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Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law

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ABSTRACT

Globalization is generally thought to be harmful for human rights, as the state retreats in favor of international organizations or private actors. Analysis of human rights law regulating the use of prisoners' labor offers an interesting insight into the impact of globalization on human rights, particularly where the private operation of prisons is concerned. Prisoners held in privately run facilities are better protected by international human rights law than those in publicly-run prisons, at least in their capacity as workers. The applicable law, however, offers only tenuous protection: there are doctrinal inconsistencies, and the law presumes that state power exists to exact forced labor.

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I. INTRODUCTION

In this article, the author examines how international human rights law protects prisoners in their capacity as workers in privatized prison systems. Prisoners may work for the benefit of private interests in three general situations: where prisoners are incarcerated and working in so-called "private prisons,"¹ where the private sector is involved as an operator of prison industries, or where prisoners are engaged by the private sector while on work release. Prisoners' labor is a matter that has been the subject of some debate in recent years within the International Labour Organisation (ILO),² but it is otherwise a topic on which international law "is not highly developed."³ Both the private operation of prisons and the private use of prisoners' labor⁴ are part of a more general increase in private sector involvement in the operation of correctional facilities,⁵ which is related to

1. The nature of "private" prisons and the related terminological issue are addressed below. See *infra* notes 32 and 33 and accompanying text.
2. *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, 85th Sess., ¶¶ 112–25 (1998), available at www.ilo.org/ilolex/english/ceacrrepsq.htm [hereinafter CEACR 1998]; *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, 87th Sess., ¶ 106 (1999), available at www.ilo.org/ilolex/english/ceacrrepsq.htm [hereinafter CEACR 1999]; *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, 89th Sess., ¶¶ 82–146 (2001), available at www.ilo.org/ilolex/english/ceacrrepsq.htm [hereinafter CEACR 2001]; *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, 90th Sess., ¶¶ 93–98 (2002), available at www.ilo.org/ilolex/english/ceacrrepsq.htm [hereinafter CEACR 2002].
3. Lee Swepston, *Prison Labour and International Human Rights*, 53 INDUS. REL. RES. ASS'N. PROC. 359 (2001).
4. Throughout the text the author uses the term "prisoners' labor" rather than the more usual "prison labor." The shift is more than merely semantic: it is a way of insisting on recognition of prisoners as workers and thus as people who have the right to control and to dispose of their labor. Generally speaking, prisoners have not been and are not so viewed. For example, in the United States prisoners have largely been unsuccessful in attempts to persuade courts that their work should be paid in accordance with the federal Fair Labor Standards Act, 29 U.S.C. §§ 201–13. Courts have generally held that they do not have the right to control their own labor. See, e.g., *Hudgins v. Hart*, 323 F.Supp. 898, 899 (E.D. La. 1971). ("The plaintiff was an inmate at the penitentiary, and as such *his labor belonged to the penitentiary.*") (emphasis added). For the argument that prisoners retain the moral right to control their own labor, see, e.g., Richard L. Lippke, *Prison Labor: Its Control, Facilitation, and Terms*, 17 L. & PHIL. 533 (1998); Gerard de Jonge, *Still "Slaves of the State": Prison Labour and International Law*, in PRISON LABOUR: SALVATION OR SLAVERY?: INTERNATIONAL PERSPECTIVES 313, 335 (Dirk van Zyl Smit & Frieder Dinkel eds., 2d ed. 2001).
5. "Correctional facilities" is a broad term, and deliberately so. While it covers prisons, it also refers to other correctional functions including, for example, halfway houses, and immigration detention facilities. As appears presently, this reflects the fact that the private sector is involved in a range of custodial and other correctional activities beyond the management of secure prisons.

the processes of globalization. This article explores these particular phenomena as a means to develop an understanding of the likely impact of globalization on the capacity of nation states to uphold their international legal obligations to protect fundamental human rights.⁶

While the current phenomena of private involvement in running prisons and exploitation of prisoners' labor do owe something to globalization, these phenomena have long been the rule rather than the exception. It is only since the 1930s that Western states have monopolized criminal justice functions.⁷ Furthermore, the exploitation of prisoners' labor is in no way a novel development. The state has long compelled prisoners to labor, and as will be discussed, international human rights law preserves state power in this respect, albeit subject to qualification.⁸ The state has also long allowed private interests to benefit from the use of prisoners' labor.⁹

The history of private sector involvement in the exploitation of prisoners' labor is littered with examples of harmful practices inflicted on prisoners: "the risk with these types of projects is that they can lead to abuses of prison workers, negating the original purpose of rehabilitation in the pursuit of financial profits."¹⁰ This is why it is critical to examine the nature and role of applicable international human rights law that has been developed in light of those experiences.

Quite apart from the question of the private use of prisoners' labor, history shows that the utmost rigor is needed to ensure that the conditions under which prisoners work, whether in the private or public sector, do not deteriorate into conditions analogous to slavery. As the ILO noted in 1932, "wherever human labour is performed in conditions of subordination, dangers arise; and with prison labour these conditions and the resulting dangers are pushed to the extreme."¹¹ It is no coincidence, then, that the most important element of international human rights law protecting prisoners who work for private benefit is the ILO's Forced Labour Convention (Convention 29).¹² Convention 29 is virtually the only international instrument

6. Examining this concrete example may prove more useful than attempting to understand the impact of globalization in an abstract way. See *infra* notes 15–24 and accompanying text.
7. Ahmed White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 122–23 (2001).
8. See *infra* notes 226–28 and accompanying text. See also de Jonge, *supra* note 4.
9. See, e.g., GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1968) (arguing that economic conditions determine forms of punishment, so that punishment under capitalism is likely to involve the private sector); ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR—THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 219 (1996).
10. Helena Henriksson & Ralph Krech, *International Perspectives, in PRISON LABOUR: SALVATION OR SLAVERY?*, *supra* note 4, at 308.
11. ILO, *Prison Labour: I*, 25 INT'L LABOUR REV. 311, 312 (1932).
12. Convention concerning Forced or Compulsory Labour (ILO No. 29), adopted 28 June 1930 (entered into force 1 May 1932), 30 U.N.T.S. 55 [hereinafter Convention 29].

that contains, either in its text or as it has been interpreted, any binding conditions with respect to prisoners in their capacity as workers. This leads to one of the paradoxes to which the title of this article refers: prisoners who work for private benefit are actually *better* protected by international human rights law than those held in traditional state-run facilities.

Part II of this article outlines the context for the author's inquiry, discussing globalization, "private prisons," and the legal and human rights issues that arise when people work in correctional facilities. Part III contains an examination of the text and operation of Convention 29, and part IV considers other international human rights instruments that include provisions relating to prisoners as workers. Part V turns to a critical analysis of the protection offered by international human rights law. Finally, part VI concludes with a reconsideration of the paradoxes to which the title of the article refers.

II. GLOBALIZATION, PRIVATE PRISONS, AND HUMAN RIGHTS

This part provides a brief working definition of globalization and shows the link between globalization and increasing private involvement in correctional functions. It next gives an overview of current practices within "private prisons" and private use of prisoners' labor. Finally, this part outlines the human rights, legal, and policy issues to which the combination of the above-described phenomena give rise.

A. Globalization and Human Rights

The term "globalization" refers to the set of economic policy choices associated with economic liberalization, including greater reliance on the free market, reduction in the size and role of the state and its budget, privatization of state functions, and deregulation of particular markets, such as telecommunications.¹³ International financial institutions play an important role in promoting these policies, often by making funding conditional on their implementation.¹⁴

13. There have been many efforts to explore and to define the term and concept "globalization." This author has presented a definition derived from the statement by the UN Committee on Economic, Social and Cultural Rights on globalization and its impact on the enjoyment of economic, social and cultural rights. *Committee on Economic, Social and Cultural Rights: Report of the 18th and 19th Sessions, 27 April–15 May 1998, 16 November–4 December 1998*, U.N. ESCOR, 18th Sess., ¶ 515 U.N. Doc. E/1999/22 (1999).

14. With respect to structural adjustment lending of international financial institutions, see, e.g., Jenny Beard & Anne Orford, *Making the State Safe for the Market: The World*

One impact of these policies in many countries has been an increase in the role of both private actors and intergovernmental organizations in areas that were formerly state responsibilities. This raises questions about the impact of globalization on human rights, including the particular question of whether states can continue to fulfill their international legal obligations to protect human rights. Some may view globalization as harmful to human rights because of its effect on the role of the state. On the one hand, the devolution of correctional functions to private actors could limit the ability of the state to ensure human rights protections for those people who interact with, or are affected by, private actors. The private operation of prisons is a very good example of this. On the other hand, in following the dictates of an intergovernmental organization (typically a development bank or other international financial institution), a state may be pursuing a program that is not concerned with international human rights law and that may, in fact, have adverse consequences for human rights.

Thus, McCorquodale and Fairbrother see globalization as a transfer of state power to "bureaucrats and special interest groups [as a result of which] the ability of governments to protect human rights, even if guaranteed by a constitution and enforced by an independent judiciary, becomes more restricted."¹⁵ The reference to the institutional architecture that is typically relied upon to enforce human rights obligations—courts, judges, constitutions—raises a related issue: whatever the impact of globalization on states' capacities to fulfill their obligations to protect human rights, it does not, and cannot, alter the legal obligations of states under international human rights law.¹⁶ This must be so, for both the human rights regime and the international economic order (which is thought by some to be antithetical to human rights) "presuppose an activist state."¹⁷

Bank's World Development Report 1997, 22 MELB. U. L. REV. 195, 202–03 (1998); Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443, 465 (1997). It is no coincidence that the UN Special Rapporteurs on globalization and its impact on the full enjoyment of human rights, J. Oloka-Onyango and Deepika Udagama, have focused on the roles of the various multinational actors involved, including the IMF, the World Bank, and the WTO. See *Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights: Preliminary Report, Submitted by J. Olonka-Onyango and Deepika Udagama, in Accordance with Sub-Commission Resolution 1999/8*, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/Sub.2/2000/13 (2000); *Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights: Preliminary Report/Submitted by J. Olonka-Onyango and Deepika Udagama, in Accordance with Sub-Commission Resolution 1999/8 and Commission on Human Rights Decision 2000/102*, U.N. ESCOR, 53d Sess., U.N. Doc. E/CN.4/Sub.2/2001/10 (2001).

15. Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 746 (1999).
16. The author is grateful to his colleague John Tobin for drawing attention to the significance of this point.
17. Jeffrey L. Dunoff, *Does Globalization Advance Human Rights?* 25 BROOK. J. INT. L. 125, 129 (1999).

Alston identifies two ways that globalization may be harmful to human rights. The first is the elevation of the means of globalization—privatization, deregulation, reliance on the free market, and reduction of the role of government—as ends or values in and of themselves. In other words, the means are no longer merely processes by which to pursue other values, particularly those expressed in instruments that protect universal human rights.¹⁸ The second way in which globalization may be harmful is that it has resulted in a move toward the assessment of human rights norms from the point of view of their market-friendliness: “In at least some respects, the burden of proof has been shifted—in order to be validated, a purported human right must justify its contribution to a broader, market-based ‘vision’ of the good society.”¹⁹

For Dunoff, however, there are at least two dominant “narratives” about globalization.²⁰ In one narrative, a focus on economic, social, and cultural rights leads to examination of the distributional inequalities associated with globalization, even when it produces higher overall growth.²¹ In the other narrative, proponents of globalization view higher growth as evidence that economic liberalization and participation in international markets are means to increase wealth and opportunity within society.²² Thus, in Dunoff’s view there can be no abstract determination of the relationship between markets, globalization, and human rights. Rather, it is necessary to examine particular examples in light of basic principles.²³ Alston also

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18. It is also true that the universality of human rights can be questioned as another form of globalizing domination by a particular set of European and male values. Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997). With respect to the author, this author neither pursues nor addresses that argument here; rather, both the universality and the desirability of international human rights norms are assumed.
19. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 3 EUR. J. INT. L. 435, 442 (1997).
20. Dunoff, *supra* note 17, at 125.
21. It is perhaps not surprising, then, that the UN Special Rapporteurs on Globalization and its Impact on Human Rights have thus far focused on the implications of globalization for economic, social and cultural rights. See, e.g., *Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights: Preliminary Report, Submitted by J. Olonka-Onyango and Deepika Udagama, in Accordance with Sub-Commission Resolution 1999/8*, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/Sub.2/2000/13 (2000); *Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights: Preliminary Report/Submitted by J. Olonka-Onyango and Deepika Udagama, in Accordance with Sub-Commission Resolution 1999/8 and Commission on Human Rights Decision 2000/102*, U.N. ESCOR, 53d Sess., U.N. Doc. E/CN.4/Sub.2/2001/10 (2001).
22. Dunoff, *supra* note 17, at 125.
23. In harmony with Alston, he suggests the following: that “liberalized global markets are neither ‘natural’ nor ends in themselves” and that “the achievement of human rights and social justice is a higher value than the protection of free markets.” *Id.* at 139.

encourages, nay, exhorts international lawyers to examine closely the implications for international norms, processes, and institutions that follow from the changed internal role of the state brought about by globalization.²⁴

B. Globalization and Private Prisons

Increased incidences of privately operated correctional facilities and private sector exploitation of prisoners' labor are stereotypical examples of how globalization has changed the role of the state. Contracting out, privatization, and public/private partnerships are all emblematic of that economic restructuring, and the increased role of the private sector in correctional functions is a part of that spectrum.

