

**Prison Labour for Private Corporations: The Impact of
Human Rights**

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Abstract

In the past two decades, the prison population has increased considerably in many industrialized countries. In the United States, for example, the prison population has more than quadrupled since 1980. As a response to the considerable incarceration costs, the number of private prisons and the number of prisoners working for private corporations have increased significantly. Proponents of private sector involvement in prison industries argue that inmate labour can reduce the incarceration costs and contribute to rehabilitation of prisoners.

The question of private sector involvement in prison facilities raises significant concerns as regards to international labour standards. Opponents of private sector involvement argue that private hiring of prison labour can involve exploitation. They also argue that the authority for punishment is a core governmental function that cannot be delegated to the private sector. Furthermore, in most cases, labour and social security laws are not applied to inmates. Therefore, prison labour can constitute unfair competition with free labour or even go as far as to replace free labour.

Sommaire

Depuis une vingtaine d'années, la population carcérale a augmenté de manière très significative dans un grand nombre de pays industrialisés. Aux États-Unis, par exemple, la population carcérale a quadruplé depuis 1980. Afin de faire face aux coûts engendrés par cette explosion carcérale, le nombre de prisons privées a augmenté et la pratique consistant à faire travailler les prisonniers pour des entreprises privées s'est largement étendue. Les partisans du travail pénitentiaire pour des entreprises privées affirment que ce dernier diminue les coûts carcéraux et contribue à la réinsertion des détenus.

Cependant, le travail des prisonniers pour des entreprises privées pose toute une série de questions par rapport aux normes internationales du travail et aux droits fondamentaux de la personne. Les opposants affirment que celui-ci peut entraîner une exploitation des prisonniers. Ils affirment également que le pouvoir de détention est une fonction gouvernementale qui ne peut être déléguée au secteur privé. De plus, la plupart du temps, les prisonniers travailleurs ne disposent d'aucun droit découlant de la législation du travail et d'aucune protection sociale. Il existe donc également un risque que le travail pénitentiaire ait un impact négatif sur le marché du travail.

Table of Contents

Acknowledgements	ii
Abstract	iii
Sommaire	iv
Table of Contents	v
 Introduction	 1
 CHAPTER 1: International Standards	 8
I. Prison Labour and the Private Sector	8
a. Prison Privatisation	8
b. Prison Industrialization	10
II. International Standards	11
a. United Nations Instruments	11
b. International Labour Organization Conventions on Forced Labour	14
i. The Forced Labour Convention, 1930 (No 29)	14
1. Definition of Forced Labour	14
2. Requirements of Article 2(2)(c)	16
<i>a) Conviction in a Court of Law</i>	17
<i>b) Supervision and Control by Public Authority</i>	18
<i>c) Conditions for Private Employment of Prisoners</i>	19
(i) Prison Labour for Private Entities	19
(ii) Meaning of the Terms “Hired or Placed at the Disposal Of”	19
(iii) Role of Private Profit or Benefit	20
3. Voluntariness	21
<i>a) Free Consent to Work</i>	21
<i>b) Conditions that “Approximate A Free Relationship”</i>	22
ii. The Abolition of Forced Labour Convention, 1957 (No. 105)	22

III. Regional Standards	23
a. European Instruments	23
b. American Instruments	24
CHAPTER 2: Case Study: The United States	26
I. Context	26
a. Prison Population	26
b. Prison Labour and Private Entities	28
c. Incarceration and Unemployment	28
II. Historical Background	29
III. The Federal System	32
a. The Thirteenth Amendment	32
b. The Eighth Amendment	33
c. History and Federal Laws	33
d. Types of Work in Prison	35
e. Systems of Prison Industries	36
i. The Federal Prison Industry	36
ii. The State Prison Industry	37
iii. The Prison Industries Enhancement Certification Program	39
iv. Private Prisons	41
1. Historical Background	41
2. Recent Developments	41
f. Conditions of Work	43
i. Application of the Fair Labour Standards Act	43
1. Meaning of “Employee”	43
2. Purposes of the FLSA	43
3. The Economic Reality Analyses	44
ii. Other Labour Rights	47
IV. Importation of Prison-Made Goods	48
a. Article XX (e) of General Agreement on Tariffs and Trade (GATT)	48
b. Section 1307 of the United States’ Tariff Act of 1930	49

VI. Different State Models	51
a. California	52
i. Context	52
ii. Prison Labour Legislation	54
b. Washington	55
c. South Carolina	55
d. Florida	56
 CHAPTER 3: Prison Labour for Private Corporations: The Debate	 58
I. The Goals of Incarceration	58
II. The Objectives of Prison Labour	61
a. In General	61
b. Rehabilitative Objectives and Reduction of Recidivism Rates	61
c. Financial Objectives	63
d. Reduce Idleness of Inmates	64
e. Restorative Objectives	64
f. Punitive Objectives	65
g. Deterrence	65
h. Why Do Prisoners Sometimes Choose to Work?	65
III. Arguments in Favour of Prison Privatization and Prison Industrialization	66
a. Reduction of Costs Linked to Prison Overcrowding	66
i. The Causes of Prison Overcrowding	67
1. Rising Crime Rates	67
2. Stricter Sentencing Laws	67
3. War on Drugs	68
4. Efforts Against Illegal Immigration	68
ii. The Effects of Prison Overcrowding	69
iii. Private Sector Involvement: A Solution to Overcrowding?	70
b. Reduce Recidivism and Provide Marketable Skills For Inmates	73
c. Private Prisons: A Better Management and More Flexibility?	73
d. Are Private Prisons An Improvement of the Quality?	74

e. Are Objectives of Prison Labour Attained?	75
IV. Arguments Against Involvement of Private Sector with Inmate Labour	78
a. Poor Working Conditions	78
b. Corner Cutting and Cream Skimming in Private Prisons	81
c. Problem of Monitoring of Private Prisons	82
d. Trends Towards Privatization	83
i. Context	83
ii. Constitutionality of the Delegation of the Incarceration Function to the Private Sector	83
e. Private Sector Involvement: Creation of An Incentive to Increase the Prison Population?	85
f. Prison Labour for Private Corporations: Impact on the Labour Market and Unfair Competition	87
g. Is Allowing People to Profit From Punishment Morally Unacceptable?	89
h. Private Non-Profit Prisons: An Alternative?	90
 CHAPTER 4: Application and Evolution of International Standards Regarding Private Sector Involvement in Prison Industries	 93
I. Application of International Standards	93
a. Compliance with International Labour Standards	93
i. Application of ILO Standards	93
ii. Compliance in Practice	94
b. Reasons for Difficulties in Application of ILO Standards	97
c. International Trade Law and Sale of Prison-Made Goods	98
II. Interpretation and Evolution of International Labour Standards	100
a. Critics Against the ILO	100
i. Excessive Conventions	100
ii. Inflexible Conventions	101
iii. The Lack of Enforcement Mechanisms	102
b. The Responses of the ILO	102
c. Impact of Globalization on International Labour Standards	103

III. The United States and the ILO	104
a. History	104
b. Non Ratification of Forced Labour Convention No. 29	105
c. Ratification and Enforcement of Forced Labour Conventions	107
IV. The Evolution of the Interpretation of International Labour Standards: The Role of the ILO	109
a. Influence of the United States	109
b. International Solutions	110
i. An International Ban of All Private Sector Involvement in Prison Industries?	110
ii. An International Ban of Prison Privatization?	111
iii. A Ban of the International Sale of Prison-Made Goods?	112
Conclusion	113
Bibliography	118

Introduction

In recent years, the involvement of the private sector in employing prison labour has developed significantly. The number of privately operated prisons has considerably expanded in many industrialized countries, and the number of prisoners in publicly administered prisons working for private firms has increased. Today, there are privately operated facilities in the United States, the United Kingdom, Australia, South Africa, New Zealand, the Netherlands Antilles and, more recently, also in Canada. Many other countries are considering the idea.

In the United States, 94,361 inmates were held in privately run prisons in 2003,¹ representing 6.5% of all federal and state inmates.² Moreover, this number is increasing at a rate four times greater than that for inmates in publicly operated prisons.³ The two largest private prison companies are Corrections Corporation of America (CCA) and the GEO Group, Inc. (GGI), formerly known as Wackenhut Corrections Corporation. CCA currently holds approximately 66,000 beds in 65 facilities. It manages over 50% of the market of private prisons in the United States and also owns facilities in Puerto Rico,

¹ See U.S., Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2003*, Bureau of Justice Statistics Bulletin, (2004) at 4 [BJS, *Inmates in 2003*].

² *Ibid.*

³ K.C. Goyer, "Prison Privatization in South Africa, Issues, Challenges and Opportunities" ISS Monograph No 64 (2001), online: Institute for Security Studies <<http://www.iss.co.za/Pubs/Monographs/No64/Contents.html>>.

England, France and Australia.⁴ GGI has a 22% share of the United States market and also operates in Australia, Canada, New Zealand, Great Britain and South Africa.⁵

Although the United States has the largest number of inmates held in private prisons, Australia's percentage is the highest in the world. The State of Victoria is the jurisdiction with the largest percentage (over 50%) of its prison population held in privately operated prisons. With the rise of the prison population, the involvement of the private sector in the prison industry is also increasing considerably in the United Kingdom.

Furthermore, an increasing number of private companies are employing inmates for production and services. In the United States, in 1979, Congress created the Prison Industry Enhancement Certification Program, which allows certified companies to employ prisoners and sell prisoner-made goods in interstate commerce. As a consequence, the figures for 1999 show that United States prison industries sold over \$1.6 billion worth of prison-made goods.⁶

⁴ See Corrections Corporation of America, "CCA At A Glance", online: Corrections Corporation of America: <<http://www.correctionscorp.com/aboutcca.html>> and Tracy F. H. Chang and Douglas E. Thompkins, "Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry" (2002) 27:1 Labor Studies Journal 45.

