⁰ In this respect, forced labour is a clear violation of the right to choose work freely, irrespective of whether this work is performed in prison or elsewhere, whether for private interests or otherwise.¹²¹

However, as the analysis of the ICCPR has already demonstrated, there are certain forms of forced labour that are usually excluded from the prohibition of its use, including prisoners’ labour under certain conditions. For that reason, it can be assumed that the exaction of forced labour from prisoners, whether it would occur in the private sphere or elsewhere, is not regulated by the ICESCR. Moreover, in terms of ensuring safe and legal working conditions for prisoners, the ICESCR appears to be rather inadequate because it does not make any specific distinction between prisoners and other workers in regard to their relevant obligations. Article 6(1) of the ICESCR specifies that the states parties which adopted and ratified the convention are bound to recognize the workers’ rights discussed therein.¹²² While this requires states to undertake proper measures to implement these rights, it simultaneously is an obligation that is likely to be affected by the ICESCR’s general and limited scope of the provisions contained in the instrument. The ICESCR may therefore only provide limited protection with regard to the working conditions for prisoners.¹²³ For more detailed information on this issue, it is essential to turn to the ILO’s international labour standards

3.2. International Labour Standards

3.2.1. The ILO Forced Labour Convention, 1930 (No. 29)

¹²⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS, Article 6(1).

¹²¹ Fenwick, ‘Private Use of Prisoners’ Labor’, 282-283.

¹²² International Covenant on Economic, Social and Cultural Rights, Article 6(1).

¹²³ *Ibid.*

The ILO's Forced Labour Convention (No. 29) is one of the organization's eight fundamental labour standards.¹²⁴ It was introduced in 1930 and clearly inspired by Article 5 of the Slavery Convention, which specifies that states have to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery. Convention No. 29 entered into force in 1932 and is currently the second most ratified ILO Convention, with 178 of the ILO's 187 members having ratified it.¹²⁵¹²⁶ The widespread ratification of Convention No. 29 is a clear manifestation of the broad support that the international community has for the instrument's main purpose, which is the total elimination of forced or compulsory labour.¹²⁷ The binding nature of the principles and aims set forth in Convention No. 29 is strengthened by the 1998 ILO's Declaration on Fundamental Principles and Rights at Work, since Article 2 of the Declaration clearly states that all ILO members have an obligation to respect, promote and realize the principle of the elimination of all forms of forced or compulsory labour. This obligation is imposed on all members, regardless of whether they have ratified Convention 29.¹²⁸

According to Article 1(1) of Convention No. 29, each state which has ratified the Convention is required to eliminate and abstain from the use of forced or compulsory labour in all its forms within the shortest possible period.¹²⁹ All laws or administrative acts that grant the right to exact forced labour must be revoked, whether it is performed by public servants or private actors. Moreover, states are legally bound to penalize the exaction of forced labour and it is imperative that the sanctions imposed are adequate and strictly enforced. Although forced labour is considered to be a criminal offense in almost all countries, there is still a clear lack of imposing adequate sanctions when it occurs. In cases where a penalty is imposed, it is often not in proportion to the magnitude of the offense. This absence of appropriate sanctions is in practice one of the main obstacles to the

¹²⁴ The others are: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Rights to Organize and Collective Bargaining Convention, 1949 (No. 98); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹²⁵ The Worst Forms of Child Labour Convention, 1999 (No. 182) is the most ratified ILO Convention, with 181 of the ILO's 187 members having ratified it.

¹²⁶ Ratification by Convention (*International Labour Organization*, 2018) <http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:7602679645114:::P12001_INSTRUMENT_SORT:1> accessed 4 April 2018.

¹²⁷ Fenwick, 'Private Use of Prisoners' Labor', 265-266.

¹²⁸ International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work (adopted June 1998), Article 2.

¹²⁹ International Labour Organization (ILO), Forced Labour Convention C29 (adopted 28 June 1930, entered into force 1 May 1932), Article 1(1).

effective abolition of forced labour. Convention No. 29 shows that the actors exacting forced labour, either governmental or private, are irrelevant to its application. Today, forced labour is mostly imposed by individuals and enterprises that act with considerable impunity from the state and other law enforcement bodies.¹³⁰

Forced or compulsory labour is defined 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.”¹³¹ However, during the drafting stage of this Convention, it became clear that most member states were rather reluctant to accept such a comprehensive definition of forced labour without including some limitations and exceptions to its application.¹³² One of these exceptions is specified in Article 2(2)(c), which states that forced labour shall not include “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.”¹³³

There are thus three conditions that must be met for prison labour to be allowed. First of all, the work has to be imposed as a result of a conviction in a court. It is required that this court must ensure a fair trial and it should act in accordance with the international standards that are set out in the UDHR and the ICCPR, among other documents. Forced labour of prisoners who are convicted by courts that do not comply with these standards is not excluded from the prohibition stated in Article 1 of Convention No. 29. Due to the fact that the service provided has to be a consequence of a conviction, individuals waiting for trial or who are placed in custody but have not yet been convicted may not be forced to work. This stands in contrast with Article 8(3) of the ICCPR, which allows the exaction of forced labour from individuals awaiting trial. In addition, if prisoners are offered work and undertake it on a voluntary basis during this period, then there is no issue of incompatibility with the Convention’s provisions. Forced labour that is exacted by non-judicial institutions or authorities is inconsistent with the scope of this instrument.¹³⁴

¹³⁰ Lars Thomann, *Steps to Compliance with International Labour Standards: The International Labour Organization (ILO) and the Abolition of Forced Labour*, Springer Fachmedien, Wiesbaden, 2011, 191.