Private sector involvement in delivering correctional services is also related to, or a product of, efforts to liberalize markets to facilitate foreign investment, often under pressure from multinational corporations looking for new avenues for profit. It is no coincidence that the same companies are operating correctional facilities in different countries. Indeed, a small number of companies operating multinationally hold the lion's share of the market.²⁵ As it was stated in a UN working paper:

The links of expertise and finance between consortia operating in this sphere in North America, Australia, the United Kingdom and in Europe show corporate awareness of the prospects worldwide. Such corporations are closely linked to the security industry and thence to military industries, resulting in an international corrections-commercial complex.²⁶

Estimates of the numbers of private prison beds operated by particular companies bear out this assertion. In September 2001,²⁷ it was estimated that the Corrections Corporation of America held 52.28 percent of the market for private operation of correctional facilities in the United States. This translated to 43.66 percent of the global market share. Wackenhut Corrections Corporation was estimated to hold 22.44 percent of the US market, but 55.37 percent of the market outside the United States. Group 4

24. Alston, *supra* note 19, at 436, 442.

25. On the spread of these companies into the Australian market early in their years of operation, see Eileen Baldry, *USA Prison Privateers: Neo-colonialists in a Southern Land*, in *PRIVATE PRISONS AND POLICE—RECENT AUSTRALIAN TRENDS* 125 (Paul Moyle ed., 1994).

26. *The Possible Utility, Scope and Structure of a Special Study on the Issue of Privatization of Prisons: Outline/Prepared by Claire Palley pursuant to Sub-Commission decisions 1992/107*, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., ¶¶ 21, 37, U.N. Doc. E/CN.4/Sub.2/1993/21 [hereinafter Palley].

27. Charles W. Thomas, *Private Adult Correctional Facility Census: A "Real-Time" Statistical Profile* (2001) (on file with author) [hereinafter *Private Corrections Project*].

Prison Services Ltd (Group 4) was estimated to hold 23.98 percent of the market outside the United States. In 1997, the Corrections Corporation of America and Wackenhut dominated the market, holding between them sixty-one of ninety-one contracts for privately run prisons.²⁸

Predictions of further consolidation appear to have been borne out.²⁹ In May 2002, it was reported that Group 4's parent company, Group 4 Falck, acquired Wackenhut Corporation, the parent company of Wackenhut Corrections Corporation.³⁰ On its face, this acquisition would appear to have given Group 4 control of almost 80 percent of the market share for private prison beds outside the United States, as well as more than 22 percent of the market for privately run prison beds inside the United States.

These figures do not reveal, however, the multitude of ways in which private sector entities may be involved in operating correctional functions and facilities. Nor do they show the variation that is possible in the structure of commercial arrangements between the state and a contracting company. As is apparent from the following list, it is also true that private involvement in correctional functions does not necessarily involve the exploitation of prisoners' labor. The many ways in which the private sector may be involved in correctional functions include:

- 1) Financing construction or rehabilitation of facilities;
- 2) Constructing prisons that may then be owned either by the private entity or by the state;
- 3) Providing professional services to prisons including medical, educational, and training services;
- 4) Controlling or participating in prison work programs;
- 5) Managing and operating whole prison facilities;
- 6) Carrying out punishments that are alternatives to prison, such as community service; and
- 7) Some combination of all of the above.³¹

It is immediately apparent that there is more to the involvement of the private sector in correctional functions than may be apparent from the frequently used expression "private prisons." In fact, if we take the meaning

28. DOUGLAS McDONALD ET AL., *ABT ASSOCIATES INC., PRIVATE PRISONS IN THE UNITED STATES—AN ASSESSMENT OF CURRENT PRACTICE* 19 (16 July 1998) [hereinafter *ABT ASSOCIATES*], available at www.nicic.org/pubs/1998/014789.pdf.

29. *Id.*

30. Public Services International Research Unit, *Prison Privatisation Report International*, No. 47 (May 2002), available at www.psiru.org/justice/ppri47.htm.

31. Palley, *supra* note 26, ¶ 21.

of that expression to be, as it seems to suggest, facilities for the incarceration of criminals that function separately from the state facilities, it is clear that it is inapposite to describe what is happening in correctional facilities today. This matter of terminology and the meaning of the term "privatization" when applied to prisons are taken up in some of the criminological literature concerning "private prisons."³²

C. Private Prisons Since the Mid-1980s

The private sector began to re-emerge in prison administration and management in the United States in the mid-1970s.³³ It was about this time that some states contracted for private management of halfway houses. One of the earliest examples came in 1975, when the R.C.A. Service Company established a facility for juvenile detainees in Pennsylvania.³⁴ At approximately the same time, the US Immigration and Naturalization Service contracted out the detention of illegal immigrants to the private sector,³⁵ a policy it has continued to the present time.³⁶ By the early to mid-1980s, the overwhelming majority of "open" juvenile facilities and adult community facilities were under contract to the private sector.³⁷ Private operators in the United States are now involved in running a wide range of correctional facilities. These include federal and state prisons and jails, detention services for the Immigration and Naturalization Service (since 1 March 2003, the Bureau of U.S. Citizenship and Immigration Services), early release facilities for inmates nearing parole, and return-to-custody detention centers for those who violate their parole.³⁸

Tennessee was the first US jurisdiction to contemplate private operation

32. See, e.g., RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* 1 (1997).

33. Robert Geoffrey Porter, *The Privatisation of Prisons in the United States: A Policy That Britain Should Not Emulate*, 29 HOWARD J. CRIM. JUST. 65, 67 (1990); Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 267 (2001).

34. Shaneen Borna, *Free Enterprise Goes to Prison*, 26 BRIT. J. CRIMINOLOGY 321, 325 (1986).

35. Douglas C. McDonald, *Private Penal Institutions*, CRIME & JUST. 361, 381–82 (1992); see also HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY*, *supra* note 32, at 267.

36. As of 31 December 2003, 1,935 of the 25,514 people detained by the US Bureau of Immigration and Customs Enforcement were held in private facilities under exclusive contract with that agency. Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, BUREAU JUST. STAT. BULL., 9 (Nov. 2004) available at www.ojp.usdoj.gov/bjs/prisons.htm.

37. CHARLES LOGAN, *PRIVATE PRISONS—CONS AND PROS* 14–16 (1990). The Bureau of Justice Statistics (BJS) distinguishes between "open" and "institutional" juvenile facilities according to the level of access to community resources, and the degree of security. "Open" facilities are commonly group homes, shelters, or halfway houses. The BJS also distinguishes between "community" and "confinement" punishment for adults: "community" facilities are those in which more than 50 percent are able to leave unaccompanied, for work or education.

38. *Id.* at 20, 21.

of its secure facilities when the Corrections Corporation of America suggested in 1985 that it run the state's prison system.³⁹ It was the Texas Department of Corrections, however, that was the first in recent times to contract out the operation of secure prison facilities, resolving in 1988 to engage private companies to build and run four 500-bed, medium-security prisons.⁴⁰ Since then, more than thirty jurisdictions in the United States have entered into contracts for the private operation of correctional facilities.⁴¹

Since these developments, governments in several other countries have entered into contracts with private companies regarding the operation of prisons.⁴² Private contract management of prisons occurs at both national and sub-national levels, and has been initiated and continued by governments of many political persuasions.⁴³ As of September 2001, estimates showed that there were 181 private prison facilities throughout the world, either in operation or under construction, with a total capacity of 142,521 prisoners.⁴⁴ Of these prisons, 151 were in the United States, with forty-two in the state of Texas alone, and twenty-two in the state of California.⁴⁵ Of those outside the United States, fourteen were located in Australia, and ten in England. The other private facilities outside the United States were in Canada (one), the Netherlands Antilles (one), New Zealand (one), Scotland (one), and South Africa (two). Between them, all of these facilities housed 142,521 prisoners: 119,023 in the United States and 23,498 elsewhere in the world.⁴⁶

Privately operated prison facilities are clearly only able to hold a small proportion of the total number of prisoners in the world.⁴⁷ For example, they

39. W. J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 842 (1987).

40. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 32, at 267.

41. ABT ASSOCIATES, *supra* note 28, at 10-19.

42. As appears below, the beginnings of the trend can be identified a decade earlier, Porter, *supra* note 33, at 67. For background on the development of private prisons around the world see, e.g., PAUL MOYLE, PROFITING FROM PUNISHMENT: PRIVATE PRISONS IN AUSTRALIA: REFORM OR REGRESSION? Ch. 2 (2000); Palley, *supra* note 26, ¶¶ 31-34.

43. In the Australian states of Queensland and Victoria, for example, prison privatization began under what might be broadly termed conservative governments and was maintained under governments headed by parties that are, broadly speaking, social democratic.

44. Private Corrections Project, *supra* note 27.

45. The number of privately operated prisons in a state, however, does not necessarily reflect decisions by that state concerning the operation of its prisons: some privately run prisons in the United States are located in one state but hold prisoners from other jurisdictions, whether state or federal. See, e.g., Private Corrections Project, *supra* note 27; ABT ASSOCIATES, *supra* note 28, at 7.

46. Private Corrections Project, *supra* note 27.

47. The world prison population (including both prisoners on remand and those serving a sentence) has been estimated at 8.75 million. ROY WALMSLEY, WORLD PRISON POPULATION LIST 1 (4th ed. 2003).

could hold only about 7 percent of the total number of prisoners under federal, state, and local jurisdictions in the United States alone.⁴⁸ What is most striking about the number of privately run prison beds is the rapid growth in that number. In September 2001, the number of beds was 142,521. In 1992, there were 20,687 private prison beds worldwide, while in 1987, there were just 3,122.⁴⁹ As Harding noted in 1997, the phenomenon appears to be here to stay,⁵⁰ just as may be assumed are the broader influences of globalization.

It is only possible in this article to provide a brief overview of the reasons behind the re-emergence of the private operation of prisons.⁵¹ In broad terms, governments have sought cost-effective ways to respond to the increasing difficulty of maintaining prison facilities and operations in a satisfactory condition. Prison conditions have steadily deteriorated, while at the same time, prison populations have dramatically increased throughout the Western world, in many cases leading to unsustainable overcrowding. This has led, in turn, to further deterioration in conditions. These structural circumstances coincide with the rise and spread of the economic strategies associated with globalization, including reduction of state budgets and privatization of state functions. Not surprisingly, elements of the private sector seized on the opportunity for profit presented by this "crime-control/fiscal-crisis contradiction."⁵²

D. The Organization of Prisoners' Labor

In its 1930 study *Prison Labour*, the ILO identified three main models for organization and management of prisoners' labor: contract labor, the piece-price system, and the state management system.⁵³ The study's main concern was with the various forms of contract labor under which the contractor generally assumed responsibility for the prisoners and paid a fee to the state.

48. As of 31 December 2003 there were 2,212,475 prisoners under federal, state, and local jurisdiction in the United States. There were 1,387,848 held in federal and state prisons; local jails held 691,301 inmates, and the balance were held in a variety of other institutions (territorial prisons, immigration service facilities, military facilities, jails in Indian country, and juvenile facilities). Harrison & Beck, *supra* note 36, at 1.

49. Private Corrections Project, *supra* note 27.

50. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 32, at 15.

51. For more detail see, e.g., ABT ASSOCIATES, *supra* note 28, at 7–10; Palley, *supra* note 26, ¶ 44; LOGAN, *supra* note 37.

52. Robert P. Weiss, *Private Prisons and the State*, in PRIVATIZING CRIMINAL JUSTICE 27 (Roger Matthews ed., 1989).

53. It identified three types of contract labor: the lease system, the general contract system and the special contract system, all of which had largely fallen into disuse by that time: ILO, *Prison Labour: I*, *supra* note 11, at 318–25.