⁵ Global Expertise in Outsourcing, "Fast Facts About GEO", online: Global Expertise in Outsourcing <<http://www.wcc-corrections.com/facts.asp>>.

⁶ Colin Fenwick, "Private Benefit from Forced Prison Labour: Case Studies on the Application of ILO Convention 29", Centre for Employment and Labour Relations, Law School, University of Melbourne, (June 2001), online: International Confederation of Free Trade Unions <<http://www.icftu.org/displaydocument.asp?Language=EN&Index=991212919>> at 1 [Fenwick, "Private Benefit from Forced Prison Labour"].

This current trend toward greater involvement of the private sector in prison industry must be seen in the context of the significant increase of the prison population in many industrialized countries. In the United States, for example, the prison population has increased from approximately 500,000 in 1980⁷ to over two million in 2004.⁸ While the rate of imprisonment was 220 for every 100,000 people in 1980, it is now 715 for every 100,000 people.⁹ This is largely the consequence of tougher sentencing laws and longer sentences, especially toward non-violent offenders.¹⁰

The increase in the incarceration rate has in turn lead to the problem of prison overcrowding, having numerous consequences. First, it creates a deterioration of prison conditions, which can lead to an increase of violence and to less security due to management and control problems.¹¹ Second, it increases the costs of incarceration for society, by causing the need to build new prisons, to increase the number of beds and the number of persons employed in the penitentiary industry. Finally, some argue that, in the short run, incarceration reduces unemployment by removing people from the labour market. However, in the long run, it actually leads to an increase in unemployment, since the prisoners, when released have even greater difficulty finding jobs due to their criminal records.¹²

⁷ See U.S., Bureau of Justice Statistics, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin (1995).

⁸ In 2003, the number of persons incarcerated was 2,078,570. See *Inmates in 2003*, *supra* note 1.

⁹ *Ibid.* at 2.

¹⁰ Goyer, *supra* note 3. Out of these two million, more than one million are non-violent offenders. See U.S., Bureau of Justice Statistics, Paige M. Harrison and Allen J. Beck, *Prisoners in 2002*, Bureau of Justice Statistics Bulletin (2003) at 10 [BJS, *Prisoners in 2002*].

¹¹ See Kerry L. Pyle, "Prison Employment: A Long-Term Solution to the Overcrowding Crisis" (1997) 77 B. U. L. Rev. 155, 156.

¹² See *ibid.* and Bruce Western and Katherine Beckett, "How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution" (1999) 104:4 AJS 1030.

In this context, prison labour can be seen as a solution to the problem of prison overcrowding. Proponents of prison labour argue that employing inmates has many financial benefits. It reduces the cost of the prison system and even generates revenue. It also allows inmates to pay compensation to their victims and contributes to the purpose of restoration. The prisoners' labour repairs, in a sense, the damages they have caused to victims and to society.

They also argue that employment can contribute significantly to rehabilitation of prisoners, which is the primary purpose of incarceration. By learning skills, training and good work habits, prisoners increase their chances of employment upon release. Employment can also have a positive impact on them, by helping them rebuild their self-esteem. After having served his time, the prisoner will more easily find a job and not have the need for criminal acts in order to survive. This will thus contribute to reducing recidivism rates. Many also argue that by reducing the idleness of inmates and by keeping them busy, prison labour also reduces many management and control problems. Finally, proponents of prison labour for private companies claim that only the private sector can produce enough jobs for the inmates and can give them marketable skills for future employment upon release.

Proponents of prison privatization argue that private prisons are better managed and more flexible than public prisons. They also argue that, due to overcrowding,

privatization is a solution to reduce the costs of operating prisons. Private companies build prisons faster and operate them more efficiently than governments.¹³

Prison labour for private corporations, however, has a number of economic, legal and moral implications. First, there is a risk that private hiring of prison labour can involve exploitation. In other words, firms would put their own profits before those of the public and of the inmates, and, above all, before the purposes of incarceration, which are incapacitation, rehabilitation, deterrence and retribution. Second, private prisons have often been accused of compromising the quality of the facilities by 'cutting corners' to maximize profit. They are also accused of housing only the non-serious offenders who are easy to manage, leaving the more difficult ones to public prisons. Third, opponents of prison privatization often argue that private prisons are much harder to monitor than public ones. Fourth, prison privatization also poses a problem because the authority for punishment is a core governmental function, and its delegation to the private sector raises serious Constitutional concerns. Fifth, the question is also raised as to whether privatization of prisons will not create an incentive to build even more prisons and thus contribute to an even more significant increase of the prison population. Sixth, prison labour can constitute unfair competition with free labour or even go as far as to replace free labour. Theoretically, any working prisoner is displacing a non-inmate worker. Furthermore, in most cases, labour and social security laws are not applied to inmates. For example, in the United States, inmate workers are not protected by the Thirteenth Amendment against involuntary servitude and by the *Fair Labor Standards Act*. Thus,

¹³ See U.S., Bureau of Justice Assistance, James Austin and Garry Coventry, *Emerging Issues on Privatized Prisons* (2001).

they are excluded from minimum wage, unemployment compensation, collective bargaining rights, the right to unionize, etc. Consequently, inmate labour can have a negative impact on 'free' workers' working conditions and depress their wages. Finally, other critics of private sector involvement in correctional facilities argue that allowing people to make profits from punishment is unacceptable morally and symbolically.

The question of private sector involvement in prison facilities also raises significant concerns regarding international standards. This question has recently been addressed by the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations. The ILO *Forced Labour Convention No. 29* excludes labour done by prisoners from the definition of forced labour, provided that the prisoners were convicted by a court of law and that the work is carried out under the supervision and control of a public authority.¹⁴ Furthermore, prisoners may not be hired or placed at the disposal of private entities. The ILO *Abolition of Forced Labour Convention No. 105* prohibits the use of forced prison labour for purposes of economic development.¹⁵

The purpose of this thesis is to discuss these major issues regarding private sector involvement in prison industries. Chapter One presents the concepts and historical background of prison privatization and prison industrialization, and provides an overview of the international and regional standards regarding prison labour. It examines in

¹⁴ *Forced Labour Convention (N°29)*, 28 June 1930, ILC, 14th Sess., Geneva, online: International Labour Organization <<http://www.ilo.org/ilolex/english/convdisp1.htm>> [Convention No. 29].

¹⁵ *Abolition of Forced Labour Convention (N°105)*, 25 June 1957, ILC, 40th Sess., Geneva, online: International Labour Organization <<http://www.ilo.org/ilolex/english/convdisp1.htm>>, article 1 b [Convention No. 105].

particular the application of the ILO forced labour conventions to private-sector involvement in prison labour. Chapter Two describes and analyses the legal regime and practice in the United States, which is the country in which the private sector is the most involved in prison labour. Chapter Three presents the debate in greater detail, outlining the goals of incarceration, the objectives of prison labour, and the legal, economical and moral arguments in favor of and against the involvement of private entities in the use of inmate labour. Finally, Chapter Four discusses the interpretation, evolution and application of the international standards regarding prison labour for private entities. It discusses possible international solutions to the problem of private sector involvement in prison industries.

CHAPTER 1: International Standards

I. Prison Labour and the Private Sector

a. Prison Privatization

Privatization refers to the transfer of functions and responsibilities from the public sector to the private sector. It became more and more frequent in the 1980s “when political leaders praised the efficiency of markets over the waste of the public sector.”¹⁶ The idea is that a private firm can perform the governmental function more efficiently, because it operates with a motive for profits, under the competition of other private firms.¹⁷ This will thus result in a reduction of operational costs.¹⁸ Privatization has touched various sectors such as airlines, factories, railroads or schools. In recent years, the prison industry has also become the target of privatization. While most private prisons in the world are in the United States, there are also some in the United Kingdom, Australia, South Africa, New Zealand, the Netherlands Antilles and Canada.

Although this movement toward privatization of prisons arose in the 1980s, the concept of private prisons is hardly a new phenomenon. Historically, all prisons were private. The first publicly operated prisons appeared only in the twentieth century.¹⁹ Until then, prisons were privately owned and managed.²⁰ However, by the early 1900s,

¹⁶ Goyer, *supra* note 3.

¹⁷ David DelFiandra, “The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983” (2000) 38 Duq. L. Rev. 593.

¹⁸ *Ibid.*

¹⁹ Ahmed A. White, “Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective” (2001) 38 Am. Crim. L. Rev. 122.

²⁰ *Ibid.*

the private prison industry became abusive.²¹ Prisoners “suffered from malnourishment, frequent whippings, overwork, and overcrowding.”²² Furthermore, there was strong public pressure against the unfair competition created by the private entities that were exploiting prison labour.²³ As a result, prisons gradually came under the control of governments.²⁴ Recently, due to public pressure, mostly because of the increase of the costs linked to the explosion of incarceration rates in the past two decades, the phenomenon of private prisons has resurfaced.

Private prisons can be defined as “institutions that are managed and sometimes owned by non-state entities.”²⁵ In theory, these entities could be either private non-profit organizations or private for-profit ones.²⁶ However, in practice, most of the private prisons in the world are managed by for-profit entities.²⁷ Their characteristic is that “the private enterprise is not the only user of prison labour, but will also exercise an important part of the authority that belongs to the prison administration.”²⁸

The distinction between a ‘public’ and ‘private’ is however not that clear. First, certain aspects of every prison are private. For example, some of the services of the prison, such as medical, food or educational services can be contracted out to the private

²¹ Peter J. Duitsman, “The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding” (1998) 76 N.C.L.Rev. 2215.

²² DelFiandra, *supra* note 17 at 595.

²³ Duitsman, *supra* note 21 at 2216.

²⁴ The John Howard Society of Alberta, “Private prisons” 19:2 *The Reporter* (September 2002), online: John Howard Society of Alberta <<http://www.johnhoward.ab.ca/PUB/respaper/privpr02.htm>>.

²⁵ White, *supra* note 19 at 114.