¹³¹ ILO, Forced Labour Convention C29, Article 2(1).

¹³² Thomann, *Steps to Compliance with International Labour Standards*, 192.

¹³³ ILO, Forced Labour Convention C29, Article 2(2)(c).

¹³⁴ Thomann, *Steps to Compliance with International Labour Standards*, 193-194.

Secondly, the use of prison labour is allowed when it is performed under the supervision of a public authority. The inclusion of this provision has clear historical roots and is meant to protect prisoners from different forms of exploitation that were inflicted on them in the past. The necessity of public supervision has a protective purpose. It aims to prevent that the circumstances under which prisoners work are being decided by any other actor than public authorities. For that reason, public supervision has to guarantee that conditions under which forced prison labour occurs remain within the acceptable legal boundaries, and are determined only by the state.¹³⁵ Nevertheless, since a growing amount of states have been following a model of prison privatization, corporations are exercising the authority which under Convention No. 29 should only be carried out by a public authority. This may undermine an effective and systematic application of public supervision.¹³⁶

Thirdly, prison labour can be excluded from the scope of the Convention when the prisoners are not hired to or placed at the disposal of private individuals, companies or associations. In this regard, prison labour performed for private benefits is not allowed when prisoners themselves have not agreed to the working arrangement. Conversely, cases in which prisoners voluntarily, and free from the risk of any sanctions, decide to work for the interests of private individuals or companies, are in accordance with Convention No. 29. In other words, privatized prisons may benefit from prison labour under the Convention as long as two conditions are fulfilled: prisoners must give their consent freely, and the conditions under which the prisoners work must be comparable to a free employment relationship. However, considering the limited nature of incarceration as such, the necessity of formal consent may be difficult to assess because it is possible that permission is given under threat of the loss of privileges or basic necessities. So, under Convention No. 29, forced labour for prisoners is permitted when the work provided is a consequence of a conviction in a proper court, when there is no association with private companies, and when the work is performed under the supervision of a public authority within or outside the prison.¹³⁷ Private prison companies are thus not allowed, under any circumstances, to impose forced labour on someone.

3.2.2. The ILO Abolition of Forced Labour Convention, 1957 (No. 105)

¹³⁵ Fenwick, 'Private Use of Prisoners' Labor', 270.

¹³⁶ Thomann, *Steps to Compliance with International Labour Standards*, 194.

¹³⁷ *Ibid*, 195.

While the initial main goal of Convention No. 29 was the abolition of forced labour imposed by colonial powers within indigenous societies, the scope of application of the instrument expanded over time. The legal definition of forced labour set forth in Convention No. 29 mainly or even exclusively focuses on its use for economic purposes, but it became apparent in the early 1950s that certain harmful practices taking place in many regions of the world were not covered by the scope of Convention No. 29. In the mid 1950s it was recognized that, despite the prohibitions of Convention No. 29, forced labour had not yet been eliminated and the unfolding of new forms of forced labour through political coercion or for economic and development purposes required international action. For that reason, the Governing Body (GB), which is the executive council of the ILO, urged the International Labour Conference (ILC), another branch of the organization that has the authority to adopt new standards by a two-thirds majority, that the instrument following Convention No. 29 should tackle the issues that were excluded from the scope of Convention No. 29. As a result, the ILO adopted the Abolition of Forced Labour Convention (No. 105) in 1957.¹³⁸

Whereas Convention No. 29 takes on a broad approach and prohibits the use of forced and compulsory labour in all its forms, regardless of the above-mentioned exceptions to its application, Convention No. 105 has a limited scope and strives for the immediate abolition of forced labour in five cases: (a) as 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 mobilizing and using labour for the purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in a strike; and (e) as a means of racial, social, national or religious discrimination.¹³⁹ It is clear that Convention No. 105 was not intended to amend Convention No. 29, but rather to supplement it.

Nevertheless, the exceptions incorporated in Convention No. 29, and especially those related to prison labour, do not necessarily apply to the provisions provided in Convention No. 105. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) recognized that under Convention No. 105 forced labour may be imposed on a convicted person as a result of a lawful court order, because the work performed is considered as part of the offender's rehabilitation process. Conversely, when an individual is forced to work in one of the five cases set out in Convention No. 105, that person enjoys protection against the use of forced labour.¹⁴⁰

¹³⁸ Thomann, *Steps to Compliance with International Labour Standards*, 195-196.

¹³⁹ International Labour Organization (ILO), Abolition of Forced Labour Convention C105 (adopted 25 June 1957, entered into force 17 January 1959), Article 1.

¹⁴⁰ Thomann, *Steps to Compliance with International Labour Standards*, 196-197.