In return, the contractor was largely left to its own devices in seeking to extract as much labor as possible from the prisoners in its charge, by whatever means necessary. Emblematic of the problems created by this practice was the convict lease system, which was characterized by widespread abuse of prisoners.⁵⁴ The convict lease system had, however, largely disappeared by the time of the ILO's report. The ILO had fewer concerns about the piece-price and state management systems for, in each of these, the state assumed responsibility for supervising and controlling prisoners during the performance of their work.⁵⁵

From the ILO's point of view, as will be discussed, the re-emergence of private contract operation of prisons has been particularly contentious in those states where work for prisoners is compulsory. One difficulty is that the wholesale private operation of a prison results in the private sector holding both custodial responsibility for all prisoners and the right and responsibility to ensure that prisoners work. This model is remarkably similar to the convict lease system of the late nineteenth century. One significant difference between that system and the present system is that in the nineteenth century the entrepreneur paid the state for the use of the prisoners, whereas today, the state pays the entrepreneur a fee to provide a service.⁵⁶

The rise in the private operation of prisons has been accompanied by a related increase in private sector involvement in the use of prisoners' labor. This has been spurred on by various imperatives including, as noted above, growing prison populations and the rising costs of imprisonment.⁵⁷ It is not difficult, then, to see why there has been an increase in private sector involvement in the exploitation of prisoners' labor. There is a pressing need to provide work for prisoners, and in the context of globalization it makes as much or more sense for the private sector to meet this need than for the state to attempt to do so. An indication of the significance of prisoners' labor in

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54. Under the convict lease system operated in many southern states in the United States from the end of the Civil War until the late nineteenth (and in some cases early twentieth) century, "entrepreneurs bid in a competitive market for the charge of entire county or state penal systems." Whole prisons, and in some cases whole prison systems were leased out to private sector operators, who could then transfer the lease if they so wished. Weiss, *supra* note 52, at 29. Lessees of prisoners in Georgia also subleased them from time to time, although this was not always lawful. JOHAN THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* 149 (1976). See also LICHTENSTEIN, *supra* note 9, at 67, 123.
55. The product of prisoners' labor might be intended to satisfy specific requests (piece-price system), used for the state's own purposes (state-management, state-use system), or sold into the open market (state management, public account system). ILO, *Prison Labor: I*, *supra* note 11, at 322-24.
56. White, *supra* note 7, at 133; CEACR 2001, *supra* note 2, ¶ 100.
57. Henriksson & Krech, *supra* note 10, at 307-08.

economic terms is that prison industries in the United States, for example, sold \$1.6 billion worth of prison-made products in 1999.⁵⁸

From a penological point of view, meaningful employment for prisoners is very important. It has the potential to provide important job skills that might be useful for prisoners in seeking employment after their release. Regular participation in work can also help to inculcate prisoners with more disciplined work and personal habits.⁵⁹ From the point of view of the prison administration, regular employment may aid in ensuring prison security, not least by alleviating the boredom that would otherwise prevail:

From the perspective of the prison administrator, an ample program of prison industries is a management tool of central importance, making for a peaceful and orderly prison. If it can also help to train the prisoner for freedom and provide him with some funds to tide him over the early days of his release, so much the better.⁶⁰

Moreover, meaningful employment may help defray the cost of keeping the prisoners.

To this end, prisoners are generally involved in either service or industrial work within a prison. Service work includes work in the upkeep and running of a prison: laundry, kitchens, maintenance, gardens, and the like. It would also include prisoners participating in the upkeep of public facilities outside the prison, for example, parks and roads. Otherwise, prisoners work in what are usually referred to as "prison industries" or "correctional industries." These may be wholly owned and operated by the state or may include some private sector involvement, as in the case of an operator of a prison workshop. In either situation, the products may be sold into the public market or, where there is concern about unfair competition from poorly paid prisoners' labor,⁶¹ the products may be used for state purposes alone.

58. American Correctional Association, Inc., *Correctional Budgets (1)*, 25 CORRECTIONS COMPENDIUM 8 (2000).

59. Melossi and Pavarini argue in this respect that prison is best seen, in the words of Gerard de Jonge, as "a factory for the production of proletarians." De Jonge, *supra* note 4, at 314. On the institutional function of the prison, compare MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridn trans., 1977); RUSCHE & KIRCHHEIMER, *supra* note 9.

60. Norval Morris, *The Contemporary Prison*, in THE OXFORD HISTORY OF THE PRISON 247 (Norval Morris & David Rotham eds., 1995).

61. In the United States, the Sumners-Ashurst Act, 18 U.S.C. § 1761, which was passed in 1940, prohibits transport of prison made goods in interstate commerce. It was preceded by the Hawes-Cooper Act, 49 U.S.C. § 11507 (passed in 1929), which applied the laws of any state to prison-made goods from any other state, thus preventing states from "dumping" cheap prison made goods in other states. Under the Ashurst-Summers Act, 18 U.S.C. § 1761 (passed in 1935) it became an offense to transport goods covered by Hawes-Cooper from one state to another. Also relevant is the Walsh-Healey Act, 41 U.S.C. § 35 (passed in 1943), which forbids the use of prisoners' labor in government

There are several different ways in which the private sector might be involved in the organization of prisoners' work today. The simplest model is the "customer" model, in which the private sector purchases goods made by prisoners. Private interests may, however, play a much greater role in the establishment of work facilities for prisoners and in the supervision and operation of work performed by prisoners. This may happen within or outside of a prison. In general, prisoners' labor in these circumstances will be organized according to the "employer" model, or the "manpower" model.⁶² In the "employer" model, the private entity has a direct contract with the prisoner and pays for the work that is performed. In the "manpower" model, the prisoners are engaged by the prison and the private company is charged for their labor: "[C]ompanies lease rather than employ their prison workforces."⁶³ Each of these systems appears to correspond in general terms to the "special contract" system of prison labor that was in use, in some cases, at the time of the adoption of Convention 29.⁶⁴

Whether or not the prisoners are directly employed by a private entity, the private sector frequently provides work supervisors. It is important to note that these arrangements for the use of prison labor may be present in any prison, whether it is publicly or privately operated. In other words, private sector use of prisoners' labor is something that may occur independently of private sector prison operation. Thus, the question of private prison operation and its relationship to the use of prisoners' labor must be analyzed separately from other ways in which the private sector may benefit from prisoners' labor, even in a privately operated facility.

E. Issues and Implications

The trends toward private operation of correctional functions and private use of prisoners' labor raise a number of significant legal, policy, and human

contracts exceeding \$10,000. Since 1979, however, state prison systems participating in the Prison Industry Enhancement Program are exempted from these prohibitions, on conditions that include a requirement to pay prisoners applicable minimum wages or the prevailing wage for the work, whichever is higher, 18 U.S.C. § 1761 (c). Compare the relevant provisions of the international trading regime, which allow states to take counter-measures against the importation of goods made by prisoners' labor. General Agreement on Tariffs and Trade, 30 Oct. 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. XX(e).

62. The concepts of the "customer," "manpower," and "employer" models derive from the analysis of private sector involvement in correctional industries in the United States. GEORGE SEXTON, U.S. DEP'T OF JUSTICE, *WORK IN AMERICA'S PRISONS: JOINT VENTURES WITH THE PRIVATE SECTOR* 10 (1995).

63. *Id.*

64. CEACR 2001, *supra* note 2, ¶ 96.

rights issues. Each form of private sector involvement in providing correctional services may raise different issues, but the private control and management of whole institutions and the associated exploitation of prisoners' labor for private benefit have been particularly controversial, at least within the ILO.

A fundamental question is whether it is appropriate to entrust the performance of correctional functions to private sector entities on behalf of the state. More broadly, the involvement of the private sector in correctional functions raises questions about how far the state may properly go in delegating such functions to the private sector. If the state can privatize prisons, can it likewise privatize policing or the prosecution of criminal offenses? If so, what legal limits might curtail that power of delegation, and how might that privatization be controlled?⁶⁵ In other words, the main question is whether the running of prisons can be described as a "core state function" that ought not be contracted out to the private sector.⁶⁶ Answering this question involves examining the extent of the state's moral or ethical obligation to exercise control directly over those it incarcerates and alternately the extent to which a state may properly limit itself to a supervisory role. Logan refers to this issue as "the propriety of private prisons."⁶⁷

In response to the argument that the state *does* have such a moral duty, Harding and others insist on distinguishing between the allocation and the administration of punishment. According to this argument, in the face of the manifest failings of state-run prison systems, it is absurd to insist upon state control if it may be possible to improve conditions by involving the private sector. Thus, those who subscribe to this argument would limit the essential function of the state to being that of the allocation of punishment.⁶⁸ For present purposes, it is sufficient to identify, rather than seek to resolve, these issues. It is noteworthy, however, that in some jurisdictions there may be legal obstacles to pursuing private involvement in correctional functions. Constitutional or legislative issues may limit the devolution of such a function.⁶⁹

The human rights implications of imprisonment are significant, whether prisoners are held in publicly or privately run facilities. We must remember that "punishment, in particular imprisonment, means that the whole of the concerned individual's life-conduct is regulated in ways which, were they

65. Palley, *supra* note 26, ¶ 42.

66. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 32, at 273.

67. LOGAN, *supra* note 37, at 49–75.

68. Of course, this can be a difficult distinction to draw on a day-to-day basis in prison, where the administrator has disciplinary functions that include the power to punish. See, e.g., Matthew Groves, *The Purpose and Scope of Prison Discipline*, 26 CRIM. L. J. 10, 16 (2002).

69. See, e.g., ABT ASSOCIATES, *supra* note 28, at 17, App. 3, at 3–12.

not authorized, would violate nearly every aspect of human rights."⁷⁰ If that regulation is carried out on a day-to-day basis by a private actor, it is all the more important to explore how the state endeavors to ensure the protection of the human rights of those whom it incarcerates.

As a general rule, there are formal administrative, legislative, and constitutional protections of prisoners' rights. On a day-to-day basis, however, officials in charge of the prison determine whether or not prisoners' human rights are properly protected. All too often, the existing mechanisms for protecting prisoners' rights are ineffective to ensure that these rights are fully observed in state-run facilities. Thus, the assignment of custodial prison functions to a private operator raises further questions about the effectiveness of the existing means for protecting prisoners' rights. Are these mechanisms directly applicable notwithstanding the interposition of a private sector entity operating a prison pursuant to a contract with the state? In the United States, for example, potential protection of prisoners' human rights is offered by 42 U.S.C. § 1983, which protects persons against the contravention of rights protected in the Constitution when such contravention takes place "under color of state law." It appears that this provision does apply to prisoners when they are held in a facility whose operation the state has contracted to a private operator.⁷¹

With regard to the privatization of prisons, the methods chosen by a state to maintain control over the private sector entity with which the state contracts and the efficacy of these methods become important issues. Among the factors to consider are: (1) the adequacy of public sector or administrative law systems for oversight of private actors; (2) the existence of constitutional or legislative guarantees of basic rights and applicability of these rights to prisoners held in privately run facilities; and (3) the effectiveness of legislative or contractual mechanisms used by the state to maintain its supervision of the private company running its prison.⁷² In addition to these considerations, the most important questions for the purposes of the present inquiry are what conditions are in place with respect to prisoners' labor and for whose financial benefit do prisoners work?

Most of the abovementioned factors are issues of national law and policy that this article does not explore in any detail; these factors merely help describe the broader context. This article focuses instead on international human rights law. Clearly, significant questions arise about the application and effectiveness of human rights law to the privatization of

70. Palley, *supra* note 26, ¶ 39.

71. *Richardson v. McKnight*, 521 U.S. 399 (1997); see also *ABT ASSOCIATES*, *supra* note 28, at 14–20.

72. The findings of those who have assessed the utility of these mechanisms are particularly important. See *HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY*, *supra* note 32, at 56–65.

prisons and the exploitation of prisoners' labor. First, what international standards apply to prisons and to prisoners and are any of these standards legally binding? Second, do the standards that exist regulate prisoners' work, and, if so, do they do so adequately? Third, what challenges are posed to the existing international standards by the re-emergence of private sector prison operators and the exploitation of prisoners' labor by private companies? In other words, is international human rights law adequate to protect prisoners as workers from private sector exploitation, bearing in mind that the "risks of developing a contemporary form of slavery must be precluded by every possible safeguard . . . having regard to historical dangers of prisoner peonage through contracted-out labor"?⁷³

III. CONVENTION 29

In exploring the operation of Convention 29 in the context of prisoners' labor, one must first consider the origins and purposes of the convention and outline those provisions that are relevant to the present inquiry. It is next important to examine the body of principles that have been developed in the interpretation of the Convention by the ILO's supervisory bodies.

A. The Origins and Purposes of Convention 29

Convention 29 is one of the ILO's eight core labor standards:⁷⁴ it is an instrument that protects fundamental human rights, adopted against the background of the campaigns against slavery. Effectively, it elaborates on Article 5 of the 1926 Slavery Convention,⁷⁵ which requires states parties "to

73. Palley, *supra* note 26, ¶ 22.

74. The others are: Convention Concerning Freedom of Association and Protection of the Right to Organise (ILO No. 87), 68 U.N.T.S. 17 (*entered into force* 4 July 1950); Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (ILO No. 98), 96 U.N.T.S. 257 (*entered into force* 18 July 1951); Convention Concerning the Abolition of Forced Labour (ILO No. 105), 320 U.N.T.S. 291 (*entered into force* 17 Jan. 1959); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (ILO No. 100), 165 U.N.T.S. 303 (*entered into force* 23 May 1953); Convention Concerning Discrimination in Respect of Employment and Occupation (ILO No. 111), 362 U.N.T.S. 31 (*entered into force* 15 June 1960); Convention Concerning Minimum Age for Admission to Employment (ILO No. 138), 1015 U.N.T.S. 297 (*entered into force* 19 June 1976); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 38 I.L.M. 1207 (*entered into force* 19 Nov. 2000).