²⁶ David E. Pozen, “Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom” (2003) 19 J. L. & Politics 254.

²⁷ *Ibid.*

²⁸ ILO, *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 85th Sess. (1998) para. 121 [Report ILO 1998] and Lee Swepston, “Prison Labor and International Human Rights” (2001) IRRA 53rd Annual Proceedings 359.

sector.²⁹ Second, it can be argued that no prison can be fully private.³⁰ “Every prison remains intimately connected to the state, incarcerating inmates arrested, prosecuted, and sentenced by the state for violating the (still) very public criminal laws and their analogues (for example, juvenile offender laws).”³¹

b. Prison Industrialization

Private prisons are different from prison industries in prison, often referred to as “factories with fences”, which “seek to turn prisoners into productive members of society by having them work and produce or perform services that can be sold in the marketplace.”³² While there are private prisons in a limited number of countries, in most countries of the world, prisoners work for private entities, when incarcerated in publicly run prisons.³³

Private sector involvement in the prison industries is not a new phenomenon either. It was a known and common practice at the time of the adoption of the 1930 ILO *Forced Labour Convention No. 29*. In its Memorandum of 1931, the International Labour Office distinguished three groups of prison systems: the Contract Labour system, the Piece-Price System and the State Management System.³⁴ In the Contract Labour System, prisoners’ labour was hired out to private entities.³⁵ This group of systems encompasses three

²⁹ Ira R. Robbins, “The Impact of the Delegation Doctrine on Prison Privatization” (1988) 35 UCLA L. Rev. 912 [Robbins, “The Impact of the Delegation Doctrine”].

³⁰ White, *supra* note 19 at 121.

³¹ *Ibid.*

³² Robbins, “The Impact of the Delegation Doctrine”, *supra* note 29.

³³ See Swepston, *supra* note 28 at 359.

³⁴ ILO, *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), ILC, 89th Sess. (2001) para. 96 [Report ILO 2001].

³⁵ *Ibid.*

different systems.³⁶ First, in the Lease System, the private contractor has a contract with the state to hire out prisoners.³⁷ “His contractual obligations are the boarding, lodging, clothing, and guarding of the prisoners, and the payment of an agreed per capita rate.”³⁸ The second system, the General Contract System, is similar to the Lease System. However, in the former system, the state supplies the buildings and housing equipment for the prisoners.³⁹ Finally, in the third system, the Special Contract System, the state supplies the buildings and equipment but it “retains the whole administration of the prisons.”⁴⁰

The Committee of Experts notes that while the Lease System resembles greatly the system of privately run prisons as it is known today in countries such as Australia and the United Kingdom, the Special Contract System corresponds to the system of prison industries followed today in several other countries.⁴¹ Thus, “the privatization of prison labour is not a new phenomenon but is a rather old one which was known and described in some detail at the time of the adoption of the Convention.”⁴²

II. International Standards

a. United Nations Instruments

The first international definition of slavery can be found in the *League of Nations Slavery Convention* of 1926. It is “the status or condition of a person over whom any or

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para. 100.

⁴² *Ibid.*, para. 101.

all of the powers attaching to the right of ownership are exercised.”⁴³ Article 2 provides that the High Contracting Parties must undertake to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.⁴⁴ After the Second World War, the *Universal Declaration of Human Rights* reaffirmed the principle that “no one shall be held in slavery or servitude.”⁴⁵ It also affirmed that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work” and to protection against unemployment.⁴⁶

The *International Covenant on Economic, Social and Cultural Rights* also provided the recognition of the right to work, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”, and prescribed that the states “take appropriate steps to safeguard this right.”⁴⁷ The *International Covenant on Civil and Political Rights* specifically reaffirms the principle of the prohibition of forced or compulsory labour.⁴⁸ However, article 8(3)(c)(i) excludes from the definition of forced labour “any work or service ... normally required of a person who is under detention in consequence of a lawful order of a court, or of a person

⁴³ *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 L.N.T.S. 253 (entered into force 9 March 1927), article 1.

⁴⁴ *Ibid.*, article 2.

⁴⁵ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No 13, UN Doc. A/810 (1948), article 4.

⁴⁶ *Ibid.*, article 23(1).

⁴⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), article 6(1).

⁴⁸ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, (entered into force 23 March 1976), article 8(3).

during conditional release from such detention.”⁴⁹ The Covenant does not address the role of private contractors with regard to prison labour.⁵⁰

The *Standard Minimum Rules for the Treatment of Prisoners* were adopted on August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 in 1930.⁵¹ Although they are not binding, they provide guidance on minimal international standards concerning prison labour. They state that “all prisoners shall be required to work, subject to their physical and mental fitness.”⁵² They focus on the purpose of rehabilitation,⁵³ providing that “the organization and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions”⁵⁴, and that “the interest of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making financial profit from an industry in the institution.”⁵⁵ Finally, rule 73(1) provides that “preferably institutional industries and farms should not be operated directly by the administration and not by private actors.”⁵⁶ The *Standard Minimum Rules* also provide for public supervision of prison labour, stating that “where prisoners are employed in work not controlled by the administration, they shall always be under the

⁴⁹ *Ibid.*

⁵⁰ Report ILO 2001, *supra* note 34.

⁵¹ Sweptson, *supra* note 28 at 359.

⁵² *Standard Minimum Rules for the Treatment of Prisoners*, ESC Aug. 1955/611, UN ESCOR, 1955, Supp. No. 1, UN Doc. A/CONF/611, rule 72(1) [Standard Minimum Rules].

⁵³ Sweptson, *supra* note 28 at 360.

⁵⁴ *Standard Minimum Rules*, *supra* note 52, rule 72(1).

⁵⁵ *Ibid.*, rule 72(2).

⁵⁶ *Ibid.*, rule 73(1).

the institution's personnel.”⁵⁷ Finally, concerning wages, they provide that “there shall be a system of equitable remuneration of the work of prisoners.”⁵⁸

b. International Labour Organization Conventions on Forced Labour

i. The Forced Labour Convention, 1930 (No. 29)

The essential international instruments concerning prison labour are the International Labour Organization's (ILO) two conventions on forced or compulsory labour. They are among the most highly ratified ILO conventions.⁵⁹ In September 2004, the *Forced Labour Convention, 1930 (No. 29)* was ratified by 163 countries with the notable exceptions of China and the United States and the *Abolition of Forced Labour Convention, 1957 (No. 105)* was ratified by 161 countries.

1. Definition of Forced Labour

Article 1(1) of the *Forced Labour Convention No. 29* requires each Member “to suppress the use of forced or compulsory labour in all its forms.”⁶⁰ Article 2(1) defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁶¹ Thus, forced labour exists when the person has not chosen freely to work or when the person is

⁵⁷ *Ibid.*, rule 72(1).

⁵⁷ *Ibid.*, rule 73(2).

⁵⁸ *Ibid.*, rule 76(1).

⁵⁹ ILO, *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Report I (B), ILC, 89th Sess. (2001) [Report ILO Stopping Forced Labour].

⁶⁰ Convention No. 29, *supra* note 14.

⁶¹ *Ibid.*

subject to sanctions if they refuse to work.⁶² These need not be in the form of penal sanctions, but can also take the form of any loss of rights or privileges. In addition, it must be noted that payment for the work does not mean that the work is not forced labour.⁶³

Different forms of forced labour exist in the world today. In 2001, the Director-General presented a report to the International Labour Conference entitled “Stopping Forced Labour”, a second global report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.⁶⁴ The report provides an overview of the different forms of forced labour that exist today:

- Slavery and abductions
- Compulsory participation in public works projects
- Forced labour in agriculture and remote rural areas (coercive recruitment systems)
- Domestic workers in forced labour situations
- Bonded labour
- Labour imposed by the military
- Forced labour in the trafficking of persons
- Some aspects of prison labour and rehabilitation through work.⁶⁵

⁶² Colin Fenwick, “When Privatization means exploitation: Prison labour in privatized facilities” in ILO, *Fundamental rights at work: Overview and prospects*, ILO, Geneva, 2001 at 40 [Fenwick, “When privatization means exploitation”].

⁶³ *Ibid.*

⁶⁴ Report ILO Stopping Forced Labour, *supra* note 59.

⁶⁵ *Ibid.* at 2.

Article 2(2) of *Forced Labour Convention No. 29*, however, exempts five particular forms of services that are not considered to be forced or compulsory labour. These exemptions include “compulsory military service”, “normal civic obligations”, “emergencies”, minor communal services, and the services exacted from a convicted person.

2. Requirements of Article 2(2)(c)

According to the Committee of Experts on the Application of Conventions and Recommendations (The Committee of Experts), the benefits of exempting prison labour under the Convention were in the interests of society in general and the personal interests of the prisoners.⁶⁶

The best method of maintaining a prisoner’s working capacity is to employ him on useful work. The idea that work for prisoners is in all circumstances evil is a survival from the days when the object of the sentence was to extirpate the criminal from society. Not until it is understood that work is a beneficial distraction for the prisoner will the right to work be recognized. The recognition of this right is an urgent social necessity.⁶⁷

However, prison labour is exempted from the definition, only provided that it is 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

⁶⁶ Report ILO 2001, *supra* note 34, para. 111.

⁶⁷ *Ibid.*

individuals, companies or associations.”⁶⁸ Thus, obligatory labour imposed as a consequence of a conviction is exempted from the prohibition of article 1(1) if certain conditions are met: first, the labour is the consequence of a conviction in a court of law, second, the labour must be supervised and controlled by public authorities and third, the labourer must not be hired or placed at the disposal of private employers. The Committee of Experts considers that the two last conditions are cumulative and apply independently.⁶⁹ Thus, if the prisoner is under the supervision and control of a public authority, this does not in itself exempt the government from fulfilling the second condition, namely that the person is not hired or placed at the disposal of private employers.⁷⁰

a) Conviction in a Court of Law

In order for prison labour to be excluded from the scope of the Convention, it must be required “as a consequence of a conviction in a court of law.”⁷¹ Any work that is required by administrative authorities or other non-judicial authorities is not compatible with the Convention.⁷² The goal of this requirement is to allow forced labour of prisoners only when the procedural guarantees such as the presumption of innocence, equality before the law, impartiality and independence of the tribunals, etc. are respected.⁷³

⁶⁸ Convention No. 29, *supra* note 14, article 2(2)(c).