3.2.3. ILO Declaration on Fundamental Principles and Rights at Work

During the 1990s, the ILO became involved in some serious discussions about the inclusion of labour standards in trade agreements and about the rather negative stance of the World Trade Organization toward this issue. Considerable efforts to incorporate stronger social clauses within the World Trade Organization were neglected at the Ministerial Conference held in Singapore in 1996. Instead, the ILO was given once more the responsibility for the promotion and protection of fundamental labour standards, including the total elimination of forced and compulsory labour. As a result, its tripartite constituents adopted the Declaration on Fundamental Principles and Rights at Work in 1998.¹⁴¹ The Declaration binds the organization's member states to respect and support the elimination of child labour and forced labour, freedom from discrimination at work and freedom of association and collective bargaining, irrespective of whether these member states have ratified any of the relevant ILO Conventions.¹⁴² The ILO therefore installed a new follow-up mechanism for members that had not ratified any of the core conventions. This means that these countries are asked to present annual reports on the adoption of the conventions and the limitations that hinder ratification. This has proven to be a quite effective method since there has been a significant increase in the ratification of the fundamental labour conventions in recent years.¹⁴³

3.3. Soft Law Instruments

Although there is no universally recognized definition of soft law, it mainly refers to international instruments - apart from a treaty - that incorporate non-binding principles, norms, standards or other stipulations of expected behavior. It remains rather unclear whether soft and hard law are to be seen as dichotomies or whether they constitute two sides of a continuum, which extend from binding legal obligation to complete freedom of action. Accordingly, it is argued that "traditional hard law instruments such as treaties increasingly contain soft obligations, such as undertakings to strive to cooperate, while traditional soft law instruments are increasing their binding power by including

¹⁴¹ ILO, Declaration on Fundamental Principles and Rights at Work, paragraph 2.

¹⁴² The ILO adopted the Worst Forms of Child Labour Convention in 1999, but it immediately became a key component of the Declaration's fundamental principles and rights at work.

¹⁴³ Beate Andrees, 'Defending Rights, Securing Justice: The International Labour Organization's Work on Forced Labour', *Journal of International Criminal Justice*, 14 (2016), 349, 352.

supervisory mechanisms traditionally found in hard-law texts.”¹⁴⁴ In this respect, the distinctive nature of a particular instrument is rather determined by its content than its form.¹⁴⁵

Irrespective of soft law’s disputable character, especially in relation to hard law, there are several important advantages. Firstly, soft law is flexible because it is relatively easy to adjust, thereby allowing governments to efficiently respond to issues in areas that are rapidly evolving or changing. It also serves as a useful basis for areas of the law for which governments cannot agree on the creation of a legally binding instrument. Secondly, soft law can be beneficial in the sense that it is not law. This means that it does not depend on the standard processes that must be complied with to pass a law, while it still can have a desired effect regardless of its non-legal status. In this respect, soft law can be considered to be more useful or efficient than a binding instrument that mainly contains weak and vague provisions. Finally, soft law complements hard law. It is often utilized to help codify the norms in a specific domain, which can then be changed into hard law, or it enhances existing hard law. In the case of the latter, soft law can resolve ambiguities or fill gaps, and, in a broader sense, it can contribute to developing an adequate regulatory framework.¹⁴⁶

3.3.1. The Nelson Mandela Rules

The international soft law instrument that maybe focuses most explicitly on the protection of the rights of prisoners is the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR). Originally adopted in 1955, the UNSMR serve as the universally recognized minimum standards for the administration of correctional facilities and the treatment of prisoners. These standards have been highly influential in the evolvement of prison laws, policies and practices on both a national and international level. Nevertheless, due to the fact that international law and prison management notably changed since 1955, it became increasingly important to reconsider the relevance of the UNSMR. In 2011, the General Assembly decided to set up an open-ended intergovernmental expert group to review and revise the UNSMR. Civil society organizations and appropriate UN entities, as well as criminal justice experts, the World Health Organization (WHO) and other actors were instrumental in this process.¹⁴⁷ After five years of consultation, the General Assembly unanimously

¹⁴⁴ Barnali Choudhury, ‘Hardening Soft Law Initiatives in Business and Human Rights’, J Du Plessis and C Low (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses*, Springer Nature, Cham, 2017, 191.

¹⁴⁵ *Ibid*, 192.

¹⁴⁶ *Ibid*, 192-193.

¹⁴⁷ UNODC, UNSMR Brochure, 1-3.

adopted an updated version of the UNSMR, also known as the Nelson Mandela Rules (Mandela Rules).¹⁴⁸

The Mandela Rules constitute 122 rules that cover numerous aspects of prison management and set out the minimum standards for the treatment of prisoners, regardless of their pre-trial or convicted status. The updates clearly demonstrate that the formulation process of the Mandela Rules did not only take into account the concerns of the detained individual, but also a comprehensive and thorough consideration of those involved in the management and treatment of prisoners. The Mandela Rules represent fundamental human rights and criminal justice standards and consolidate a vast array of international laws that are relevant to protecting the inherent dignity of those deprived from their liberty.¹⁴⁹ The constant thread running through the content of this instrument is that human dignity must serve as the basis of all considerations.¹⁵⁰ This key concern is stressed by Rules 1 to 5, which outline the basic principles of prison management and the treatment of prisoners and require that prisoners should be treated with respect for their inherent dignity and value as human beings. Forced labour and torture or any other form of ill-treatment are prohibited and prisoners should be treated in a manner that corresponds with their needs and without discrimination.¹⁵¹

The issue of prisoners' work under the Mandela Rules is covered by Rules 96 to 103. These rules mainly state that servitude, slavery or compelling detained individuals to work for the personal or private benefit of any prison staff is prohibited. Any kind of work that is carried out should be in the best interest of a prisoners's job prospects after release or be remunerated in an equitable manner, and take place in safe and legal conditions. Prisoners must not be employed in a disciplinary capacity.¹⁵² Of particular interest is Rule 99(2), which specifies that "the interests of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making a financial profit from an industry in the prison."¹⁵³ This means that private correctional facilities that are managed by profit-motivated companies are not allowed to use prison labour for

¹⁴⁸ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (adopted 8 January 2016) A/RES/70/175.