75. Slavery Convention (1926), 25 Sept. 1926, 60 L.N.T.S. 253 (*entered into force* 9 Mar. 1927).

take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery."⁷⁶ Convention 29 entered into force in 1932 and has since become the most widely ratified ILO Convention, with 163 of the ILO's 177 members having ratified it.⁷⁷

The almost universal ratification of Convention 29 is a concrete demonstration of the widespread support that the international community has for the convention's goal, which is the complete suppression of forced or compulsory labor. The international and universally binding nature of the principles in Convention 29 is further enhanced by the ILO's *Declaration on Fundamental Principles and Rights at Work and its Follow Up*.⁷⁸ Article 2 of the Declaration requires all ILO member states to promote and realize, in good faith, the principle of the elimination of all forms of forced or compulsory labor. This obligation binds all ILO member states, irrespective of whether they have ratified Convention 29.

While Article 1 of Convention 29 generally prohibits the exaction or imposition of forced or compulsory labor in any form,⁷⁹ Article 2(2) provides for five exemptions from that prohibition. Article 2(2)(c) exempts prison labor, meaning:

[A]ny work or service exacted from a 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.⁸⁰

It is apparent that Article 2(2)(c) contains three conditions. First, the work or service must be exacted "as a consequence of a conviction in a court of law." Second, it must be carried out "under the supervision and control of a public authority." Third, prisoners must not be "hired to or placed at the disposal of private individuals, companies or associations." Clearly the

76. On the history of the preparatory work for the adoption of Convention 29, see, e.g., NICOLAS VALTICOS & GERALDO VON POTOBSKY, *INTERNATIONAL LABOUR LAW* 109 (2d ed. 1995).

77. See available at www.ilo.org/ilolex/english/index.htm.

78. ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow Up*, adopted 18 June 1998, 37 I.L.M. 1233. For analysis, see Anne Trebilcock, *The ILO Declaration on Fundamental Principles and Rights at Work: A New Tool*, in *THE ILO AND THE SOCIAL CHALLENGES OF THE 21ST CENTURY* 93–116 (Roger Blanpain & Chris Engels eds., 2001); Hillary Kellerson, *The ILO Declaration of 1998 on Fundamental Principles and Rights at Work: A Challenge for the Future*, 137 INT'L LAB. REV. 223 (1998).

79. Convention 29, *supra* note 12, art. 1(1). By Article 1(1), states parties undertake "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period."

80. *Id.* The other exemptions are for compulsory military service (art. 2(2)(a)), work that is part of a citizen's "normal civic obligations" (art. 2(2)(b)), work exacted in case of emergency that endangers the whole or part of the population (art. 2(2)(d)) and minor communal service that can be considered a normal civic obligation (art. 2(2)(e)).

requirements of public supervision and that prisoners not be "hired to . . . private individuals" are relevant where a private sector entity is involved in providing correctional services, at least in regard to the work that prisoners do.

Thus, Convention 29 applies to prisoners' work in prisons that are privately run and to other situations in which private entities employ prisoners or otherwise supervise or control their labor. As discussed below, the ILO's Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)⁸¹ has developed a significant body of principles on the application of Article 2(2)(c) to private sector involvement in correctional facilities. These principles constitute the most detailed elaboration of binding international legal regulation of prisoners' work.

Before considering the meaning and application of specific conditions, it is important to emphasize the general nature of Article 2(2). It provides for exemptions from the prohibition in Article 1(1), not exclusions from the concept of forced or compulsory labor in the Convention. In other words, the forced labor of prisoners would be prohibited by Convention 29, but for Article 2(2)(c). All of the exemptions "assume . . . that work or service is exacted forcibly."⁸² Thus, Article 2(2)(c) does not save the practice of compelling prisoners to work from being a practice that ought otherwise to be eradicated because of its links to slavery and other slavery-like practices. Rather, it is one of a number of exemptions that are made for particular policy reasons, provided that the practice complies with the requirements of the Convention.⁸³

The five categories of labor that are exempted have two things in common. First, they are all of general application; they each concern labor that might be exacted from a sector of the community (either general or particular) that would usually comprise a large number of people.⁸⁴ In addition, "there is a distinctive flavor of assumed general civic benefit."⁸⁵ Thus, Convention 29 assumes that exempting the practice of forcing

81. The Committee of Experts is composed of jurists who are appointed by the ILO's Director General, and serve in their individual capacities. Each year the Committee of Experts issues a report, based on analysis of written reports provided by ILO member states in relation to their efforts to comply with ratified ILO conventions. Pursuant to Article 19 of the ILO Constitution, the Committee of Experts also periodically reviews reports by countries concerning their efforts to comply with the requirements of ILO Conventions that they have not yet ratified. See HÉCTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOUR ORGANIZATION—THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* ch. 7 (1996).

82. CEACR 2001, *supra* note 2, ¶ 108 (emphasis added).

83. *Id.*

84. *Id.*

85. *Id.*

prisoners to work is "in the interests of society in general."⁸⁶ Society may have a direct interest, for example, where prisoners work on public activities, such as roads and other public places. There are also indirect benefits to society through the prospect that regular work will serve a rehabilitative function, and assist, therefore, in reducing the risk that prisoners will be subsequently imprisoned. Of course, in this respect, a direct benefit to the prisoners themselves is also assumed.⁸⁷

Another broad theme, however, runs through Convention 29 and through the exemptions provided for in Article 2. It is assumed that, in each case, the beneficiary of the labor "should not be private entities but the public . . . forced or compulsory labour has never been allowed to be imposed or permitted to be exacted for the benefit of private entities."⁸⁸

This condition applies particularly to the forced labor of prisoners. As appears further below, the specific requirements of Article 2(2)(c), taken together with the general theme that the exemptions are permitted only for the benefit of the public, have significant implications for the private use of prisoners' labor. They are relevant both to prisons and to other cases in which private interests use prisoners' labor.

Indeed, the specific question of the application of these principles to the use of prisoners' labor was considered by the International Labour Conference when it adopted Convention 29. The Conference debated, and rejected, a proposal that would have allowed the use of forced labor by prisoners in public works carried out by private undertakings.⁸⁹ Thus, the conditions in Article 2(2)(c) are also "important guarantees against the administration of the penal system being diverted from its true course by coming to be considered as a means of meeting labour requirements."⁹⁰

B. Conviction in a Court of Law

Conviction in a court of law is an essential element of the exemption for prisoners' labor contained in Article 2(2)(c). The exemption is acceptable only if it is imposed as a result of a conviction in a proper court of law,

86. *Id.* ¶ 111.

87. *Id.*

88. *Id.* ¶ 114.

89. *Id.*

90. *1968 Report of the Committee of Experts, General Survey on the Reports concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, Int'l Labour Conference, ¶ 38 (Geneva, 1968) [hereinafter *1968 General Survey*], referring at n.2 to the *Report of the UN-ILO Ad Hoc Committee on Forced Labour*, U.N. ESCOR, 16th Sess., Supp. No. 13, ¶ 369, U.N. Doc. E/2431 (1953).

meaning a court that meets internationally accepted principles for its character, composition, and fair trial procedures.⁹¹ These rights are protected in, for example, the Universal Declaration of Human Rights⁹² and the International Covenant on Civil and Political Rights (ICCPR).⁹³ Thus, an obligation exists to observe internationally accepted legal standards. The exemption, therefore, requires that the person must have been convicted in a court that was acting according to law. The forced labor of prisoners convicted by courts that do not meet these standards is not exempted from the prohibition in Article 1. Further, the imposition of forced labor by administrative measures or other non-judicial authorities is incompatible with Convention 29. Thus, for example, the more than 200,000 people forced to work in the People's Republic of China while held in "administrative detention" would be protected by Article 1—assuming that China had ratified Convention 29, which it has not.⁹⁴

The requirement of conviction in a court of law also means that persons detained, particularly pending a hearing of criminal charges against them, may not be forced to work.⁹⁵ However, they may be offered work and if they take it up voluntarily, then no issue of incompatibility with the Convention's requirements exists. The conditions developed by the Committee of Experts as indicia of voluntariness in prisoners' labor are considered below.⁹⁶

C. Supervision by Public Authorities

The requirement of public supervision is closely related to the prohibition on the use of forced labor for private entities, which has never been allowed under the Convention. The reason for this is simple: the inevitable focus of

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91. 1979 *General Survey of the Reports relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Int'l Labour Conference (Geneva, 1979) [hereinafter 1979 *General Survey*], ¶ 94. See also 1968 *General Survey*, *supra* note 90, ¶ 90.
 92. Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, arts. 7–11, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. 127 (Supp. 1949) [hereinafter UDHR].
 93. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, arts. 14–15, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) [hereinafter ICCPR].
 94. See, e.g., Colin Fenwick, *Private Benefit from Forced Prison Labour: Case Studies on the Application of ILO Convention 29* (June 2001) (for the International Confederation of Free Trade Unions), available at www.icftu.org/displaydocument.asp?Index=991212919&Language=EN [hereinafter ICFTU report].
 95. Nevertheless, non-sentenced inmates are not exempt from "certain limited obligations intended merely to ensure cleanliness." 1968 *General Survey*, *supra* note 90, ¶ 77.
 96. *Infra* text accompanying notes 133–52 and accompanying text.

a private entity on its own business interests raises the prospect of a conflict with "the reformative aims of the State" as they are carried out in its prison system.⁹⁷

Arguably, the significance of this requirement is bolstered by the surrounding historical circumstances. The Convention was adopted at the end of the 1920s in conjunction with significant steps in the campaign to eradicate slavery and at about the same time that the lease system of prison management finally died out in the United States. The public supervision requirement was clearly seen as being of critical importance in preserving prisoners from a return to the exploitation that had hitherto characterized their lot.

The requirement of public supervision has a protective function; it is "to prevent the conditions under which prisoners work being determined otherwise than by the public authorities, in a situation in which the workers concerned do not enjoy the rights of free workers. The supervision of the public authorities is therefore required to ensure that conditions remain within acceptable limits."⁹⁸ Thus, under Convention 29, the state has the responsibility to ensure that it alone controls the conditions under which prisoners are forced to work. The state must comply with the public supervision requirement in order to qualify for the exemption in Article 2(2)(c) from what would otherwise be a prohibition on requiring prisoners to work.

The requirement of public supervision and control of prisoners' labor calls for close examination of any situation where there is private involvement in prison systems and the use of prisoners' labor. It applies to all work organized in privately run prisons because:

[I]n private prisons there is one form of constraint which will have an effect also on the question of supervision: the private enterprise is not only a user of prison labour, but will inevitably also exercise, in law or in practice, an important part of the authority which under the convention should be exercised by the public authorities.⁹⁹

In the case of privately run prisons, the public supervision requirement calls into question the adequacy of the means by which contracts to run prisons

97. *Prison Labour Memorandum* 321, referred to in CEACR 2001, *supra* note 2, ¶ 114. See also Henriksson & Krech, *supra* note 10, at 308.

98. CEACR 1998, *supra* note 2, ¶ 122.

99. CEACR 1998, *supra* note 2, ¶ 121. See *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labor Conference, 83d Sess., ¶ 80 (1996), available at www.ilo.org/ilolex/english/ceacrrepsq.htm [hereinafter CEACR 1996]; *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, 82d Sess., ¶ 90 (1995), available at www.ilo.org/ilolex/english/ceacrrepsq.htm [hereinafter CEACR 1995].

are granted, administered, and supervised.¹⁰⁰ In most cases, supervision is achieved by a combination of legislative requirements and contractual specifications, which are the likely sources of performance standards for private prison operators and the methods by which governments monitor and supervise compliance with contractual obligations.

Both legislative and contractual provisions will shape the monitoring arrangements that a government uses to supervise compliance with contractual obligations to run a prison. Usually, monitoring is carried out by a combination of record-keeping and reporting requirements, supplemented by the right of the state to inspect and audit prison operations either at specified intervals or at will. In some cases, dedicated contract monitors are used to oversee compliance. In some jurisdictions monitoring is done "remotely" by civil servants whose work is dedicated to overseeing contract compliance and who supplement their examination of records and reports by audits and inspections. The Committee of Experts has observed that, "if the supervision and control are restricted to a general authority to inspect the premises periodically, this by itself would not appear to meet the requirement of the convention for supervision and control."¹⁰¹

In a number of jurisdictions, monitors work at the prison itself. Although in these cases there is ostensibly direct public supervision of the private company, it is not clear that this is public supervision and control of prisoners' labor. In practice, the monitor might spend a lot of time dealing with administrative matters, rather than monitoring. Moreover, when a single public official works in a privately run organization, isolated from the government agency of which he or she is a member, there is an increased risk of regulatory capture.¹⁰² In other words, the monitor may come to adopt the outlook of the organization that he or she is supposed to oversee or in other ways become ineffectual.¹⁰³

In some cases, the private operation of prisons is subject to the inspection regime that applies to all prisons. In these situations, there is generally an independent inspector with general authority to oversee prison operations and conditions on behalf of the state.¹⁰⁴ The work of prisoners

100. For analysis, see HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 32, at 51–82.

101. CEACR 1998, *supra* note 2, ¶ 124.

102. *Id.*

103. On the concept of "regulatory capture," see, e.g., ROGER COTTERRELL, THE SOCIOLOGY OF LAW—AN INTRODUCTION 265 (2d ed. 1984).