⁶⁹ Report ILO 2001, *supra* note 34, para. 119.

⁷⁰ *Ibid.*

⁷¹ Convention No. 29, *supra* note 14, article 2(2)(c).

⁷² ILO, *Abolition of Forced Labour: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, Report III (4B), ILC, 65th Sess. (1979), para. 94.

⁷³ *Ibid.*

Furthermore, the requirement of a conviction also implies that non-sentenced prisoners may not be forced to work.⁷⁴

b) Supervision and Control by Public Authority

Article 2(2)(c) of the Convention provides that prison labour must be carried out under the supervision and control of a public authority. Thus, prison labour that is performed in prisons operated by a public authority and under the sole control and supervision of the public authority without any link with private entities is excluded from the scope of the Convention.⁷⁵ In these circumstances, prisoners may be compelled to work and there is no requirement for them to be paid.⁷⁶ The problem of consent arises as soon as one of the functions of the prison is exercised by private entities. In the 1998 “General report of the Committee of Experts on the Application of Conventions and Recommendations”, the Committee of Experts did not establish a clear criterion regarding the requirement of supervision and control by public authority.⁷⁷ The Committee of Experts states that “no general prescription may be laid down which will cover all the possible arrangements for this.”⁷⁸ However, the Committee of Experts considers 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.”⁷⁹

⁷⁴ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6.

⁷⁵ Report ILO 2001, *supra* note 34, para. 113.

⁷⁶ *Ibid.*

⁷⁷ Report ILO 1998, *supra* note 28.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

*c) Conditions for Private Employment of Prisoners**(i) Prison Labour for Private Entities*

Prison labour is linked with private entities in various circumstances. First, prisoners can work for private employers as part of education or training to acquire qualifications.⁸⁰ Second, prisoners may work within the prison to produce goods, which are sold to private entities in the open market.⁸¹ Third, prisoners may work for a private entity outside prison as part of a pre-release scheme.⁸² Fourth, prisoners may work in prisons run by private entities. Finally, there can also be a combination of these arrangements with private entities.⁸³

(ii) Meaning of the Terms “Hired or Placed at the Disposal Of”

There has been a lot of discussion and controversy concerning the scope of the terms “hired or placed at the disposal of”. Some have argued that prisoners can be considered to be “hired or placed at the disposal” of private entities only in cases where they are employed by the private corporation and that “prisoners should not be considered to be placed at the disposal of private companies where the companies did not have absolute discretion over the type of work that they could request the prisoner to do, but were limited by the rules set by the public authority.”⁸⁴ According to the Committee of Experts, however, “such situations are not removed from the normal scope of the term “hired to.””⁸⁵

⁸⁰ Report ILO 2001, *supra* note 34, para. 116.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para. 88

⁸⁵ *Ibid.*, para. 122.

Furthermore, several employer members have argued that “contractual arrangements were not comparable to what would normally be regarded as a hiring arrangement in cases where it was not the private company which was paying the public authority as providers of the prisoners’ services.”⁸⁶ While the Committee of Experts agrees that the term “hired to” does not refer to cases where the private company is subsidized by the state, this situation is covered by the term “placed at the disposal” of private entities. Thus, article 2(2)(c) of the *Forced Labour Convention No. 29* prohibits forced labour of prisoners for private contractors whether the contractor pays the state or the state subsidizes the contractor.⁸⁷

(iii) Role of Private Profit or Benefit

Although the Convention does not refer to “profit”, article 4 of the Convention prohibits the authorities from imposing or permitting the imposition of forced or compulsory labour “for the benefit” of private individuals, companies or associations. The Committee of Experts notes that the “purported absence of profit results from an agreement between the government and each private prison operator, requiring the operator to ensure that all income from prison industries be isolated within the overall income of the operator, and that any profit from the industries be reinvested in the industry or spent in such other manner as approved by the government.”⁸⁸

⁸⁶ *Ibid.*, para. 88.

⁸⁷ *Ibid.*, para. 123.

⁸⁸ *Ibid.*, para. 124.

3. Voluntariness

The Committee of Experts recognizes that voluntary prison labour is possible. Thus, the question of the legality of prison labour for private enterprises does not arise in the case where prisoners are given a genuine option to choose to work or not.

However, in order to demonstrate the ‘voluntariness’, two conditions must be met. First, the formal consent of the prisoner concerned is an important criterion. Second, the work conditions and circumstances must approximate a free employment relationship.⁸⁹ It must be noted that these questions of free consent and conditions approximating a free relationship are only relevant when private entities are involved in the prison labour.

a) Free Consent to Work

Due to their captive circumstances, it is difficult to determine whether prisoners have offered free consent to work. “Prison labour is captive labour in the full sense of the term, namely, it has no access in law and in practice to employment other than under the conditions set unilaterally by the prison administration.”⁹⁰ Nevertheless, if there are detrimental consequences because of the failure to undertake work, the work is not considered voluntary. “The option to perform work must be a true option and not one in which the alternative to the provision of work is a detriment.”⁹¹

The detriments can include loss of rights, advantages or privileges or aggravation of detention conditions. If employment activities are taken into account in determining a

⁸⁹ *Ibid.*, para. 132.

⁹⁰ *Ibid.*, para. 130.

⁹¹ *Ibid.*, para. 129.

prisoner's good behaviour, which is a criterion for reduction of sentence, the work performed by the prisoners is considered "work or service exacted under the menace of ... penalty" within the meaning of *Forced Labour Convention No. 29*.

b) Conditions that "Approximate a Free Relationship"

The Committee of Experts has also pointed out that a necessary part of consent is that there must be further guarantees and safeguards covering the essential elements of a free labour relationship.⁹² This is "the most reliable and overt indicator of voluntariness."⁹³ Employer members have often argued that the fact that prisoners received lower wages than ordinary workers could be explained because "private employers who hired prisoners faced increased costs and considerable risks" and that "in practice, it was often difficult to find enterprises willing to employ prisoners."⁹⁴ For example, if the wages are comparable to those for the similar work in a free employment relationship, this is one indicator that the work is voluntary. Other indicators are whether prisoners have an employment contract, and whether they are protected by labour and social security laws. If this is not the case, it will be difficult to consider that the conditions are comparable to a free employment relationship.

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

The Abolition of Forced Labour Convention, 1957 (No. 105) does not revise the *Forced Labour Convention, 1930 (No. 29)*, but in fact supplements it.⁹⁵ While the *Forced*

⁹² Report ILO 1998, *supra* note 28, para. 125.

⁹³ Report ILO 2001, *supra* note 34, para. 132.

⁹⁴ *Ibid.*, para. 94.

⁹⁵ Report ILO Stopping Forced Labour, *supra* note 59.

Labour Convention No. 29 prescribes the suppression of the use of forced or compulsory labour “within the shortest period possible”⁹⁶, the *Abolition of Forced Labour Convention No. 105* calls for the “complete and immediate abolition” of any form of forced labour:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination.⁹⁷

III. Regional Standards

a. European Instruments

At the regional level, the 1950 *European Convention on Human Rights* also prohibits forced labour. Article 4(2) provides that “no one shall be required to perform forced or compulsory labour.”⁹⁸ Article 4(2)(a) excludes from the definition of forced labour “any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention.”⁹⁹ The Convention does not define what is meant by forced or compulsory labour, and “no guidance on this point is to be found in the various Council of Europe documents relating to the preparatory work of the European Convention.”¹⁰⁰

⁹⁶ Convention No. 29, *supra* note 14, article 1.

⁹⁷ Convention No. 105, *supra* note 15, article 1.

⁹⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5, article 4.

⁹⁹ Article 5 of the European Convention guarantees the right to liberty and security of person. See *ibid.*, article 4 and 5.

¹⁰⁰ *Van der Musselle v. Belgium* (1983), Eur. Ct. H.R. (Ser. A) 13, 6 EHRR 163.

The European Court of Human Rights has referred to the definition from article 2(1) of ILO *Forced Labour Convention No. 29*.¹⁰¹

Furthermore, the *European Prison Rules*, although they are a non-binding instrument, are an important tool for interpretation by international and national courts. They follow the *United Nations Standard Minimum Rules*, but also provide additional protection. Rule 71(1) provides that prisoners under sentence may be required to work.¹⁰² Rule 72(2), however, provides that the interests of the prisoners and their treatment must not be subordinated to the pursuit of financial profit from industries.¹⁰³ Finally, the *European Social Charter* provides at article 1(2) that the Contracting Parties undertake “to protect effectively the right of the worker to earn his living in an occupation freely entered upon.”¹⁰⁴

b. American Instruments

The *American Convention on Human Rights* of 1969 contains similar provisions than those of the European Convention.¹⁰⁵ The most important difference is that the American Convention, using the wording of the ILO *Forced Labour Convention No. 29*, provides that work or service required of a person imprisoned in execution of a sentence must be carried out under the supervision and control of public authorities. Furthermore,

¹⁰¹ *Ibid.*

¹⁰² Council of Europe, *Recommendation No. R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules*, 12 February 1987, rule 71(2).

¹⁰³ *Ibid.*

¹⁰⁴ *European Social Charter*, 13 October 1961, 529 U.N.T.S. 89 (entered into force 26 February 1965).

¹⁰⁵ Nicolas Valticos, *International Labour Law* (Deventer: Kluwer, 1979).

“any persons performing such work or service shall not be placed at the disposal of any private party, company or judicial person.”¹⁰⁶

¹⁰⁶ *American Convention on Human Rights*, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978), article 6(3)(a).