¹⁴⁹ Human rights instruments that influenced the revision of the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

¹⁵⁰ Kasey L McCall-Smith, 'Introductory Note: United Nations Revised Rules on Treatment of Prisoners', *International Legal Materials*, 55 (2017), 1180.

¹⁵¹ Penal Reform International, Short Guide to the Revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (January 2016), 5.

¹⁵² *Ibid*, 14.

¹⁵³ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 99(2).

the sole purpose of financial benefits while simultaneously disregarding the well-being of the prisoners. The rehabilitation process remains the primary responsibility of any actor that manages one or several correctional facilities. In addition, Rule 100 clarifies that it is preferable that institutional industries should be operated directly by the prison administration and not by private contractors. If prisoners are employed in work that is not managed by the prison administration, then they should always be supervised by the prison staff.¹⁵⁴

3.3.2. The UN Guiding Principles

In the 1990s, due to the significant growth of extractive companies and the shocking labour conditions in clothing and footwear factories operating for commercial global corporations, the prevalence of corporate human rights violations became a widely recognized issue. It was not until the early 2000s that the United Nations undertook serious efforts to tackle this issue. In 2004, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights were submitted to the Commission on Human Rights (Commission).¹⁵⁵ These draft norms aimed to address the responsibilities and obligations of business enterprises from a human rights perspective. However, the Commission eventually rejected the proposal as a result of internal disagreement and considerable resistance from the corporate sector.¹⁵⁶

In 2005, John Ruggie was appointed as Special Representative of the Secretary-General (SRSG) to focus on the issue of human rights and transnational corporations and other business enterprises. After six years of consultations, research reports and pilot projects, the UN Human Rights Council (Council) unanimously adopted the United Nations Guiding Principles on Business and Human Rights (GPs). This was in principle the first document issued by the Council or its forerunner, the Commission, that set out particular obligations of states and business on human rights. The GPs contain three complementary pillars. The first pillar focuses on the state's duty to protect human rights and requires states to take action against corporate abuses through appropriate law and policy. The second pillar concentrates on the corporate responsibility to respect human rights. Companies are therefore required to adopt policies that demonstrate a strong commitment to

¹⁵⁴ Ibid, Rule 100.

¹⁵⁵ The Commission on Human Rights is the predecessor body of the Human Rights Council.

¹⁵⁶ Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles', *Human Rights Law Review*, 16 (2016), 58.

respect human rights. In addition, it is essential that business act in accordance with the law since this is one of the cornerstones of the responsibility to respect human rights. In cases where domestic law does not sufficiently safeguard all human rights, then the responsibility to respect “exists over and above compliance with, and is not limited by, domestic law.”¹⁵⁷ The third and final pillar addresses the state’s obligation to guarantee access to effective remedy, judicial and non-judicial for people who have been the victim of corporate human rights abuses. Business, then, are expected to set up grievance mechanisms for harm caused. It is crucial to note that the GPs apply to all human rights provided in the main international instruments as well as the the eight key conventions of the International Labour Organization. Since the GPs do not explicitly refer to forced labour, this is important to take into account. Ultimately, the GPs may be the focal point in the splintered sphere of business and human rights.¹⁵⁸

Put more concretely, in terms of the state’s duty to protect, UNGP 1 provides that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”¹⁵⁹ This does not necessarily mean that the state is responsible if corporate abuses occur, but it points out that appropriate action should be taken in order to prevent and punish abuse. States are able to choose which measures to adopt, but it is suggested that regulation as well as adjudication of business action in relation to human rights are necessary. It is, however, important to note that it is rather clear that the states’ duty to protect refers to host states’ obligations.¹⁶⁰ Home states, on the other hand, should strongly recommend companies to respect human rights abroad, but their duty to protect is usually not extraterritorial.¹⁶¹ In addition, the GPs stipulate that the state’s duty to protect contains the necessity of policy coherence and of increased attention to the regulation of companies in conflict-affected areas.¹⁶² In order for states to meet their duty to protect human rights, it is also required to implement policies that address the so-called state-business nexus. This involves

¹⁵⁷ John G Ruggie and John F Sherman, ‘Adding Human Rights Punch to New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice’, *Journal of International Dispute Settlement*, 6 (2015), 456-457.

¹⁵⁸ UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (adopted 17 June 2011) HR/PUB/11/04.

¹⁵⁹ UN Human Rights Council, Guiding Principles on Business and Human Rights, GP 1.

¹⁶⁰ United Nations, Guiding Principles on Business and Human Rights, 3-4.

¹⁶¹ Davitti, ‘Refining the Protect, Respect and Remedy Framework’, 59-60.