104. In the United Kingdom, Her Majesty's Chief Inspector of Prisons for England and Wales is appointed under the *Prison Act 1957*, § 5(A) (UK), available at www.homeoffice.gov.uk/justice/prisons/insprisons/. In the Australian State of Western Australia, the Inspector of Custodial Services carries out functions under the *Prisons Act 1981*, Pt. X(A)(WA), available at www.custodialinspector.wa.gov.au/.

and the conditions under which they perform are potentially a part of this inspection regime and could, perhaps, be relied on to ensure public supervision and control of prison labor. In practice, however, inspectors' reports tend to pay little or no attention to the conditions under which prisoners work or to questions such as for whom the work is performed or by whom the work is supervised. Early inspection reports in the Australian state of Western Australia, for example, have focused on the lack of work for prisoners and the poor facilities, rather than on for whom the work is done and under whose supervision.¹⁰⁵ In the United Kingdom, Her Majesty's Inspector of Prisons has made similar remarks about the relative underemployment of prisoners—but not about other matters concerning their work that are addressed by Convention 29.¹⁰⁶

The question that ultimately arises is whether the public supervision requirement is satisfied by the operation of a mechanism for overseeing contractual obligations between the state and a private manager of a prison. In other words, can a private sector prison operator fairly be seen as an agent of the state? If so, is the state fulfilling the requirement of public supervision of prisoners' work? Similar questions and issues may arise in the case of private sector involvement in the conduct of "correctional industries" within prisons and in the supervision of prisoners' labor in work release schemes. In both cases, it is common for the private entity to supervise the work of prisoners through its own employees.

It is instructive, in this respect, to recall that the drafting history of Article 2(2)(c) shows, among other things, that the ILO Conference rejected the argument that a private entity could be considered to stand in the shoes of the state where a project using forced prisoners' labor was carried out for the state's benefit.¹⁰⁷ What are the implications of this for the modern practice of the private operation of prisons, within which there may be a requirement that prisoners work? It appears that there can be no simple assumption that a private prison operator ought to be treated as an agent for the state, and similarly no presumption that the state is complying with the public supervision requirement of Article 2(2)(c) when a prison is privately

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105. GOVERNMENT OF WESTERN AUSTRALIA, REPORT OF AN INSPECTION, ALBANY REGIONAL PRISON 5–10, 41 (Sept. 1999) (over-representation of aboriginal inmates in grounds and maintenance work, compared with other work); GOVERNMENT OF WESTERN AUSTRALIA, REPORT OF AN INSPECTION, BUNBURY REGIONAL PRISON 25–30, 24 (July 1999) (over-representation of aboriginal inmates in grounds and maintenance work, compared with other work); GOVERNMENT OF WESTERN AUSTRALIA, REPORT OF AN INSPECTION, WOOROLOO PRISON FARM 1 (Aug., Nov. 1999) (lack of constructive activities for prisoners, "especially work").
106. CHIEF INSPECTOR OF HM PRISONS, ANNUAL REPORT, 33–34 (1998–1999), available at www.homeoffice.gov.uk/docs/ar99.pdf.
107. ILO, *Record of Proceedings, International Labour Conference*, 14th Sess., at 270, 302–03, 305–06, 308 (1930).

operated. The requirement has a particular protective function for the "captive workforce,"¹⁰⁸ who are prisoners. It is also intended to ensure that a broad public benefit derives from any forced prison labor, rather than a merely private benefit.

Clearly, the ILO Conference acted in 1930 to forestall the perceived dangers of private exploitation of prisoners and the private benefit from using the forced labor of prisoners. This ought to be borne in mind when examining any particular arrangement by which a private operator manages a prison or supervises prisoners' work. In this respect, the Committee of Experts has observed that "the practice of the supervision and control of public authority [sic] would also have to be examined carefully, as the convention does not allow a full delegation of supervision or control to a private business."¹⁰⁹

D. Hired to or Placed at the Disposal of Private Interests

Compliance with the requirement of public supervision alone is not sufficient to ensure that prisoners' labor in any given case is exempted from the prohibition in Article 1. The requirements of Article 2(2)(c) "are cumulative and applied independently."¹¹⁰ Thus, the meaning of the expression "hired to or placed at the disposal of private individuals" within Article 2(2)(c) must be explored.¹¹¹

This requirement raises particular issues in the case of privately operated prisons:

In private prisons there are two inter-related forms of constraint: first, the private enterprise operating a prison includes prison labour in its profit calculations and, second, the private enterprise is not only a user of prison labour, but also exercises, in law or in practice, an important part of the authority which belongs to the prison administration.¹¹²

Of course, if the private sector's only involvement with prisoners' labor is as a customer, few difficulties are likely to arise. If prisoners' labor is performed under public supervision, and the private sector has no involvement other than as the end-user of the product, Convention 29 requires neither that the labor be voluntary nor that the prisoners be paid for performing it.¹¹³

108. CEACR 2001, *supra* note 2, ¶ 145.

109. CEACR 1999, *supra* note 2, ¶ 109 (Australia).

110. *Id.* ¶ 119.

111. Convention 29, *supra* note 12, art. 2(2)(c).

112. CEACR 1996, *supra* note 99, at 80 (France).

113. CEACR 2001, *supra* note 2, ¶ 113.

A number of ILO members have argued in recent years that their practices of privately operating prisons, or otherwise privately using prisoners' labor, are in compliance with Convention 29, notwithstanding the above requirement. They have pointed to several factors to support their position. First, the private entity does not usually have an employment contract with the prisoner.¹¹⁴ According to this argument, the private entity has not "hired" the prisoner within the meaning of Article 2(2)(c). Second, the prisoner is not placed in a condition of complete servitude to the private entity, and, therefore, is not "at the disposal" of the private sector.¹¹⁵ Third, the private entity often has limited discretion to determine the type of work being performed by the prisoner, which is performed as an incident of the prisoner's incarceration and pursuant to the requirements of the state.¹¹⁶ This would seem to be an argument that the prisoner is not at the disposal of the private sector, but rather at the disposal of the state.

The Committee of Experts has considered and rejected these arguments. First, when Convention 29 was adopted, it was taken to cover those forms of contract labor with which the ILO had been concerned in its 1930 report *Prison Labour*.¹¹⁷ In those cases, working prisoners did not have an employment contract. Nor did the companies that used their labor have complete discretion over the work they did; public authorities controlled their work, which was, in any event, a condition of imprisonment imposed by the state. The prisoners were nevertheless taken to be covered by the expression "hired to."¹¹⁸ Second, the fact that a private sector operator does

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114. Prisoners are generally not considered to be employees. In the United States it has consistently been held that prisoners are not employees when seeking payment under the Fair Labor Standards Act. See, e.g., *Hale v. Arizona*, 967 F.2d 1356 (9th Cir. 1992), *rev'd* 993 F. 2d 1387 (9th Cir. 1993), *cert. denied*, 510 U.S. 946 (1993), *Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320 (9th Cir. 1991), *Alexander v. Sara Inc.*, 721 F.2d 149 (5th Cir. 1983), *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992); *Henthorn v. Department of Navy*, 29 F.3d 682 (D.C. Cir. 1994). In the few cases where US courts have held that prisoners were employees entitled to FLSA minimum wages the prisoners worked voluntarily for a private employer, outside the prison premises. See, e.g., *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990). In the United Kingdom, New Zealand, and Australia it has also been held that a prisoner is not an employee, although the determination has usually been made in the course of proceedings concerning injuries received by a prisoner, usually while working. *Pullen v. Prison Commissioners*, 3 All E.R. 470 (1957); *Morgan v. Attorney General*, NEW ZEALAND L. REV. 134 (1965); *Hall v. Whatmore*, V.R. 225 (1961). See, e.g., Colin Fenwick, *Regulating Prisoners' Labour in Australia: A Preliminary View*, 16 AUSTRAL. J. LABOUR L. 284, 302-06, 314-16 (2003).
115. Convention 29, *supra* note 12, art. 2(2)(c).
116. See CEACR 2001, *supra* note 2, ¶ 121. (The last of these situations is plainly one similar to the question raised in the previous section as to whether the private entity is standing in the shoes of the State.)
117. *Id.* ¶ 122. The forms of contract labor were the lease system and the special and general contract systems; as noted above, these had largely fallen into disuse at the time. ILO, *Prison Labour: I*, *supra* note 11, at 318-25.
118. CEACR 2001, *supra* note 2, ¶ 122.

not pay for the labor of the prisoners may mean that the prisoners are not "hired," but the practice is still encompassed by the words "placed at the disposal of," which were included to strengthen the protection for prisoners.¹¹⁹ The Committee of Experts stressed that the legal relationship between the prisoners and the user of their labor is not determinative. It does not matter that a prisoner is not directly employed by a private sector employer;¹²⁰ it is enough that a prisoner is made available as a worker to the private sector, even pursuant to a triangular labor hire arrangement.

A further issue is whether prohibiting a private prison operator from making a profit from prisoners' labor changes the situation. In the Australian state of Victoria, for example, the private operator must keep separate and identifiable accounts of "prison industry."¹²¹ Any surplus may only be disbursed with governmental approval, and only to improve the running of the prison.¹²² The Australian government has argued that this arrangement ensures that forced prisoners' labor in privately run prisons does not produce a profit for the prison operators, and that this is relevant to whether the prisoners have been "hired to, or placed at the disposal" of the companies concerned.¹²³

The Committee of Experts has rejected this argument,¹²⁴ noting that Convention 29 itself does not refer to "profit" "in the sense of a balance sheet result."¹²⁵ The Committee of Experts interpreted Article 2(2)(c) for these purposes by reference to Article 4 of Convention 29, which refers to persons being forced to labor "for the benefit of" private entities.¹²⁶ That expression arguably covers the concept in Article 2(2)(c) of a person being "hired to or placed at the disposal of" private entities: "[N]either wording suggests that the absence of balance sheet profit would negate the applicability of the Articles to particular private entities."¹²⁷ If Convention 29 requires that prisoners not be forced to labor for the benefit of private

119. *Id.* ¶ 123.

120. CEACR 1998, *supra* note 2, ¶ 118.

121. *See, e.g., Prison Services Agreement between State of Victoria and Australian Correctional Facilities Ltd. for the Men's Metropolitan Prison*, Annexure T, Prison Management Specification, cl. 22(c) (obligation to quarantine profits from prison industry); cl. 22(d) (requirement to keep separate accounts for prison industry); cl. 22(f) (duty to reinvest profits from prison industry in prison industry, or as otherwise directed). *See available at* www.contracts.vic.gov.au/major/51/Prison3.pdf.

122. *Id.*

123. *Report of the Committee on the Application of Standards*, Int'l Labour Conference, 87th Sess. (1999), *available at* www.ilo.org/public/english/standards/relm/ilc/ilc87/com-apid1.htm#A.%20General%20Observations.

124. CEACR 2001, *supra* note 2, ¶ 126.

125. *Id.* ¶ 125.

126. *Id.*

127. *Id.*

nonprofit associations, it follows that profit by the private operator of a prison is irrelevant.¹²⁸ As the Committee of Experts pointed out, the alternative would be that "a scheme where the prisoner is compelled to work in a totally private prison would escape the scope of the Convention on account of bookkeeping arrangements and investment decisions which have no bearing on the situation of the prisoner."¹²⁹

The Committee of Experts has been particularly stringent in its response to suggestions that the commercial need for profit cannot be avoided.¹³⁰ An employer delegate to the 2001 ILO Conference, for example, remarked that the Committee of Experts could not hide from the need for companies to make profits merely by referring to documents prepared in the early 1930s, before the "universal acceptance of the free market principle."¹³¹ As to this, the Committee of Experts referred directly to the link between the international legal regulation of the use of prisoners' labor and the international campaigns to eradicate slavery and the slave trade. The Committee observed that this type of resort to the universal acceptance of the free market principle and the accompanying inevitability of the need for profit "might make obsolete legal requirements of a basic human rights Convention, in a field where an even older international instrument first interfered with the then free trade in human beings. Such suggestion disregards the peremptory character of basic human rights standards in international law, and is unacceptable."¹³²

E. Voluntary Prison Labor for Private Benefit

Up to this point, this article has focused largely on the ways that Convention 29 seeks to restrict the imposition of forced labor on prisoners, where they would be compelled to work for private interests. Article 2(2)(c) prohibits forced prison labor for private benefit. It does not, however, prevent *voluntary* prison labor for private benefit.¹³³ Nor does it prevent either forced or voluntary labor for the benefit of the state.¹³⁴ More than permitting voluntary labor, however, Convention 29 effectively requires that prison labor that benefits private interests must be performed voluntarily. For these

128. *Id.*

129. *Id.* ¶ 127.