CHAPTER 2: Case Study: The United States

I. Context

a. Prison Population

In the past twenty years, the prison population in the United States has quadrupled.¹⁰⁹ From approximately 500,000 in 1980 to over two million¹¹⁰ today, and having more than doubled since 1996,¹¹¹ the number of people incarcerated has significantly increased. To compare, the United States has the highest percentage of people in prisons in the world (715 for 100,000 residents),¹¹² more than Russia (584 for 100,000 residents) and South Africa (402 for 100,000 residents).¹¹³ In 2003, one of every 140 American residents was incarcerated.¹¹⁴ The United States has approximately 5% of the world's population and 25% of the world's prison population.¹¹⁵ At this rate of imprisonment, one person out of every fifteen persons (6.6%) will serve time in a prison during their lifetime.¹¹⁶

¹⁰⁹ Chang and Thomkins, *supra* note 4 at 54.

¹¹⁰ The United States incarcerated 2,078,570 persons at midyear 2003. See Séverine Vatan, "Droit du travail au rabais pour les détenus" *Manière de Voir* N° 71 (October-November 2003) 72 at 74 and U.S., Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2003* (2004) at 1 [BJA, *Inmates in 2003*].

¹¹¹ William P. Quigley, "Prison Work, Wages and Catholic Social Thought: Justice Demands Decent Work For Decent Wages, Even For Prisoners" (2004) 44 Santa Clara L. Rev. 1159.

¹¹² BJA, *Inmates in 2003*, *supra* note 110 at 2.

¹¹³ The Sentencing Project, "New Prison Figures Demonstrate Need For Comprehensive Reform" (2004) online: The Sentencing Project <<http://www.sentencingproject.org>> [The Sentencing Project]. Other incarceration rates in some industrialized countries are 116 for 100,000 in Canada, 95 for 100,000 in France, 96 for 100,000 in Germany and 54 for 100,000 in Japan.

¹¹⁴ BJA, *Inmates in 2003*, *supra* note 110 at 2.

¹¹⁵ "Drug War", online: Madison, Wisconsin, Independent Media Center <<http://madison.indymedia.org/newswire/display/331/index.php>>.

¹¹⁶ U.S., Bureau of Justice Statistics, *Summary Findings: Criminal Offenders Statistics* (2001) at 1.

It has been often noted that crime rates have declined in the past ten years rather than increased.¹¹⁷ Research has shown that the increase of the incarceration rate from 1992 to 2001 (over 49%)¹¹⁸ is due to changes in policy and not to a rise in crime rates.¹¹⁹ Two factors have contributed to this increase. First, there is a significant increase in the number of prison admissions.¹²⁰ Second, prisoners serve much longer sentences.¹²¹ The policy changes that lead to the increase in the prison population include the “three strikes and you’re out” and “truth in sentencing” laws enacted by many states since 1993, and the harsher legislation against drug offenders.¹²² The “three strikes” legislation provides for mandatory lengthy imprisonment terms for persons who have been convicted again of certain crimes for which they have already had two prior convictions.¹²³ The “truth in sentencing” legislation, for its part, usually provides that inmates must serve all or most of their sentence.¹²⁴

Furthermore, studies show that the impact of the rise in incarceration rates is mostly on African Americans.¹²⁵ In 2003, 832,400 black people were in jail or prison, comprising nearly half of the total prison population,¹²⁶ while representing only 12% of the American population.¹²⁷ Moreover, 12% of black males in their twenties were

¹¹⁷ See The Sentencing Project, *supra* note 113.

¹¹⁸ *Ibid.*

¹¹⁹ See Jennifer C. Karberg and Allen J. Beck, “Trends in U.S. Correctional Populations: Findings from the Bureau of Justice Statistics”, presented at the National Committee on Community Corrections, Washington, D.C., April 16, 2004.

¹²⁰ The Sentencing Project, *supra* note 113.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ James Austin ““Three and You’re Out”: The Likely Consequences on the Courts, Prisons, and Crime in California and Washington State” (1994-1995) 14 St. Louis U. Pub. L. Rev. 239.

¹²⁴ *Ibid.*

¹²⁵ See The Sentencing Project, *supra* note 113.

¹²⁶ BJA, *Inmates in 2003*, *supra* note 110 at 11.

¹²⁷ Chang and Thompkins, *supra* note 4 at 47.

incarcerated.¹²⁸ Generally, black people are nine times more likely to have been incarcerated than white people.¹²⁹

b. Prison Labour and Private Entities

Prison labour for private entities, although common practice in other countries such as the United Kingdom, Australia and New Zealand, is the most frequent in the United States. Private sector programs have doubled in size since 1995.¹³⁰ Furthermore, private prisons exist in various countries, but “the United States leads in experimenting with this ‘new’ form of correctional management.”¹³¹ In addition, due to the very significant number of people incarcerated in the United States, prison labour for private entities concerns more people in the United States than any place else.

c. Incarceration and Unemployment

It has been argued that incarceration has lowered the United States unemployment rate.¹³² Western and Beckett argue that incarceration has short run and long run effects on unemployment.¹³³ First, “it lowers unemployment by institutionalizing many who would otherwise be unemployed.”¹³⁴ “Incarceration thus reduces the labor supply by removing able-bodied, working-age men from the workforce.”¹³⁵ Second, incarceration creates ‘hidden unemployment’. To be blunt, the larger the prison population, the lower the

¹²⁸ BJA, *Inmates in 2003*, *supra* note 110 at 11.

¹²⁹ *Ibid.* at 8.

¹³⁰ Rod Hay, “Prison Labour” (19 March 2000), online: Progressive Economists Network <<http://csf.colorado.edu/pen-l/2000l/msg02227.html>>.

¹³¹ Philip A. Ethridge and James W. Marquart, “Private Prisons in Texas: The New Penology For Profit” (1993) 10 Just. Q. 29.

¹³² Western and Beckett, *supra* note 12 at 1031.

¹³³ *Ibid.* at 1032.

¹³⁴ *Ibid.* at 1038.

¹³⁵ *Ibid.*

unemployment rate.¹³⁶ Thus, if one were to include the prison population in the incarceration rate, the employment performance in the United States would look weaker.¹³⁷

However, these authors argue that while incarceration lowers the unemployment rate in the short run, it increases unemployment in the long run.¹³⁸ Studies show that it is much more difficult for persons with a criminal record to find a job than those who do not have one.¹³⁹ Therefore, after release, ex-prisoners will have greater a chance of being unemployed,¹⁴⁰ thus increasing the unemployment rate. These authors so conclude that “high incarceration rates lower conventional unemployment statistics by hiding joblessness but create pressure for rising unemployment once inmates are released. Sustained low unemployment depends, in part, not just on a large stage intervention through incarceration but on a continuous increase in the magnitude of this intervention.”¹⁴¹

II. Historical Background

Prison labour for private entities has existed historically in the United States,¹⁴² since the beginning of the nineteenth century. In 1885, there were six systems of prison labour: the contract system, the piece-price system, the lease system, the state-account system, the state-use system and the public works and ways. Under the *contract system*,

¹³⁶ *Ibid.* at 1040.

¹³⁷ *Ibid.* at 1041.

¹³⁸ *Ibid.* at 1044.

¹³⁹ *Ibid.* at 1045.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* at 1053.

¹⁴² Ethridge and Marquart, *supra* note 131 at 32.

private entities furnished the material and supervised the prisoners inside the prison, but the prisoners were under the surveillance of the state.¹⁴³ This system was most common in the North and the East of the United States.¹⁴⁴ Under the *piece-price system*, private entities provided the material and paid the state for each piece made by the prisoners.¹⁴⁵ The most widely adopted system was the *lease system*. This system prevailed in the South of the United States,¹⁴⁶ where states, devastated economically by the civil war, decided to lease prison systems to make profit.¹⁴⁷ Under this system, inmate labour was sold to the highest bidder.¹⁴⁸ Private firms could then use the inmate labour for commercial purposes.¹⁴⁹ The system is similar to the contract system but, unlike the contract system, the private companies were also responsible for the custody and care of the prisoners.¹⁵⁰ Thus, the state had no role to play.¹⁵¹ Prisoners were left completely to the mercy of private firms and were often subject to abuse.¹⁵² Other systems of prison labour were the *state-account* and the *state-use* systems, where the state operated and managed the production of the goods.¹⁵³ Under the *state-account* system, the goods were sold on the open market, whereas under the *state-use* system the goods were only sold to

¹⁴³ Chang and Thompkins, *supra* note 4 at 54.

¹⁴⁴ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 5.

¹⁴⁵ Chang and Thompkins, *supra* note 4 at 54.

¹⁴⁶ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6.

¹⁴⁷ Ethridge and Marquart, *supra* note 131 at 33.

¹⁴⁸ Chang and Thompkins, *supra* note 4 at 54.

¹⁴⁹ White, *supra* note 19 at 127.

¹⁵⁰ Stephen P. Garvey, "Freeing Prisoners' Labor" (1998) 50 Stan. L. Rev. 345.

¹⁵¹ *Ibid.*

¹⁵² U.S., Federal Bureau of Prisons, John W. Roberts, "Work, Education, and Public Safety: A Brief History of Federal Prison Industries" in Federal Bureau of Prisons, *Factories with Fences: the History of Federal Prison Industries* (Washington, DC: Federal Prison Industries, Inc., 1996) 12.