¹⁶² Addo, ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’, 134.

situations where a state contracts private companies to provide services that may affect the enjoyment of human rights.¹⁶³

UNGP 5 specifies that "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights."¹⁶⁴ This shows that states may not abandon their international human rights obligations when they outsource public functions. Moreover, when states transfer certain functions from the public to the private sector, they should ensure that the companies activities are properly supervised, mainly through monitoring and accountability mechanisms, and that they respect all human rights.

In respect to the corporate responsibility to respect, UNGP 11 states that companies should respect human rights by avoiding infringing of the rights of others and addressing adverse human rights impacts with which they are involved, as this is "a global standard of expected conduct for all business enterprises wherever they operate."¹⁶⁵ Business enterprises are thus expected to operate in a manner that does not violate the human rights of others. This responsibility stems from the UDHR that urges every organ of society to promote, respect and fulfill human rights. UNGP 11 is particularly interesting when one wonders whether private prison companies' focus on making profits is an infringement of the rights of the people who they hold in custody, since the adequate treatment of prisoners might be subsidiary to gaining financial profits.

Furthermore, business enterprises need to know and show that they respect human rights by putting appropriate measures in place, such as a policy commitment, human rights due diligence and providing access to remedies when harm is done.¹⁶⁶ In theory, this means that companies are expected to act in accordance with the law, even if it is not imposed, and to respect the principles set out in the main international documents in case of the absence of any relevant domestic law.¹⁶⁷ Nevertheless, corporations have frequently exploited human rights as a public relations instrument, while refusing to accept regulations which could extend their accountability for human rights violations.¹⁶⁸ The GPs may fail to meet certain standards and they are characterized by some

¹⁶³ UN Human Rights Council, Frequently Asked Questions about the Guiding Principles on Business and Human Rights (2014) HR/PUB/14/3, 19.

¹⁶⁴ UN Human Rights Council, Guiding Principles on Business and Human Rights, GP 5.

¹⁶⁵ *Ibid*, GP 11.

¹⁶⁶ UN Human Rights Council, Frequently Asked Questions, 25-26.

¹⁶⁷ United Nations, Guiding Principles on Business and Human Rights, 13-16.

¹⁶⁸ Davitti, 'Refining the Protect, Respect and Remedy Framework', 68-69.

uncertainties and imperfections due to its general scope, but they serve as a broad-based foundation for the further enhancement and development of the protection of human rights in the corporate sphere.¹⁶⁹

3.3.3. The Sustainable Development Goals

The international community settled on an ambitious project in September 2015, when world leaders adopted the Sustainable Development Goals (SDGs).¹⁷⁰ The SDGs were the final outcome of a relatively long deliberation process that involved grassroots activists, NGOs, think-tanks, academics and UN mechanisms, combining research, advocacy and policy-influencing.¹⁷¹ This does not necessarily mean that human rights advocates were pleased with the result. Indeed, there were plenty of voices that argued that the SDGs did not represent the recommendations put forward by those who were striving to keep human rights central to the new development era. Others claimed that the SDGs reflect a unifying agenda that is equally relevant to all countries, regardless of criticisms of being too vague and too numerous. In the end, the ultimate goal of the SDGs is to produce positive change and reduce growing inequalities between and within countries.¹⁷²

Of particular importance to this study is SDG 8, which aims to “promote sustained, inclusive and sustainable growth, full and productive employment and decent work for all.”¹⁷³ In order to achieve this goal, it is essential to “take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour...”¹⁷⁴ and to “protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.”¹⁷⁵ “All workers” therefore also includes detainees who are working, either on a forced or voluntary basis, in a correctional facility. While it can be argued that SDG 8 provides several important conditions for ensuring decent work for all, including prisoners

¹⁶⁹ Thielborger and Ackermann, ‘A Treaty on Enforcing Human Rights Against Business’, 53.

¹⁷⁰ Marx and Wouters, ‘Combating Slavery, Forced Labour and Human Trafficking’, 495.

¹⁷¹ Inga T Winkler and Carmel Williams, ‘The Sustainable Development Goals and Human Rights: A Critical Early Review’, *The International Journal of Human Rights*, 21 (2017), 1024.

¹⁷² *Ibid*, 1023.

¹⁷³ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (adopted 25 September 2015) A/RES/70/1, Goal 8.

¹⁷⁴ *Ibid*, Goal 8(8).

¹⁷⁵ *Ibid*.

in private correctional facilities, it still reflects two rather contrasting visions of development: a market-centered business approach, which focuses on an increase in economic activity and value, and a rights-based approach, which emphasizes the significance of decent work for all.¹⁷⁶ This is also relevant in the context of prisoners working in private prisons, as it questions the private correction company's capacity to treat inmates with dignity while simultaneously putting them to work for the corporation's economic development.