130. CEACR 2002, *supra* note 2, at 96.

131. *Id.*

132. *Id.*

133. ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference (1955) referred to in the *1968 General Survey*, *supra* note 90, ¶ 79.

134. CEACR 2001, *supra* note 2, ¶ 135.

purposes, it is immaterial whether the workplace in which there is a private interest is within the confines of the prison.¹³⁵

The Committee of Experts has outlined measures that states must put into place to ensure that prisoners' labor is voluntary and to guard against the risk that private business goals may conflict with the reformatory purpose of prisoners' labor.¹³⁶ The fact that prisoners are held within government facilities (whether or not they are privately operated) makes it all the more important that they be entitled to the same protections as employees in the free labor market. In considering the necessity of this protection, it is desirable to distinguish between the status of prisoners as prisoners on the one hand and as workers on the other.¹³⁷

The first major requirement is that there must be specific measures to obtain prisoners' formal consent to work.¹³⁸ Of course, it is not easy to be satisfied that a prisoner has freely consented to work. Prisoners' labor is truly captive; they have no access to employment "other than under the conditions set unilaterally by the prison administration."¹³⁹ Furthermore, the nature of the prison regime, in and of itself, necessarily bears on the question of whether a prisoner offers to work voluntarily. Many adverse consequences may exist for failing or refusing to work. A prisoner's work, or lack thereof, might, for example, be taken into account in assessing whether or not a prisoner should be allowed to participate in a work-release program. Likewise, a prisoner's record of behavior might be used to determine the allocation of particular accommodations or other privileges during the course of imprisonment.

Though some of the possible detriments may be practical, or imposed administratively, they still fall under Convention 29's definition of forced or compulsory labor. It refers to "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."¹⁴⁰ For these purposes, "penalty" includes any loss of rights or privileges.¹⁴¹ Thus, it covers work performed by a

135. 1979 *General Survey*, *supra* note 91, ¶¶ 97–98; 1968 *General Survey*, *supra* note 90, ¶ 79.

136. CEACR 2001, *supra* note 2, ¶¶ 128–43.

137. CEACR 1996, *supra* note 99, ¶ 82 (France: COE asked the Government "to supply detailed information on any measures taken to distinguish the situation of . . . workers in or regarding their employment from their situation in prison").

138. In one instance, the suspension of a statutory provision requiring formal consent from prisoners working for private interests was considered a matter of "regret." ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, at 62 (1982) (Federal Republic of Germany).

139. *Id.* ¶ 130.

140. Convention 29, *supra* note 12, art 2(1).

141. 1979 *General Survey*, *supra* note 91, ¶ 21. See also 1968 *General Survey*, *supra* note 90, ¶ 27.

prisoner whose alternative is, for example, confinement to cells, or where the prisoner's good performance at work might be taken into account to reduce the prisoner's sentence, even where refusal to work could not be taken into account to a lengthened sentence.¹⁴² In such a system, "[t]he menace in question . . . not only governs the initial acceptance of prison work but also accompanies the worker throughout . . . detention."¹⁴³ Any such system needs to be taken into account, for the option to work "must be a true option, and not one in which the alternative to the provision of work is a detriment."¹⁴⁴

The difficulties surrounding whether prisoners may freely consent to work lead to the second major requirement: that the conditions of work must approximate a free employment relationship. This will help to suggest objectively that consent was freely given, despite the circumstance that the worker is a prisoner.¹⁴⁵ The reason for this is simple: objective evidence of this kind is "the most reliable and overt indicator" that labor is voluntary.¹⁴⁶ A good indicator that labor is voluntary is the payment of wages comparable to those available for similar work in the private sector. The opposite is also true: "where private enterprises are permitted to pay prisoners wages that are less than the minimum wage, their relationship cannot be considered comparable to a free employment relationship."¹⁴⁷

The existence of an employment contract between the prisoner and the user of his labor also serves to suggest that the prisoner volunteered to work. This is because the majority of the protections offered by labor law apply to those who are "employed." Thus, where a worker in the free labor market would usually have an employment contract, a prisoner performing similar work for a private entity should also have one as a means of securing the full protection of labor law. The absence of an employment contract calls into question whether a prisoner's labor was voluntarily given, as it raises the issue of whether a worker would choose to work without the full protection of labor law.¹⁴⁸

It might be thought that some or all of these requirements are unhelpful or unrealistic in the prison context. The Committee of Experts has noted, however, that they might assist the rehabilitative goal of prisoners' work by

142. CEACR 1996, *supra* note 99, ¶¶ 80–81.

143. *Id.* ¶ 81.

144. CEACR 2001, *supra* note 2, ¶ 129.

145. ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, at 145 (1994) (United Kingdom).

146. CEACR 2001, *supra* note 2, ¶ 132.

147. ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Int'l Labour Conference, at 90 (1990) (Colombia) [hereinafter CEACR 1990].

148. *Id.* at 81 (Austria).

helping to create a "real work situation."¹⁴⁹ Moreover, there is some evidence to suggest that paying higher wages to prisoners has the positive effect of encouraging them to participate more fully in rehabilitative work.¹⁵⁰ From a point of view less beneficial to prisoners, the Committee of Experts has also determined that just as deductions may be made from wages in the free labor market, so can they be made from payments to prisoners. Deductions might go toward assisting with restitution to victims, support to families, and for board and lodging.¹⁵¹ Thus, working conditions for prisoners who work for private benefit need not be exactly the same as those for free workers. The Committee of Experts has emphasized, however, that in the areas of wages, social security, safety and health, and labor inspection, conditions "should not be so disproportionately lower than the free market that it could be characterized as exploitative."¹⁵²

IV. OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

In addition to Convention 29, other international human rights instruments bear on the treatment of prisoners and on the issue of their work in particular. Examination of these instruments provides a fuller picture of how international human rights law applies to prisoners as workers. Certain fundamental human rights instruments directly address the question of forced labor, although not all specifically contemplate the issue of prisoners' work. By contrast, a number of the relevant instruments are specifically concerned with prisoners, although they are generally soft law.¹⁵³

A. Binding International Law

As noted, Article 5 of the 1926 Slavery Convention expressly refers to the need to ensure that forced labor, where practiced, should not develop into "conditions analogous to slavery."¹⁵⁴ The balance of the article contains conditions that should apply to any subsequent use of forced labor. These

149. ILO, *Report of the Committee on the Application of Standards*, Int'l Labour Conference (1998) [hereinafter ILCC 1998]; CEACR 2001, *supra* note 2, ¶ 137.

150. Jon Vagg & Ursula Smartt, *England and Wales*, in PRISON LABOUR: SALVATION OR SLAVERY?, *supra* note 4, at 39.

151. Deductions of this nature are commonly made in US prison labor systems.

152. CEACR 2001, *supra* note 2, ¶ 143.

153. See, e.g., the overview and discussion in ROGER S. CLARK, *THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM—FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION* chs. 4, 6 (1994).

154. Slavery Convention, *supra*, note 75.

conditions appear to have served as the basis for the more detailed regulation of forced labor that is contained in Convention 29, adopted only three years later.¹⁵⁵ Article 5 also provides that compulsory or forced labor should only be used for public purposes,¹⁵⁶ and that responsibility for recourse to forced labor should rest with the “competent central authorities” of the territory in question.¹⁵⁷ These limitations are clearly echoed and amplified in Convention 29, and, as will be discussed below, in other instruments. The Universal Declaration of Human Rights also prohibits slavery and servitude and requires the prohibition of the slave trade.¹⁵⁸ While it does not refer to forced labor, the *travaux préparatoires* show that forced labor was considered a form of slavery or servitude.¹⁵⁹

The ICCPR prohibits forced or compulsory labor,¹⁶⁰ but it excludes from that prohibition hard labor performed pursuant to a sentence handed down by a court in countries where the law provides for such a penalty.¹⁶¹ It also excludes other forms of forced labor in terms similar to Article 2(2) of Convention 29.¹⁶² Article 8(3)(c)(i) of the ICCPR excludes work exacted from persons detained pursuant to a lawful court order. This would appear to be inconsistent with Article 2(2)(c) of Convention 29, which permits imposing forced labor only on prisoners who have been convicted of a crime, but not on those in detention.¹⁶³

Regional instruments protecting human rights also include provisions relating to slavery and forced labor. Some of these exclude prison labor from

155. For an overview of the origins of Convention 29 in the efforts of the international community to eradicate slavery, and the status of the prohibition of forced labor in international law, see ILO, *Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, ¶¶ 63–67 (1998) [hereinafter *Burma Inquiry Report*].

156. Slavery Convention, *supra* note 75, art. 5(1).

157. *Id.* art. 5(3).

158. UDHR, *supra* note 92, art. 4.

159. See *Summary record of the 53rd meeting, Commission on Human Rights, Third Session, U.N. ESCOR, Comm'n on Hum. Rts., 3d Sess., U.N. Doc. E/CN.4/SR.53* (1948). The same point is made in the work of the Sub-Commission on the Promotion and Protection of Human Rights: See, e.g., *Updated Review of the Implementation of and Follow-Up to the Conventions on Slavery*, U.N. ESCOR, 52d Sess., ¶ 12, U.N. Doc. E/CN.4/Sub.2/2000/3/Add.1 (2000).

160. ICCPR, *supra* note 93, art. 8(3)(a).

161. *Id.* art. 8(3)(b).

162. Convention 29, *supra* note 12, and accompanying text. The exclusions cover: work required of a person detained by lawful court order, or while on conditional release from that detention (art. 8(3)(c)(i)), compulsory military service (art. 8(3)(c)(ii)), service in case of calamity or emergency (art. 8(3)(c)(iii)), and service that is part of normal civic obligations (art. 8(3)(c)(iv)).

163. *Id.* art. 2(2)(c).

those prohibitions. The European Convention on Human Rights¹⁶⁴ prohibits slavery and servitude¹⁶⁵ and also forced or compulsory labor.¹⁶⁶ It excludes from the prohibition the following forms of labor: (1) labor required of persons detained pursuant to proper legal procedures¹⁶⁷; (2) forced labor for military service; (3) forced labor in case of national emergency; and (4) labor required as part of a person's normal civic obligations.¹⁶⁸ The exclusion of labor that is exacted pursuant to "proper legal procedures" is similar to the exclusion found in Article 8(3)(c)(i) of the ICCPR both in its content and in its apparent inconsistency with Article 2(2)(c) of Convention 29.

The American Convention on Human Rights (American Convention)¹⁶⁹ proscribes slavery and the slave trade,¹⁷⁰ and also the imposition of forced or compulsory labor.¹⁷¹ It excludes from that prohibition a sentence of imprisonment to hard labor imposed by a court when the laws of the country concerned provide for such a sentence.¹⁷² Unusually in binding instruments (although as appears below, consistently with the UN Standard Minimum Rules for the Treatment of Prisoners), this exception from the prohibition is subject to the condition that the forced labor so imposed should not "adversely affect the dignity or the physical or intellectual capacity of the prisoner."¹⁷³

The American Convention contains a separate exemption for forced labor required of prisoners who have been properly convicted by a court of law. The exemption is subject to two conditions: first, that the work should be carried out under the supervision of the public authorities; and second, that a prisoner should not be "placed at the disposal of any private party, company, or juridical person."¹⁷⁴ These conditions closely follow the requirements of Article 2(2)(c) of Convention 29. Other exceptions from the

164. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force 3 Sept. 1953) [hereinafter ECHR].

165. *Id.* art. 4(1).

166. *Id.* art. 4(2).

167. *Id.* art. 4(3) (referring to "detention according to the provisions of Article 5," which is concerned with the right to liberty and security and specifies in detail the necessary legal protections against arbitrary use of state power in this respect). Again, questions are raised about whether this instrument would permit forced labor to be exacted from persons detained in circumstances other than those contemplated by Convention 29, which requires that a person have been convicted in a court of law.

168. ECHR, *supra* note 164, art. 4(3)(b),(c),(d).

169. American Convention on Human Rights, signed 22 Nov. 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979) (entered into force 18 July 1978), reprinted in 9 I.L.M. 673 (1970) [hereinafter American Convention].

170. *Id.* art. 6(1).

171. *Id.* art. 6(2).

172. *Id.*

173. *Id.*

174. *Id.* art. 6(3)(a).

prohibition on the exaction of forced labor include compulsory military service,¹⁷⁵ work exacted in a time of national calamity,¹⁷⁶ and work that forms a part of normal civic obligations.¹⁷⁷

The African Charter of Human and Peoples' Rights¹⁷⁸ also proscribes slavery.¹⁷⁹ It does not, however, refer to forced labor. Nor does it provide for any exceptions from that concept.