¹⁵³ Chang and Thompkins, *supra* note 4 at 54.

state markets.¹⁵⁴ Finally, in the *public works* and *ways projects*, prison labour was used for the construction of roads, railways, and public buildings.¹⁵⁵

Opposition against prison labour, mostly from labour unions, has always existed.¹⁵⁶ By the late 1880s, however, labour organizations became stronger and started contesting more and more private sector involvement in the prison industry, arguing against the unfair competition of prison labour to ‘free’ workers.¹⁵⁷ Businesses were also opposed to the competition from low wage labour,¹⁵⁸ and prison reformers argued against the poor work conditions of the inmates.¹⁵⁹ The first real opposition against the prison industry came from New York Trades’ Union, which started a legislative campaign against prison-made goods.¹⁶⁰ Other northern states then followed. The 1870s and 1890s depressions in the United States put a definite end to the contract system, replacing it by the state-use system.¹⁶¹ A similar phenomenon appeared in the South of the United States, putting an end to the lease system in the 1920s.¹⁶² However, unlike in the North, where inmates worked inside the prisons for the state, in the South, prisoners worked on chain gangs and state farms.¹⁶³ “Chain convicts, mostly black, became a common sight along the southern roadways.”¹⁶⁴ Nevertheless, the chain gangs only lasted a short period of time. With the opposition against the abuses and with the depression, they disappeared

¹⁵⁴ Garvey, *supra* note 150 at 344.

¹⁵⁵ Chang and Thompson, *supra* note 4 at 54.

¹⁵⁶ Garvey, *supra* note 150 at 345.

¹⁵⁷ Daniel J. Gallagher and Mary E. Edwards, “Prison Industries and the Private Sector” (1997) 25:1 Atlantic Economic Journal 91.

¹⁵⁸ Quigley, *supra* note 111 at 1162.

¹⁵⁹ Pozen, *supra* note 26 at 257.

¹⁶⁰ Garvey, *supra* note 150 at 362.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* at 364.

¹⁶³ *Ibid.* at 365.

¹⁶⁴ *Ibid.*

in the 1940s.¹⁶⁵ Thus, by the beginning of the twenty-first century, prisons all over the United States started being managed by governments,¹⁶⁶ and laws were enacted, allowing prison-made goods to be sold only to state government agencies.¹⁶⁷

III. The Federal System

a. The Thirteenth Amendment

The Thirteenth Amendment states that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.” Thus, prisoners do not have the constitutional right to work or to refuse to work, and they can be punished if they refuse to work.¹⁶⁸ Furthermore, they may be forced to work even if the work has no rehabilitation objective.¹⁶⁹ Courts have systematically refused appeals from plaintiffs claiming that prison labour constitutes involuntary servitude in violation of the Thirteenth Amendment. In *Hale v. Arizona*, the Supreme Court stated that “convicted criminals do not have the right freely to sell labor and are not protected by the thirteenth amendment against involuntary servitude.”¹⁷⁰ Involuntary servitude has been defined as “an action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement.”¹⁷¹ Thus, in *Watson v. Graves*, the Court stated that “when the employee has a choice, even though it is a painful one, there is no involuntary

¹⁶⁵ *Ibid.* at 366.

¹⁶⁶ Pozen, *supra* note 26 at 257.

¹⁶⁷ Gallagher and Edwards, *supra* note 157 at 92.

¹⁶⁸ Richard L. Lippke, “Prison Labor: its control, facilitation, and terms” (1998) 17 Law & Phil. 533.

¹⁶⁹ Stephanie Evans, “Making More Effective Use of Our Prisons” (1999) Pepp. L. Rev. 535.

¹⁷⁰ *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

¹⁷¹ *Watson v. Graves*, 990 F.2d 1549 (5th Cir. 1990).

servitude.”¹⁷² For example, the Court judged that although “the choice of whether to work outside the jail for twenty dollars a day or remain inside the jail and earn nothing” may indeed be “painful”, the prisoners were not subject to involuntary servitude, because they were not forced to work or continue to work against their will.¹⁷³

b. The Eighth Amendment

The other amendment frequently invoked concerning prison labour is the Eighth Amendment. The Eighth Amendment provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” Thus, prison labour must not constitute cruel or unusual punishment in violation of this amendment. In *Toombs v. Hicks*, the Court held that the Eighth Amendment is violated if prisoners are knowingly compelled to do work which (1) causes undue pain, (2) endangers the prisoner's life or health or (3) exceeds the prisoner's physical capacity.¹⁷⁴ In general, forcing prisoners to work is not cruel or unusual punishment, provided that they are not deprived of human needs.¹⁷⁵

c. History and Federal Laws

As mentioned earlier, in the nineteenth century, it was common practice in the United States to force prisoners to work. The opposition against the prison industry began at the state level.¹⁷⁶ However, with the Great Depression, action was also taken at the federal level to eliminate prison labour for private entities. In 1929, Congress enacted the

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Toombs v. Hicks*, 773 F.2d 995 (8th Cir. 1985).

¹⁷⁵ Evans, *supra* note 169 at 533.

¹⁷⁶ Garvey, *supra* note 150 at 366.

Hawes-Cooper Act, which permitted states to ban the importation of prisoner-made goods from other states.¹⁷⁷ It later also enacted, in 1936, the *Walsh-Healy Act*.¹⁷⁸ This Act prohibits the use of convict labour by federal government contractors for contracts worth more than \$ 10,000.¹⁷⁹

Furthermore, the 1940 *Sumners-Ashurst Act* prohibited the transport of prison-made goods in interstate commerce and made it into a federal crime, independently from what is provided by state legislation.¹⁸⁰ The goal of Congress with the adoption of this Act was to eliminate the problem of unfair competition from prisoner-made goods.¹⁸¹ Nevertheless, the Act does not prevent the sale of prison-made goods between government entities,¹⁸² and it does not cover services by prisoners. Thus, in practice, a number of prisoners perform work such as “data entry, telemarketing, and telephone reservation and reception work for private companies.”¹⁸³

Thus, from 1940 to 1979, the use of convict labour was limited to goods sold to the federal government for less than U.S. \$ 10,000, to goods sold to state governments and to non-profit organizations.¹⁸⁴ Only the public authorities could use prison labour. However, in the late 1970s, with the dramatic rise of the prison population and the costs of incarceration, there was a renewed interest in prison labour in order to lower the

¹⁷⁷ Gallagher and Edwards, *supra* note 157 at 92.

¹⁷⁸ *Ibid.*

¹⁷⁹ 41 USCS § 35 (2004).

¹⁸⁰ Garvey, *supra* note 150 at 367.

¹⁸¹ Matthew J. Lang, “The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers” 5 U. Pa. J. Lab. & Emp. L. 196.

¹⁸² Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6.

¹⁸³ *Ibid.* at 11.

¹⁸⁴ Brain Hauck, “Prison Labor” (2000) 37 Harv. J. on Legis. 282.

expenses. Consequently, in 1979, Congress adopted the *Justice Improvement Act*, which authorized seven states to sell prisoner-made goods in interstate commerce.¹⁸⁵ In 1984, Congress enacted the *Comprehensive Crime Control Act*, which increased the number of authorized projects to twenty.¹⁸⁶ Finally, the *Crime Control Act* of 1990 increased the number from twenty to fifty jurisdictions.¹⁸⁷ Thus, today, federal law allows the private sector to become involved in prison industries. First, prisoner-made goods can be sold in the interstate market.¹⁸⁸ Second, private sector businesses are involved within prisons, and they can sell the products in the interstate commerce.¹⁸⁹ Finally, the Prison Industries Enhancement Certification Program also permits the certified departments to sell prison-made goods to the Federal government for amounts that exceed U.S. \$ 10,000.¹⁹⁰

d. Types of Work in Prison

At the federal level, there are four general types of work. First, prisoners are engaged in prison maintenance such as janitorial service, laundry, food preparation or medical service.¹⁹¹ The private sector is involved in this type of work in the case of privately run federal prisons.¹⁹² The second type of work includes agricultural activities and public works projects such as repairing roads and planting trees.¹⁹³ These two types of work are non-industrial work. The third type is industrial work, where the prison

¹⁸⁵ Ira P. Robbins, "The Legal Dimensions of Private Incarceration" (1988-1989) 38 Am. U. L. Rev. 610 [Robbins, "The Legal Dimensions of Private Incarceration"].

¹⁸⁶ Gallagher and Edwards, *supra* note 157 at 92.

¹⁸⁷ *Ibid.* at 93.

¹⁸⁸ See 18 USCS § 1761 (2004) and *ibid.* at 92.

¹⁸⁹ *Ibid.* at 93.

¹⁹⁰ U.S., Bureau of Justice Assistance, *Bureau of Justice Assistance Fact Sheet: Prison Industry Enhancement Certification Program* (1995) [BJA Fact Sheet: PIECP].

¹⁹¹ Chang and Thompkins, *supra* note 4 at 56.

¹⁹² Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 7.

¹⁹³ *Ibid.*

industry employs prisoners for profitable production and services.¹⁹⁴ Finally, the fourth type is work-release programmes, where inmates work outside the prison during the day and return to the prison at night.¹⁹⁵

e. Systems of Prison Industries

There are four systems of prison industries: the federal prison industry, the state prison industry, the Prison Industries Enhancement Certification Program, and the prison industry operated by private prisons.¹⁹⁶

i. The Federal Prison Industry

The largest government industry is the Federal Prison Industries Inc. (FPI), which was established by Congress in 1934.¹⁹⁷ Its trade name is UNICOR. FPI may not sell its products to the public, but only to “governmental agencies, public organizations, tax-supported entities, or markets in other countries.”¹⁹⁸ In 2000, it employed 22,000 prisoners and generated U.S. \$ 17 million in profit.¹⁹⁹ Prisoners who work for the FPI are paid between U.S. \$ 1.73 and U.S. \$ 8.63 for a day of seven hours and a half.²⁰⁰ Inmates work in textile, furniture, electronics, metals, graphics and services.²⁰¹

¹⁹⁴ Chang and Thompkins, *supra* note 4 at 56.

¹⁹⁵ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 7.