Many business advocates welcomed SDG 8 because it was the first time that the global development agenda refers to economic growth and productivity in a clear and detailed manner, which, from their standpoint, is the key to sustainable development. SDG 8 can serve as a firm basis for business advocates to strengthen their attempts to encourage the ILO and national governments to adopt policies that support a favorable and sustainable business environment, and to establish market solutions and regulatory regimes that are "sound and fair" from a business perspective. Sound and fair policies involve cuts in public expenditure and the liberalization of the market economy.¹⁷⁷

Conversely, human rights advocates direct the attention toward the SDG 8 commitment to realize full employment and decent work for all by 2030. As already mentioned, taking action to eliminate forced labour and modern slavery, as well as to safeguard labour rights are of vital importance in this regard. Though it should be noted that other factors of decent work set out in SDG 8 are merely promotional. For instance, it is intended to "promote" rather than "achieve" safe and secure working environments. From a human rights point of view, the SDGs seem to have failed in separating full employment and decent work from economic growth. Instead of finding a solution to these two contrasting visions of development, they have been brought together under one umbrella making the realization of full employment and decent work conditional on economic growth. This "confuses ends and means". However, it remains unclear whether corporate interests will outweigh those of human beings in the following global agenda for sustainable development.¹⁷⁸

¹⁷⁶ Winkler and Williams, 'The Sustainable Development Goals and Human Rights', 1026.

¹⁷⁷ Diane F Frey, 'Economic Growth, Full Employment and Decent Work: The Means and the Ends in SDG 8', *The International Journal of Human Rights*, 21 (2017), 1178.

¹⁷⁸ *Ibid*, 1179.

Conclusion

As the rise of the prison industry continues, so does the use of forced labour. The application of prison privatization seems to be a logical consequence of the global shift toward neoliberalism as countries have gradually embraced the idea of the free market economy. However, the effects of neoliberal policies have been largely underestimated and many of the challenges that the international community is currently facing are to some extent linked to the ongoing process of globalization. While the actual benefits and limitations of private prisons are still under discussion, several cases of forced labour or human trafficking under the supervision of private actors in the correctional sector have recently received more attention from the general public as well as government officials and others. Instead of considering these cases as relatively rare occurrences, they should be seen as a sign and confirmation of the numerous risks of prison privatization.

The increase of the world prison population during the 1980s and 1990s has led to a widespread problem of prison overcrowding in many countries, which, in turn, caused serious problems in maintaining proper prison conditions. These circumstances have resulted in an increasing demand for extended prison capacity and better prison conditions. The use of prison privatization seemed to be an appropriate response to these demands and was increasingly seen as a new dimension of urgency and flexibility to the correctional system. By allowing private companies to build and run correctional facilities, many countries have tried to solve this problem of prison overcrowding. Nevertheless, the world prison population is currently still growing and correctional facilities continue to be overpopulated, with disastrous and inhumane prison conditions as a result. It is therefore that large-scale systematic strategies aimed to mitigate this problem of prison overcrowding should rather concentrate on crime prevention, alternatives to imprisonment and the enhancement of social welfare policies that promote sustainable development and tend to eradicate poverty and inequality.

The re-emergence, expansion and consolidation of the private prison industry has resulted in a growing use of prison labour by private actors. For this reason, this dissertation sought to answer the question to which extent prisoners detained in private correctional facilities are protected against forced labour under international human rights law. In general, it can be concluded that there are a number of relevant regulatory instruments in place that, to some degree, address this issue. International human rights instruments mainly focus on the prohibition of forced labour and on respect for the inherent dignity and worth of all human beings. Accordingly, states are required to adopt adequate measures in order to eliminate the use of forced labour. Still, the scope of these

instruments is quite broad and general, and therefore also limited as it does not directly stress the responsibility of business to respect human rights. The ILO's international labour standards, and Convention No. 29 in particular, provide a more detailed discourse on the issue of forced labour in prison systems. Under Convention No. 29, forced labour for prisoners is permitted when the work provided is a consequence of a conviction in a proper court, when there is no association with private companies, and when the work is performed under the supervision of a public authority within or outside the prison. Private prison companies are thus not allowed, under any circumstances, to impose forced labour on their detainees. As Convention No. 29 clearly prohibits the use of forced labour, notwithstanding some exceptions, it also fails to explicitly address the role of the corporate sector.

It is in this sense that soft law instruments, the Mandela Rules and the GPs in particular, are rather different in scope, because they thoroughly seek to address the state's obligations as well as the companies responsibilities in relation to economic development and human rights. Although, the GPs are marked by various limitations and shortcomings, they remain one of the most dominant discourses in the field of business and human rights since they function as the constant interconnection between business enterprises, state parties and other relevant stakeholders. Therefore, it is essential to keep on examining their complex nature and effectiveness as an instrument for protection from business-related human rights violations. It may be perceived as an unfinished instrument, but it was never meant to be the final step of the process.

Perhaps the most important opportunity in the field of business and human rights is about the question whether it would be constructive for both states and corporations to create a legally binding treaty on business and human rights in order to fill the protection and accountability gaps. Recent proposals have put the formulation of a binding treaty back on the UNHRC's agenda. Until now, the specific model of a treaty is unclear. In general terms, the document would probably concentrate on specific state obligations to prevent and remedy business-related human rights violations, as well as on creating corporations' own legal obligations, if deemed possible. Nevertheless, opinions on this initiative are already extremely divided and the actual creation of this treaty is far from certain. It would not be an easy nut to crack.

As Dunoff stated: "Globalized markets are neither inherently a friend nor a foe of human rights. While increased economic openness is often associated with increased national wealth, and can promote progress on other measures of well being, such as nutrition or education, we simply cannot answer in the abstract the ultimate effects of markets and globalization on human rights and

social justice for any particular society.”¹⁷⁹ Whether this is true or not is open to debate, but it definitely shows that it is imperative to address particular issues in the light of basic principles, as this may help us to understand the broader implications of globalization on human rights.