Using forced labor to exploit the labor of a racial group is proscribed by the International Convention on the Suppression of the Crime of Apartheid.¹⁸⁰ Other instruments that include provisions relating to forced labor include the Convention on the Rights of the Child¹⁸¹ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹⁸²

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸³ contains several provisions that relate to working conditions generally rather than to the working conditions of prisoners specifically.¹⁸⁴ Of particular importance is the ICESCR's protection of the right to work, which includes the right to gain a living by work that is freely chosen or accepted.¹⁸⁵ Obviously, being compelled to work, whether in prison or elsewhere, whether for private interests or otherwise, is a violation of the right to choose

175. *Id.* art. 6(3)(b).

176. *Id.* art. 6(3)(c).

177. *Id.* art. 6(3)(d).

178. African Charter of Human and Peoples' Rights, *adopted* 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (*entered into force* 21 Oct. 1986).

179. *Id.* art. 5.

180. International Convention on the Suppression of the Crime of Apartheid, *opened for signature* 30 Nov. 1973, G.A. Res. 47/81, 47 U.N. GAOR, Supp. No. 49, at 161, art. II(e), U.N. Doc. A/47/49 (1992) (*entered into force* 18 July 1976) (concerning the prohibition of the use of forced labor as a means of exploiting the labor of a racial group).

181. Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, arts. 32, 34, 36, U.N. Doc. A/44/49 (1989) (*entered into force* 2 Sept. 1990, *reprinted* in 28 I.L.M. 1448 (1989)).

182. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49, art. 11, U.N. Doc. A/Res/45/158 (1990) (*entered into force* 1 July 2003). Article 11 largely follows the provisions of the ICCPR, in providing that those protected should not be subject to forced labor, but excluding from that prohibition the imposition of a penalty of imprisonment at hard labor where national law so provides, and excluding from the definition of forced labor its imposition in cases of emergency or for normal civic obligations or where a person is lawfully detained by an order of a court.

183. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].

184. *Id.* arts. 6 (right to work), 7 (right to just and favorable working conditions). Compare UDHR, *supra* note 92, arts. 23–24.

185. *Id.* art. 6(1).

work freely. As Siegel notes, however, and as the foregoing analysis of international human rights instruments discloses, certain forms of forced labor are generally excluded from prohibitions on the practice, including prisoners' labor.¹⁸⁶ It would appear, therefore, that the exaction of forced labor from prisoners, whether for the private sector or otherwise, would not be regulated by the ICESCR. Insofar as prisoners' working conditions are concerned, the ICESCR may be lacking, for it does not distinguish between prisoners and other workers in its expression of the relevant obligations. Under Article 6(1) of the ICESCR states party to the convention are bound to "recognize" the workers' rights discussed therein. Although this imposes an immediate obligation on states to take steps to implement the rights in question, that obligation is subject to the ICESCR's general limitation that states parties strive for progressive realization of the rights protected by the instrument.¹⁸⁷ Thus, in practice, the ICESCR may offer only limited protection for prisoners insofar as their working conditions are concerned.

Moving away from instruments and provisions that are specifically concerned with forced labor or work, more generally, there is, of course, a large body of international human rights law concerned with ensuring that all persons are treated humanely and with dignity. I have in mind, in particular, the various prohibitions on the imposition of cruel punishment and the instruments and customary law relating to the prohibition on torture. It is not difficult to conjure images of work and work conditions imposed on prisoners that might violate some of these instruments. For present purposes, however, the relevance of these instruments is that their provisions would protect prisoners (or not) regardless of whether they were compelled to work for the benefit of private interests.¹⁸⁸

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186. Richard L. Siegel, *The Right to Work: Core Minimum Obligations*, in *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 21, 40–41 (Audrey Chapman & Sage Russell eds., 2002).
187. ICESCR, *supra* note 183, art. 2(1). See Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 *HUM. RTS. Q.* 156, 185 (1987).
188. For comment, see, e.g., Suzanne M. Bernard, *An Eye For An Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 *RUTGERS L. J.* 759 (1994). On the application of the law relating to torture in particular, see NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2d ed. 1999). It is striking that this authoritative work gives scant attention to the issue of prisoners' work.

B. Soft Law

The international instrument that is perhaps most obvious for protecting the rights of prisoners is the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR).¹⁸⁹ Despite the great relevance of this instrument, it is dealt with under the heading of soft law in order to maintain the distinction between hard and soft law. Rules 71 to 76 of the UNSMR deal with prisoners' work. Among other things, they provide that all sentenced prisoners should be required to work,¹⁹⁰ but that their work should not be "of an afflictive nature."¹⁹¹ Some of these parts of the UNSMR are particularly relevant for the purposes of comparison with Convention 29. The UNSMR require, for example, that prisoners' interests and vocational training should not be subordinated to the interest of making profit from the prison industry.¹⁹² In this respect, the UNSMR makes explicit the policy that is implicit in Convention 29.

The UNSMR also specify that institutional industries and farms should be operated directly by the public administration rather than by contractors. If prisoners do work for persons or entities other than the state administration, they should be supervised by the institution's personnel.¹⁹³ This clearly echoes the requirement of Article 2(2)(c) of Convention 29 that prisoners' work be carried out "under the supervision and control of a public authority."¹⁹⁴ Other provisions of the UNSMR that relate to work concern the application of occupational health and safety and accident insurance laws to prisoner workers,¹⁹⁵ the regulation of working time,¹⁹⁶ and payment.¹⁹⁷ Evidently, these specific requirements echo the principles developed by the Committee of Experts in the interpretation of Article 2(2)(c) of Convention 29.

Further detail on the issues relating to prisoners' labor and how to

189. The UN Standard Minimum Rules for the Treatment of Prisoners were adopted by the first UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955; they were later approved by the Economic and Social Council, *Standard Minimum Rules for the Treatment of Prisoners*, E.S.C. Res. 663C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1 at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, U.N. ESCOR, Supp. No. 1 at 35, U.N. Doc. E/5988 (1977) [hereinafter UNSMR]. For comment, see, e.g., Matthew Groves, *International Law and Australian Prisoners*, 24 U. NEW SOUTH WALES L. J. 17, 24–27 (2001).

190. UNSMR, *supra* note 189, ¶ 71(2).

191. *Id.* ¶ 71(1).

192. *Id.* ¶ 72(2).

193. UNSMR, *supra* note 189, ¶ 73(1), (2).

194. Convention 29, *supra* note 12, art. 2(2)(c).

195. UNSMR, *supra* note 189, ¶ 74.

196. *Id.* ¶ 75.

197. *Id.* ¶ 76.

implement the UNSMR may be found in *Making Standards Work*,¹⁹⁸ "an international handbook on good prison practice" promulgated by the NGO Penal Reform International.¹⁹⁹ Insofar as the private use of prisoners' labor is concerned, this document emphasizes the importance of having a clear contract between the prison administration and the private user of prisoners' labor.²⁰⁰

The UNSMR have also led to specific action in Europe. In 1987, the Council of Europe promulgated a "revised European version" of the UNSMR: the European Prison Rules (EPR).²⁰¹ Following the UNSMR closely, Rules 71 to 76 of the EPR contain detailed provisions regulating prisoners' work. Under the EPR, prisoners "may" be required to work, subject to their fitness,²⁰² and work is to be seen as a "positive element in treatment, training and institutional management."²⁰³ Like the UNSMR, the EPR deal with the question of making profit from industries in penal institutions and require that "the interests of the prisoners and of their treatment must not be subordinated to that purpose."²⁰⁴ Unlike the UNSMR, the EPR do not specify that the prison administration ought to be responsible for supervising prisoners' work when they work for private interests. In this respect, the EPR are limited to providing that where prisoners work for private contractors, they should receive the "full normal wages" applicable to that work, taking into account, however, their "output."²⁰⁵ The EPR also stipulates that the prisoners' work should resemble as closely as possible the organization and methods of work in the free labor market.²⁰⁶ Furthermore, the prison administration must provide for the regulation of workplace health and safety,²⁰⁷ working hours,²⁰⁸ and remuneration.²⁰⁹

It bears emphasizing that the UNSMR, the EPR, and *Making Standards Work* contain more detailed and explicit provisions than any other international instrument relating to the work of prisoners. Naturally, therefore, they

198. PENAL REFORM INTERNATIONAL, *MAKING STANDARDS WORK* 137–43 (2d ed. 2001), available at www.penalreform.org/english/MSW.pdf.

199. *Id.* at *i*.

200. *Id.* at 140. ("The prison administration remains under an obligation to ensure that the terms of the contract are absolutely explicit and that the prisoner exercises free choice as to whether or not to undertake this work.")

201. Council of Europe, *European Prison Rules*, Committee of Ministers, Rec. No. R (87)3, (1987) [hereinafter EPR]. For comment, see, e.g., Groves, *supra* note 189, at 29–31.

202. EPR, *supra* note 201, rule 71(2).

203. *Id.* rule 71(1).

204. *Id.* rule 72(2).

205. *Id.* rule 73(1)(b).

206. *Id.* rule 72(1).

207. *Id.* rule 74.

208. *Id.* rule 75.

209. *Id.* rule 76.

offer the possibility of serving as a guide to countries that seek to promote and protect the human rights of those they hold captive, and not only in respect of the work those persons may be required to perform.²¹⁰ Nevertheless, it is equally important to emphasize that none of these instruments are binding in international law, and are, therefore, less stringent as a means of regulating the use of prisoners' labor, whether by public authorities or by private entities.

There are many other instruments that provide guidance for various aspects of the administration of criminal justice. Relatively few, however, address the matter of prisoners' work. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, for example, is silent on the matter of prisoners' work.²¹¹

Some relevant provisions appear in the Basic Principles for the Treatment of Prisoners.²¹² These encourage providing "meaningful remunerated employment" that will help prisoners find work upon release and will generate income that will allow prisoners "to contribute to their own financial support and to that of their families."²¹³ The UN Rules for the Protection of Juveniles Deprived of their Liberty²¹⁴ provide that, wherever possible, juveniles in detention should have the opportunity to perform remunerated labor of a type that will assist in obtaining paid employment upon release.²¹⁵ The work should preferably be within the local community and according to the usual organization of work. Juveniles should be equitably compensated for their work, and their vocational training should not be subordinated to efforts to make a profit from running the prison industry of which the juveniles themselves are a part.²¹⁶ In general, juveniles should be able to select the type of work they wish to perform,²¹⁷ provided that relevant national and international standards applicable to child labor are observed.²¹⁸

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210. For example, one of the objectives of the (now repealed) Victorian Prison Industries Commission Act 1983 (Vic.) was to make prison industries and farms profitable, "consistent with the UN minimum standard rules [sic] concerning prison work (Rules 71-76)": Victorian Prison Industries Commission Act 1983 (Vic.) § 4(a).
211. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, Annex, U.N. GAOR, 43d Sess., Supp. No. 49 at 298, U.N. Doc. A/43/49 (1988).
212. *Basic Principles for the Treatment of Prisoners*, G.A. Res. 45/111, Annex, U.N. GAOR, 45th Sess., Supp. No. 49 at 200, U.N. Doc. A/45/49 (1990).
213. *Id.* art 8.
214. *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, G.A. Res. 45/113, Annex, U.N. GAOR, 45th Sess., Supp. No. 49 at 205, U.N. Doc. A/45/49 (1990).
215. *Id.* rule 45.
216. *Id.* rule 46.
217. *Id.* rule 43.
218. *Id.* rule 44.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice²¹⁹ also directly address the issue of prisoners' work. Rule 11.3 specifies that where juveniles are required to participate in diversionary programs, such as community service, they should do so only after their consent has been obtained. The notes to this section of the Beijing Rules specify that the reason for this is so as not to contradict the provisions of the Abolition of Forced Labour Convention.²²⁰

Whether binding in international law or not, as de Jonge has pointed out,²²¹ all international instruments have at least one thing in common. International law presumes, in its efforts to regulate the exaction of forced labor generally and in its specific regulation of prisoners' labor, that the state may exact forced or compulsory labor from those within its jurisdiction, even if that presumed right is subject to conditions in certain cases. That presumption amounts to a significant limitation on the ability of international human rights law to protect prisoners in their capacity as workers.

V. ASSESSING THE EFFECTIVENESS OF INTERNATIONAL HUMAN RIGHTS LAW FOR PRISONERS WHO WORK FOR PRIVATE BENEFIT

What emerges from this examination of international human rights law is that there are significant weaknesses in the relevant international and regional regimes. The most obvious difficulty is that there are virtually no binding standards that relate to the performance of work by prisoners. While the UNSMR and the EPR contain highly detailed provisions regulating prisoners' work, including some attention to the question of work by prisoners for private interests, they are soft law.

The doctrinal inconsistencies between the relevant instruments further weaken the protections that they offer prisoners. The most important of these concerns whether, and how, prisoners may be required to work. Generally, the ability of states to require prisoners to work appears in the relevant instrument as an exception to, or exemption from, a general prohibition on the imposition of forced or compulsory labor. This is itself a significant conceptual weakness: each instrument presumes that forced prisoners' labor is within the definition of types of forced labor that ought to

219. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, G.A. Res. 40/33, Annex, U.N. GAOR, 40th Sess., Supp. No. 53 at 207, U.N. Doc. A/40/53 (1985).