¹⁹⁶ Chang and Thompkins, *supra* note 4 at 55.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* at 56.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

FPI is completely owned by the United States government. It operates factories and employs inmates in Federal prisons.²⁰² Legislation provides that FPI may not sell its goods and services “to the public in competition with private enterprise.”²⁰³ Furthermore, it must “provide employment for the greatest number of those inmates in the United States penal and correctional institutions who are eligible to work as is reasonably possible, diversify, so far as practicable, prison industrial operations and so operate the prison shops that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor.”²⁰⁴

ii. The State Prison Industry

Since 1995, the inmate population in state prisons has increased of 24% and twelve states increased their prison populations by over 50%.²⁰⁵ In 1999, state prison industries employed 56,000 prisoners and generated U.S. \$ 67 million in profit.²⁰⁶ Inmates were paid between \$ 2.26 and \$ 6.52 for a seven-hour day.²⁰⁷

Every state prison operates its own prison industry.²⁰⁸ The largest state prison industries are the Texas Correctional Industries (164,222 inmates in 2003) and the California Correction Industry (163,361 inmates in 2003).²⁰⁹ Texas Correctional Industries was established in 1963 with the passage of *Senate Bill 338*, which authorized

²⁰² Roberts, *supra* note 152 at 10.

²⁰³ 18 U.S.C. § 4122(a) (1982).

²⁰⁴ 18 U.S.C. § 4122(b)(1) (1982).

²⁰⁵ BJS, *Prisoners in 2002*, *supra* note 10 at 4.

²⁰⁶ Chang and Thompkins, *supra* note 4 at 58.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ BJS, *Inmates in 2003*, *supra* note 1 at 1.

“to sell prison-made goods to all tax supported agencies and political subdivisions.”²¹⁰ Its factories produce “mattresses, shoes, garments, brooms, license plates, printed matter, detergents, furniture, textile and steel products.”²¹¹ In 2000, it generated U.S. \$ 350,000 in profit.²¹²

The prison system in California has changed drastically in the past twenty years. Between 1980 and 1995, the prison population increased by 500%.²¹³ In 1995, California spent more than 10% of its budget on the state’s correctional system, and one person out of 250 was in prison in California.²¹⁴ The Prison Industry Authority (PIA), which is a state-operated organization, provides work for inmates in California’s adult correctional institutions.²¹⁵ It operates over sixty services, manufacturing, and agricultural industries at twenty-two prisons throughout California for approximately 6,000 inmates.²¹⁶ Other large state prison industries are the Florida prison industry (80,352 inmates in 2003) and the New York Prison Industry (65,914 inmates in 2003).²¹⁷ In Florida, prisoners work on farms and gardens, construct new correctional facilities, perform repairs and renovations to facilities, and maintain the ongoing operation of correctional institutions.²¹⁸

²¹⁰ U.S., Texas Correctional Industries, *About Texas Correctional Industries*, online: Texas Correctional Industries: <<http://www.tci.tdcj.state.tx.us/about.htm>>.

²¹¹ *Ibid.*

²¹² Chang and Thompkins, *supra* note 4 at 58.

²¹³ Lisa C. Phelan, “Making Prisons Work” (1996-1997) 30 Loy. L. A. Rev. 1760.

²¹⁴ *Ibid.*

²¹⁵ U.S., California Department of Corrections, *Prison Industry Authority Mission*, online: Prison Industry Authority <http://www.pia.ca.gov/piawebdev/pia_iep/iep_3.html>.

²¹⁶ *Ibid.*

²¹⁷ BJA, *Inmates in 2003*, *supra* note 1 at 1.

²¹⁸ U.S., Florida Department of Corrections, *Florida Corrections: Centuries of Progress*, online: Florida Department of Corrections <<http://www.dc.state.fl.us/oth/myths.htm>>.

iii. The Prison Industries Enhancement Certification Program

With the Prison Industries Enhancement Certification Program (P.I.E.C.P.), state prison systems can contract with private firms if they are authorized by state legislation, and if they are certified by the Department of Justice's Bureau of Justice Assistance (BJA). According to the Department of Justice, "the PIE Certification Program was created ... to establish business opportunities for prisoners that approximate private sector work opportunities. The program is designed to place inmates in a realistic environment, pay them the local prevailing wage for similar work, and enable them to acquire marketable skills to increase their potential for successful rehabilitation and meaningful employment upon release."²¹⁹ A total of 50 jurisdictions may be certified under the P.I.E.C.P. As of March 2004, 38 jurisdictions were certified.²²⁰

In order to be certified by the BJA, each program must demonstrate that it meets the list of criteria. The corrections department that apply the P.I.E.C.P. must pay wages "at a rate not less than that paid for work of a similar nature in the locality in which the work is performed",²²¹ provide inmate workers with "worker benefits, including workers' compensation or its equivalent",²²² "involve the private sector in the production and sale

²¹⁹ *BJA Fact Sheet: PIECP*, *supra* note 190.

²²⁰ See U.S., Bureau of Justice Assistance, Richard R. Nedelkoff, *Prison Industry Enhancement Certification Program*, (2002), online: Bureau of Justice Assistance <<http://www.ncjrs.org/html/bja/piecp/>>. The following 38 jurisdictions have been certified under the P.I.E.C.P.: Alaska; Arizona; California; Colorado; Connecticut; Florida; Hawaii; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Maryland; Minnesota; Mississippi (*inactive*); Missouri (*inactive*); Montana (*inactive*); Nebraska; Belknap County, New Hampshire; Stafford County, New Hampshire; New Mexico (*inactive*); North Carolina; North Dakota; Ohio (*inactive*); Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas Private Sector Prison Industries Oversight Authority (TXPSPIOA); Utah; Utah County, Utah; Vermont; Virginia; Washington State; the Washington State Jail Industries Board (*inactive*); Wisconsin and Wyoming, see *PIE Certification Program*, online: National Correctional Industries Association <<http://www.nationalcia.org/pieprog2.html>>.

²²¹ *Ibid.*

²²² *Ibid.*

of prisoner-made goods”,²²³ and give written assurances that inmate participation is voluntary. The deductions from inmate worker wages include taxes, room and board, family support, and victims’ compensation. Deductions cannot be greater than 80% of the wages.²²⁴ The inmate workers must contribute between 5 and 20 % of their wages to victims’ compensation deductions.²²⁵

In average, prisoners working in the P.I.E.C.P. are paid between U.S. \$ 27.04 and U.S. \$ 43.23 for a day of approximately seven hours.²²⁶ Most of them work for “manufacturing apparel, metal, electronic equipment, furniture, and wood products” or for providing business and automobile services.²²⁷ In practice, few prisoners are employed in the P.I.E.C.P. On March 31st 1999, the number of inmates employed in this program was 2,770.²²⁸

Prisoners working in PIE industries produce a wide variety of goods, including micrographics, textiles, children’s clothing, toys, hotel amenities, waterbed, restored antique autos, fishing lures, golf balls, and snowshoes ... prisoners at the Arizona Center for Women take reservations for Best Western. Washington inmates package software for Microsoft, and South Carolina inmates sew graduation gowns for Jostens. Perhaps best known are the inmates at the Eastern Oregon Correctional Institute, who make “Prison Blues”, designer jeans “made on the inside to be worn on the outside”.²²⁹

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Chang and Thompkins, *supra* note 4 at 58.

²²⁷ *Ibid.* at 59.

²²⁸ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 13.

²²⁹ Garvey, *supra* note 150 at 372-373.

iv. Private Prisons

1. Historical Background

Finally, the last prison industry is the industry operated by private prisons. Private prisons can be defined as “prisons and other institutions of confinement ... operated and managed by private corporations for profit.”²³⁰ They are not a new phenomenon in the United States. In the nineteenth century, in the United States, states contracted out the operation of prisons to private entities, which could thus make profit by using the labour of the inmates.²³¹ However, workers began contesting the unfair competition made to ‘free’ labourers, and reformers argued against the bad conditions in privately run prisons.²³² Thus, by the beginning of the twentieth century, prisons began to be operated by governments, and private entities were no longer involved in the management of the prison industry.²³³ However, private prisons reappeared in the United States in the mid-1980s, when municipal and state governments contracted out with private companies to run local and state prisons.²³⁴

2. Recent Developments

Today, the United States has the largest number of private prisons in the world. On January 31st of 2001, they held 119,449 beds in 153 facilities in 33 different states.²³⁵ This corresponds to over 5% of the total American prison population. In recent years, the number of private prisons has increased significantly. From 1995 to 2000, the average

²³⁰ Pyle, *supra* note 11 at 166.

²³¹ Pozen, *supra* note 26 at 257.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.* at 258.

²³⁵ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 1-2.

daily number of prisoners held in private prisons rose 455%.²³⁶ Corrections Corporation of America (CCA) was the first private firm involved in the operation of prisons. It was created in Tennessee in 1983, and opened its first prison in Texas in 1984.²³⁷ It is currently the largest correctional corporation. It holds more than 50% of the United States market, and also operates at the international level.²³⁸ It also owns facilities in Puerto Rico, England, France and Australia.²³⁹

The second largest firm is Wackenhut Corrections Corporation (WCC) known as “The GEO Group Inc.” (GGI) since 2003. It also arose in the 1980s. In 2001, CCA held approximately 70,000 inmates, which is more than the number of inmates held in the largest state prisons and at the federal level.²⁴⁰ WCC, while it held 22,707 inmates in 1996, increased its capacity to approximately 40,000 inmates in 2001.²⁴¹ Another important actor in the market is Group 4. It increased its total capacity from 2,360 inmates in 1996 to over 5,000 inmates in 2001.²⁴² Thus, the capacity of its facilities has more than doubled in four years. Other smaller firms also operate throughout the United States.

²³⁶ U.S., Bureau of Justice Statistics, James J. Stephan and Jennifer C. Karberg, *Census of State and Federal Correctional Facilities, 2000*, Bureau of Justice Statistics (2003).

²³⁷ Douglas C. MacDonald, “Public Imprisonment By Private Means: the Reemergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia” (1994) 34 *Brit. J. Crimin.* 30.

²³⁸ Chang and Thompson, *supra* note 4 at 50.

²³⁹ *Ibid.*

²⁴⁰ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 25.