¹⁷⁹ Jeffrey L Dunoff, ‘Does Globalization Advance Human Rights? (Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets)’, *Brooklyn Journal of International Law*, 25 (1999), 138.

5. Bibliography

5.1. Primary Sources

League of Nations, Convention to Suppress the Slave Trade and Slavery (signed 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

International Labour Organization (ILO), Abolition of Forced Labour Convention C105 (adopted 25 June 1957, entered into force 17 January 1959).

International Labour Organization (ILO), Eradication of forced labour: General Survey concerning the Force Labour Convention, 1930 (no. 29), and the Abolition of Forced Labour Convention, 1957 (no. 105), ILC, Report III, Part 1B, 96th session, 2007.

International Labour Organization (ILO), Forced Labour Convention C29 (adopted 28 June 1930, entered into force 1 May 1932).

International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work (adopted June 1998).

Penal Reform International, Global Prison Trends 2015 (2015).

Penal Reform International, Global Prison Trends 2016 (2016).

Penal Reform International, Global Prison Trends 2017 (2017).

Penal Reform International, *Global Prison Trends 2018* (2018).

Penal Reform International, *Short Guide to the Revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)* (January 2016).

Swepton L, International Labour Organization, *Working Paper on Forced and Compulsory Labour in International Human Rights Law*, 2014.

UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (adopted 25 September 2015) A/RES/70/1.

UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (adopted 8 January 2016) A/RES/70/175.

UN Human Rights Committee, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)* (10 April 1992) .

UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (adopted 17 June 2011) HR/PUB/11/04.

UN Human Rights Council, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (2014) HR/PUB/14/3.

UN Human Rights Council, *Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of over incarceration and overcrowding*, Report of the United Nations High Commissioner for Human Rights (21 August 2017) A/HRC/36/28.

UN Human Rights Council, *Protect Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (adopted 7 April 2008) A/HRC/8/5.

United Nations, Economic and Social Council, Commission on Human Rights 3d Session: Summary Record of the 53d Meeting (4 June 1948) E/CN.4/SR.53.

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

United Nations Office of Drugs and Crime (UNODC), Draft Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation (Doha Declaration) (adopted 31 March 2015) A/CONF.222/L.6.

United Nations Office of Drugs and Crime (UNODC), United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): An updated blueprint for prison management in the 21st century.

U.S. Department of Justice, Federal Bureau of Prisons, Memorandum for Chief Executive Officers (24 January 2018).

U.S. Department of Justice, Office of the Inspector General, Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons (August 2016).

U.S. Department of Justice, Bureau of Justice Statistics, Prisoners Series (2015).

5.2. Secondary Sources

Addo M, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14, *Human Rights Law Review*, 133-147.

Andrees B, 'Defending Rights, Securing Justice: The International Labour Organization's Work on Forced Labour', *Journal of International Criminal Justice*, 14 (2016), 343-362.

Annisson J, Burke L and Senior P, 'Transforming Rehabilitation: Another Example of English 'Exceptionalism' or a Blueprint for the Rest of Europe?', *European Journal of Probation*, 6 (2014), 6-23.

Appel H and Orenstein M, 'Why Did Neoliberalism Triumph and Endure in the Post-Communist World?', *Comparative Politics*, 48 (2016), 313-331.

Bonanno A, *The Legitimation Crisis of Neoliberalism: The State, Will-Formation, and Resistance*, New York, 2017.

Bugaric B, 'Neoliberalism, Post-Communism, and the Law', *Annual Review of Law and Social Science*, 12 (2016), 313-329.

Burrows S, Discussion of D Cahill, *The End of Laissez-Faire? The Durability of Embedded Neoliberalism*, Edward Elgar Publishing Inc, Cheltenham, 2014, *Journal of Sociology*, 52 (2016), 907-914.

Cabral S and Saussier S, 'Organizing Prisons Through Public-Private Partnerships: A Cross-Country Investigation', *Brazilian Administration Review*, 10 (2013), 100-120.

Cahill D and Konings M, *Neoliberalism (Key Concepts)*, Polity Press, Cambridge, 2017.

Choudhury B, 'Hardening Soft Law Initiatives in Business and Human Rights', J Du Plessis and C Low (eds.), *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses*, Springer Nature, Cham, 2017, 189-208.

Christensen B and Kowalczyk C, 'Introduction to Globalization: Strategies and Effects', B Christensen and C Kowalczyk (eds.), *Globalization: Strategies and Effects*, Springer, Berlin, 2017, 1-16.

Culp R, 'The Rise and Stall of Prison Privatization: An Integration of Policy Analysis Perspectives', *Criminal Justice Policy Review*, 16 (2005), 412-422.

Davitti D, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles', *Human Rights Law Review*, 16 (2016), 55-75.

Dunoff J, 'Does Globalization Advance Human Rights? (Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets)', *Brooklyn Journal of International Law*, 25 (1999), 125-139.

Fenwick C, 'Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law', *Human Rights Quarterly*, 27 (2005), 249-293.

Fox C, Bannister J and Mischczak P, 'The 2010-2015 Coalition and Criminal Justice: Continuities and Contradictions', *Safer Communities*, 15 (2016), 110-120.