220. ILO, *Abolition of Forced Labour Convention* (ILO No. 105), 320 U.N.T.S. 291 (*entered into force* 17 Jan. 1959).

221. De Jonge, *supra* note 4, at 320.

be prohibited because of their links to slavery and slavery-like practices. Still, each instrument also presumes that the state has, and should have, the power to compel persons to work, and reinforces that power, notwithstanding the relationship between the permitted practices and the practices of slavery and the slave trade. Prisoners' labor is one of "the strongest areas of State interest in maintaining access to coerced labour."²²²

A further weakness is that the instruments do not impose the same conditions on whether or not a person who is detained may be forced to work. Some appear to permit the state to compel work from those who are detained but who have not been convicted in a court of any crime nor sentenced to imprisonment. This is clearly insufficient protection against administrative detention for the purpose of forcing the detainee to carry out work. Here, Article 2(2)(c) of Convention 29 and the principles relating to its application, developed by the Committee of Experts, constitute the best protection for prisoners from exploitation of their labor by private interests.

The Committee of Experts has also insisted upon the observance of the requirement that there be public supervision of prisoners' work, closely examining the arrangements put in place by any state that engages the private sector to run its prisons or otherwise allows for the private use of prisoners' labor. Findings from criminology and administrative law tend to support the Committee of Experts and Convention 29 in this respect, showing that there are real difficulties in devising appropriate methods to oversee the private operation of prison facilities. In part, this stems from the inherent difficulties of supervision in prisons. As Harding has noted, "[i]n this area of public administration, the instinct for secrecy is very strong; defensiveness against allegations of incompetence or indifference is second nature."²²³ It also stems, in part, from the use of methods traditionally (but not necessarily effectively) applied to the oversight of public administration, in the rather different context of commercial relations regulated in large part by contract.²²⁴

The Committee of Experts has developed a significant body of principles that can be used to assess whether a prisoner is working voluntarily. Moreover, while the Committee of Experts has maintained a constant position about the need to protect prisoners, it has, in recent years, developed these principles in certain important ways that might enable

222. Siegel, *supra* note 186, at 41.

223. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 32, at 22.

224. *Id.* at 51–65. Compare Liz Curran, *Unlocking the Doors on Transparency and Accountability*, 11 CURRENT ISSUES CRIM. JUST. 135 (1999); Matthew Groves, *Public Accountability and Private Prisons* (Feb. 2001) (unpublished paper delivered at the Australia and New Zealand Society of Criminology Annual Conference, on file with author).

states to involve the private sector in providing appropriate work and training opportunities for prisoners without unduly enriching the private sector, thereby complying with Convention 29. The Committee of Experts has, for example, recently noted that it is not inconsistent with its principles to deduct appropriate amounts from prisoners' wages to defray the cost of their imprisonment and to help make amends to any victim(s) of their crime.²²⁵

These principles developed by the Committee of Experts, together with the specific requirements of the text of Article 2(2)(c) of Convention 29, constitute the most important protections offered by international human rights law to prisoners in their capacity as workers. As has been discussed, no other binding standard offers the same level of protection to workers, with the possible exception of the American Convention.²²⁶

Nevertheless, certain important weaknesses to the protection offered by Convention 29 remain, both in doctrine and in principle. First, Convention 29 requires states to maintain a stark distinction between the public and the private sector. Here, to be frank, the Convention would have states maintain a paradigm in respect to prison labor that is fundamentally changing in myriad areas of service provision, and it might be asked whether the instrument can continue to hold up in light of the changing character of the globalized state. Leaving that to one side, it is clear that it is difficult to achieve a stark distinction between public and private in practice, once the private sector is involved in running prisons in any way. White argues, for example, that there is an unavoidable "interpenetration" of the public and private spheres once the private sector engages in running prisons. This was true in the era of convict leasing, and it is true today. According to White, this (inevitable) interpenetration is detrimental not only in the simple sense that it can make it hard to identify who is responsible for a prisoner, but also at a deeper level, it is detrimental to the rule of law as a means to protect citizens against sovereign power.²²⁷

Convention 29 is also deficient in that it does not contain any provisions that regulate the conditions under which prisoners work. It is true that the Committee of Experts has developed certain criteria by which it judges whether or not prisoners are working voluntarily. These, however, are only relevant in circumstances where prisoners are working for private interests. Thus, the re-emergence of prison chain gangs in Alabama in recent years, for example,²²⁸ is not regulated by Convention 29, provided that the

225. CEACR 2001, *supra* note 2, ¶ 142. This is also a feature of many of the US prison work regimes.

226. American Convention, *supra* note 169 and accompanying text.

227. White, *supra* note 7, at 112, 137–46.

228. See de Jonge, *supra* note 4, at 315–17.

prisoners are compelled to work for the state, and that they are publicly supervised in their work. While other instruments may speak to such a practice, for example, those concerned with whether it may be cruel, unusual, or unjust punishment, as a working condition, the chain gang is of no concern to Convention 29.

It is here that the problems of doctrine and principle converge. The requirement that prisoners be publicly supervised while working can be met simply by requiring them only to work for the benefit of the state itself. In other words, Convention 29 does nothing to protect prisoners from being subjected to forced labor, provided that they are publicly supervised in the performance of the work. Thus, there are two issues of principle. First, Convention 29 purports to maintain a clear distinction between public and private uses of prison labor, yet this is difficult to maintain in practical terms when the private sector is involved in operating prisons or in using prison labor. It is all the more difficult to sustain when it translates to a license for states to exploit prisoners' labor for their own benefit.

The second, and perhaps more telling, issue of principle raised by Convention 29 is the clear line it purports to draw between forced and free labor. In fact, Convention 29 protects against some forms of forced labor, but not all. Thus, what it gives, it also takes away: by enshrining a state right to exact forced labor within an instrument that otherwise seeks to prevent its imposition, Convention 29 is based on the assumption that the state has, and will always have, the power to exact forced labor from its citizens.²²⁹ In this respect, Convention 29's approach is consistent with that of all the other international human rights instruments considered thus far. This raises significant issues; if the state is presumed always to have the power to force labor from its citizens, even if that power is limited by conditions and restrictions, human rights law appears to have a limited capacity to provide complete protection for the person's right to labor freely.

Thus we arrive at the paradoxes to which the title of this article refers. The first is that Convention 29 better protects the rights of prisoners held in privately run correctional facilities than it does the rights of those incarcerated in traditional, state-run prisons. Those prisoners apparently most exposed to the impact of globalization on the state through the privatization of its prison operations, are the ones *best* protected by international human rights law, at least in their capacity as workers. This raises the second paradox: even the protection of human rights law is tenuous and problematic. Convention 29 suffers from significant limitations, both in doctrine and in principle, as a means of protecting prisoners' human rights to control and dispose of their own labor as they see fit.

229. *Id.* at 330.

VI. CONCLUSION

What has emerged from an examination of the international human rights instruments relevant to prisoners as workers is that there are significant overall weaknesses in the international human rights system in its application to prisons and to prisoners. (For those long engaged with the issues raised by how prisoners are treated, of course, there is nothing particularly new in this.) However, the answer to the question of how prisoners' work is regulated by the international human rights system exposes a striking paradox from the point of view of the relationship between globalization and international protection of fundamental human rights. It might generally be supposed that a contraction of the state, coupled with an increase in the power of private actors in important social functions, would jeopardize the human rights protections of prisoners held in privately operated prisons or employed by private companies. However, the opposite is the case: it is *only* when held in privately operated facilities, or employed by private entities, that the ILO's interpretation of the proper application of Convention 29 offers any detailed protective regulation for prisoners at work. It is in fact those prisoners held in state-run prisons, and employed by the state for its own purposes, whose human rights as workers are *least* protected by international standards. Ultimately, then, this examination of how international law protects prisoners as workers magnifies the significance of the state's obligations under international law, and the fact that those obligations endure, notwithstanding the impact of globalization, real or supposed.

What then remains to be done to address these issues? On the one hand, the ILO or other organizations might engage in standard setting activities to more closely regulate the work of prisoners, as suggested by Sweptson.²³⁰ However, given the positions taken in the ILO Governing Body and Conference Committee on the Application of Standards by employers, as well as by the government representatives of the influential industrialized countries where private involvement in correctional functions is most prevalent, it seems unlikely that further regulation could be agreed upon while maintaining the present principles that underlie Convention 29.

If there is unlikely to be further standard setting on the issue, what other possibilities remain? Frankly, it appears probable that a number of states will continue to refuse to comply with Convention 29, even though it is the most widely ratified of the ILO's fundamental human rights conventions.²³¹ In view of the importance of the instrument, and the general principles of

230. Sweptson, *supra* note 4, at 371.

231. The United Kingdom and Australia have ratified the instrument, for example, whereas the United States has not.

freedom of labor for which it stands, this would be most unfortunate. Continued noncompliance with any international instrument can ultimately call into question its relevance and importance. This would be a sorry state of affairs when the instrument in question is one intended to eradicate slavery and slavery-like practices.

It seems that the only sure way to comply with Convention 29 would be to remove all private sector involvement in correctional functions, particularly with regard to the exploitation of prisoners' labor. However, given the political and practical difficulties to which this would give rise, this seems highly unlikely. Moreover, it would require a reversal of the seemingly irresistible forces of globalization and the changes being brought about in the nature and function of the state. Yet the history of private sector involvement in correctional functions only points to the importance of considering a return to entirely publicly run prisons.

Ahmed White has sounded an important warning in this respect. His work demonstrates that the experience of convict leasing (which he shows is closely allied to the structure of the present private prison phenomenon) indicates that "juridical structure is relevant to the prospects of reform."²³² In other words, the capacity of the state to reform a prison regime may be significantly impaired by the involvement of the private sector. If this analysis is correct, it would tend to bear out the hypothesis that globalization may be harmful to human rights. Moreover, this conclusion is quite contrary to that of proponents of private involvement in correctional functions, who argue that where the public sector prison fails to deliver satisfactory outcomes, the private sector may as well be given the opportunity to participate, and perhaps by competition (or "cross fertilization"²³³) help improve the standards of all prison regimes. Ultimately, in White's view, the public/private distinction is never particularly sound, either in principle or in practice. In the case of imprisonment, at the end of the day, it is better for the state to do its own dirty work:

[I]n a society that claims a basis in rule of law norms, it is probably always a good thing for the state to wage its own wars against its citizens and to do so in an obvious and maximally costly way . . . at least the public prison is transparently problematic and irrational.²³⁴

This would require the state to face directly the political, legal, and fiscal costs of criminal justice.

It is not just a little ironic that the terms and application of an

232. White, *supra* note 7, at 146. White also warns that also that the possibility of reform should not be confused with the probability of it taking place.

233. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 32, at 111.

234. White, *supra* note 7, at 145.

international human rights instrument concerned with the work of prisoners could, in theory, induce states to withdraw from involving private entities in correctional functions, a practice that has been quite contentious in many places where it has been pursued. This is because the work of prisoners has generally been of little concern to penologists,²³⁵ or to international human rights law as it applies to prisoners. There are, of course, other disabilities under which prisoners suffer, quite apart from being forced to work. Nevertheless, this is no reason to ignore the important issues of whether prisoners work, for whom, and under what conditions; labor rights are often an important bellwether for human rights generally.²³⁶ The importance of the matter only increases when considering the historical, and continuing, importance of work as an element of punishment regimes. In this sense, the ability and the willingness of the ILO to examine the issues raised by the private operation of prisons, in the context of the application of Convention 29, are most welcome.

After considering all relevant international law relating to forced labor, and particularly Convention 29, the prohibition on forced labor was described by the ILO Commission of Inquiry into forced labor in Burma in the following terms: "[T]here exists now in international law a peremptory norm prohibiting any recourse to forced labour and . . . the right not to perform forced or compulsory labour is one of the basic human rights."²³⁷

Hopefully, more attention will be paid in the future to the fundamental, indeed peremptory, human right not to be forced to labor, particularly as it relates to prisoners, and especially as it relates to the increasing number of prisoners held in privately run correctional facilities, or who are otherwise compelled to work for private interests.

235. This is illustrated for example by Harding's analysis of custodial issues of particular importance and how they are affected by privatization. He lists these in order or priority as (1) overcrowding; (2) riots and disturbances; (3) other security issues such as drug use, discipline, and escapes; and (4) "Finally comes the question of the prison regime as it affects inmates." Here he lists suicide prevention, health management, race relations, food, visits, and other matters. He does not list work at all. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY*, *supra* note 32, at 121.

236. See, e.g., Virginia Leary, *Lessons from the Experience of the International Labour Organisation*, in *THE UN AND HUMAN RIGHTS—A CRITICAL APPRAISAL* 580, 583 (Philip Alston ed., 1992).

237. *Burma Inquiry Report*, *supra* note 155, ¶ 203.