Frey D, 'Economic Growth, Full Employment and Decent Work: The Means and the Ends in SDG 8', *The International Journal of Human Rights*, 21 (2017), 1164-1184.

Hannum H, 'The UDHR in National and International Law', *Health and Human Rights*, 3 (1998), 145-158.

Jing Y, *Prison Privatization: A Study of the Causes and Magnitude*, Nova Science Publishers, Inc., New York, 2010.

Lindsey A, Mears D and Cochran J, 'The Privatization Debate: A Conceptual Framework for Improving (Public and Private) Corrections', *Journal of Contemporary Criminal Justice*, 32 (2016), 308-327.

Ignatieff M, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution: 1750-1850*, The MacMillan Press Ltd, London and Basingstoke, 1978.

Kettler A, 'Isolating Social Welfare: Recent Works on Neoliberalism, Human Rights, and Public Policy', *Human Rights Review*, 18 (2017), 485-490.

Khey D, 'Privatization of Prison', Wesley G Jennings (eds.), *The Encyclopedia of Crime and Punishment* (The Wiley Series of Encyclopedias in Criminology and Criminal Justice), John Wiley & Sons Inc, Hoboken, 2016.

Kim Y and Price B, 'Revisiting Prison Privatization: An Examination of the Magnitude of Prison Privatization', *Administration & Society*, 46 (2014), 255-275.

Mackay A, 'Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) and Australian Prisons', *Australian Journal of Human Rights*, 23 (2017), 368-389.

Marx A and Wouters J, 'Combating Slavery, Forced Labour and Human Trafficking: Are Current International, European and National Instruments Working?', *Global Policy*, 8 (2017), 495-497.

Mason C, *International Growth Trends in Prison Privatization* (The Sentencing Project), 2013.

McBeth A, 'Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights', *Hamline Journal of Public Law and Policy*, 30 (2008), 33-88.

McCall-Smith K, 'Introductory Note: United Nations Revised Rules on Treatment of Prisoners', *International Legal Materials*, 55 (2017), 1180-1205.

Moyn S, *The Last Utopia: Human Rights in History*, Harvard University Press, Cambridge, 2010.

Nowak M, *Human Rights or Global Capitalism: The Limits of Privatization* (Pennsylvania Studies in Human Rights), University of Pennsylvania Press, Philadelphia, 2017.

Nycz G, 'Questioning the Neoliberal Paradigm: A Critique of the Washington Consensus in Historical Perspective', *Ad Americam. Journal of American Studies*, 11 (2010), 79-90.

Pozen D, 'Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom', *The Journal of Law & Politics*, 19 (2003), 253-284.

Roodman D, *The Impacts of Incarceration on Crime*, Open Philanthropy Project, 2017.

Ruggie J and Sherman J, 'Adding Human Rights Punch to New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice', *Journal of International Dispute Settlement*, 6 (2015), 455-461.

Thielborger P and Ackermann T, 'A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?', *Indiana Journal of Global Legal Studies*, 24 (2017), 43-79.

Thomann L, *Steps to Compliance with International Labour Standards: The International Labour Organization (ILO) and the Abolition of Forced Labour*, Springer Fachmedien, Wiesbaden, 2011.

Walmsley R, *World Prison Population List*, Institute for Criminal Policy Research, 2016.

Winkler I and Williams C, 'The Sustainable Development Goals and Human Rights: A Critical Early Review', *The International Journal of Human Rights*, 21 (2017), 1023-1028.

5.3. Websites

Law V, 'Investigation: Corporations Are Profiting From Immigrant Detainees' Labor: Some Say It's Slavery' (29 May 2018) <<https://www.business-humanrights.org/en/commentary-voluntary-work-programs-at-us-immigrant-detention-centres-run-by-private-prison-cos-amount-to-forced-labour>> accessed 5 June 2018.

Ratification by Convention (*International Labour Organization*, 2018) <http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:7602679645114:::P12001_INSTRUMENT_SORT:1> accessed 4 April 2018.

Roodman D, 'Impact of Incarceration on Crime: Reasonable Doubt: A New Look at Whether Prison Growth Cuts Crime' (*Open Philanthropy Project*, 2017) <<https://www.openphilanthropy.org/blog/impact-incarceration-crime>> accessed 25 April 2018.

Morrissey K, 'Judge allows case over alleged forced labor in immigration detention to move forward' (*San Diego Union Tribune*, 2018) <<https://www.business-humanrights.org/en/usa-private-prison-co-corecivic-to-face-lawsuit-alleging-use-of-forced-labour-of-immigrants-at-detention-centre#c172733>> accessed 13 June 2018.

Planas R and Foley E, 'Immigrants' Lawsuit Accuses Private Prison Contractor' (*Huffington Post*, 2018) <<https://www.business-humanrights.org/en/usa-private-prison-co-corecivic-to-face-lawsuit-alleging-use-of-forced-labour-of-immigrants-at-detention-centre#c171922>> accessed 6 May 2018.

Woodruff B, 'Republicans Say Forced Labour is Good for Detained Immigrants in Letter Defending Private Prison' (15 March 2018) <<https://www.business-humanrights.org/en/usa-congressmen-express-support-to-private-prison-co-geo-group-in-lawsuit-over-alleged-use-of-forced-labour>> accessed 27 April 2018.