²⁴¹ *Ibid.*

²⁴² *Ibid.* at 26.

f. Conditions of Work

i. Application of the *Fair Labour Standards Act*

1. Meaning of “Employee”

The *Fair Labor Standards Act* (FLSA) requires that employers pay their employees the minimum wage. The first question raised in order for the FLSA to be applied to prison labourers is whether they can be considered “employees” within the meaning of the Act. “Employee” is defined as “any individual employed by an employer.”²⁴³ The FLSA does not provide any exception for inmate workers.²⁴⁴ Furthermore, Congress has never specifically exempted prison labourers from coverage.²⁴⁵ In recent years, there have been several attempts to exclude prisoners from the FLSA’s coverage, but they have been unsuccessful.²⁴⁶ It is thus unclear whether or not Congress intended to extend FLSA coverage to prisoner workers.²⁴⁷ Some argue that since there is no specific exemption regarding prisoners, they should be included in the FLSA coverage.²⁴⁸ Nevertheless, courts have generally concluded that neither the plain meaning of the word “employee”, nor its context in the FLSA determines whether prisoners are “employees” within the meaning of the FLSA.²⁴⁹ Courts have therefore examined the purposes of the FLSA.

2. Purposes of the FLSA

The primary concern of the FLSA is to eliminate substandard labour conditions. Congress wanted to maintain a “minimum standard of living necessary for health,

²⁴³ *Fair Labor Standards Act*, 29 U.S.C. § 203 (e)(1) (2004).

²⁴⁴ *Ibid.*, 29 U.S.C. § 203 (e)(2)(c).

²⁴⁵ Lang, *supra* note 181 at 192

²⁴⁶ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 11.

²⁴⁷ Alexander B. Wellen, “Prisoners and the FLSA: Can the American Taxpayer Afford Extending Inmates the Federal Minimum Wage?” (1994) 67 Temple L. Rev. 295.

²⁴⁸ Lang, *supra* note 181 at 192.

²⁴⁹ Wellen, *supra* note 247 at 298.

efficiency, and general well being for workers.”²⁵⁰ Some courts have argued that since prisons provide clothing, shelter and food for prisoners, they are not entitled to the minimum wage protection of the FLSA.²⁵¹

Another goal of the FLSA is to eliminate the unfair methods of competition in commerce.²⁵² In enacting the FLSA, Congress recognized that “the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers ... (3) constitutes an unfair method of competition in commerce.”²⁵³ However, it has often been argued that the primary goal of prison labour is not profit and the prison industry has a “de minimis effect ... on the general employment market.”²⁵⁴

3. The Economic Reality Analyses

Most courts have determined that “for purposes of FLSA, determination of employee status focuses on economic reality and economic dependence.”²⁵⁵ Before 1983, in order to determine the economic reality of the working relationship, courts considered three factors: 1) whether the labour was performed inside or outside the prison; 2) whether the work was compelled or voluntary, and 3) whether the inmate’s employer was the state or a private company.²⁵⁶ Some courts have determined that the FLSA applied

²⁵⁰ *Fair Labor Standards Act*, 29 U.S.C. § 202(a) (2004).

²⁵¹ See *Hale v. Arizona*, *supra* note 170.

²⁵² *Fair Labor Standards Act*, 29 U.S.C. § 202 (2004).

²⁵³ *Ibid.*

²⁵⁴ *Lang*, *supra* note 181 at 196.

²⁵⁵ *Watson v. Graves*, *supra* note 171.

²⁵⁶ *Wellen*, *supra* note 247 at 308-309.

only to prisoners working outside the prison, but not to prisoners working inside the prison. In *Alexander v. Sara, Inc.*, the plaintiff inmates, who performed work for a profit-making private entity on prison grounds, filed a lawsuit under the FLSA. The Court held that “there was no employer-employee relationship, because the inmates’ labor belonged to the penitentiary, which was the sole party to the contract with [the inmate].”²⁵⁷

After 1983, some courts began applying different tests for determining the economic reality of the working relationship.²⁵⁸ In *Bonnette v. California Health & Welfare Agency*,²⁵⁹ the Court created a new test to determine the existence of an employer-employee relationship under the FLSA. The factors that are considered are whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.²⁶⁰ Some courts then began applying the *Bonnette* factors to prison labour situations.²⁶¹ *Watson v. Graves* was the first case in which a court granted “employee” status to prisoners under the FLSA.²⁶² In this case, the inmates worked voluntarily for a private company outside the prison. Using the *Bonnette* factors, the Court found that the company “supervised and controlled employee work schedules or conditions of work”, had de facto power to hire and fire the employees, and determined the rate and method of employment.²⁶³

²⁵⁷ *Alexander v. Sara, Inc.*, 721 F.2d 149 (5th Cir. 1983).

²⁵⁸ Lang, *supra* note 181 at 199.

²⁵⁹ *Bonnette v. California Health & Welfare Agency*, 525 F. Supp. 128 (N. D. Cal. 1981).

²⁶⁰ *Ibid.*

²⁶¹ Lang, *supra* note 181 at 200.

²⁶² *Ibid.*

²⁶³ *Watson v. Graves*, *supra* note 171 at 18.

In *Hale v. Arizona*, the inmates were forced to work for a private employer inside the prisons.²⁶⁴ Still relying *Bonnette*, the Court recognized the existence of an employment relationship, and held that the inmates were entitled to the federal minimum wage.²⁶⁵ However, one year later, the Court reheard the case and issued a new opinion.²⁶⁶ In the new decision, the Court held that the *Bonnette* factors “are not a useful framework in the case of prisoners who work for a prison-structured program because they have to”, and cited the *Vanskike v. Peters*²⁶⁷ case, where the Court concluded that “the *Bonnette* factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation.”²⁶⁸ The Supreme Court confirmed this in *Danneskjold v. Hausrath*:

We agree with, and adopt, the reasoning of Vanskike that forced prison labor for the prison is not subject to the FLSA. The relationship is not one of employment; prisoners are taken out of the national economy; prison work is often designed to train and rehabilitate; prisoners' living standards are determined by what the prison provides; and most such labor does not compete with private employers.²⁶⁹

After the second *Hale* decision, when dealing with a case of prison labour inside prison walls, courts have generally concluded that the prisoners were not entitled to minimum wage under the FLSA.²⁷⁰ In the 1996 *Danneskjold v. Hausrath* case, the *Bonnette* test was held inapplicable whether the prison work is forced or voluntary and

²⁶⁴ *Hale v. Arizona*, *supra* note 170.

²⁶⁵ *Ibid.*

²⁶⁶ *Lang*, *supra* note 181 at 203.

²⁶⁷ *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).

²⁶⁸ *Hale v. Arizona*, *supra* note 171.

²⁶⁹ *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996).

²⁷⁰ *Lang*, *supra* note 181 at 204.

whether a private contractor is used or not.²⁷¹ However, the Court held that “prison labour is not in all circumstances exempt from the FLSA and that an economic reality test is to be used in determining whether payment of FLSA wages is required.”²⁷²

Prison labor that produces goods or services for institutional needs of the prison, whether voluntary or involuntary, inside or outside the institution, or in connection with a private employer, is not an employment relationship within the meaning of the FLSA. Where a prisoner’s work for a private employer in the local or national economy would tend to undermine the FLSA wage scale, as in *Watson*, the FLSA applies. Intermediate cases will be resolved as they arise.²⁷³

Thus, in the absence of much guidance from Congress or the Supreme Court, courts have determined the economic reality analysis on a “case-by-case basis.”²⁷⁴

ii. Other Labour Rights

In *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, a prisoners’ labour union claimed a violation of its First Amendment and equal protection rights because of North Carolina regulations that prohibited prisoners from union meetings and from soliciting other prisoners to join the union.²⁷⁵ The Court held that the regulations did not violate the First Amendment.²⁷⁶

The most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects.

The concept of incarceration itself entails a restriction on the freedom of inmates

²⁷¹ *Danneskjold v. Hausrath*, *supra* note 269.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Wellen*, *supra* note 247 at 309.

²⁷⁵ *Jones v. North Carolina Prisoners’ Labor Union Inc.*, 433 U.S. 119 (1977).

²⁷⁶ *Ibid.*

to associate with those outside the penal institution. Equally as obvious, the inmate's status as a prisoner and the operational realities of a prison dictate restrictions on the associational rights among inmates.²⁷⁷

IV. Importation of Prison-Made Goods

a. Article XX (e) of General Agreement on Tariffs and Trade (GATT)

The problem of competition against goods made by prison labour was one of the earliest issues of unfair trade. The question arose for the first time at the International Commission on Labour Legislation in 1919.²⁷⁸ The United States proposed to incorporate an article into the Peace Treaty to prohibit any good from being shipped or delivered in international commerce if it was produced using prison labour.²⁷⁹ The proposal was refused. The question of the exportation of prison-made goods was also discussed in 1927, at a League of Nations conference, which agreed to exempt import prohibitions applying to prison-made goods.²⁸⁰

Later, this exemption was included in Article XX (e) of the *General Agreement on Tariffs and Trade* (GATT) in 1947. Article XX (e) of the GATT provides that

[S]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent

²⁷⁷ *Ibid.*

²⁷⁸ Steve Charnovitz, "The Influence of International Labour Standards on the World Trading Regime: A Historical Overview" (1987) 126 *International Labour Review* 565.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

the adoption or enforcement by any contracting party of measures: e) relating to the products of prison labor.²⁸¹

The inclusion of this article does not seem to have created dissention. Moreover, no member has ever contested its use.²⁸² While this provision allows import restrictions on prison-made goods, it does not establish a rule to prevent trade in such products.²⁸³

b. Section 1307 of the United States' Tariff Act of 1930

The first prohibition of imports of prison-made goods was established under section 51 of the *McKinley Tariff Act* of 1890.²⁸⁴ This law was expanded by section 1307 of the *Tariff Act of 1930*.²⁸⁵ According to section 1307,

[A]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labor or/and indentured labor, shall take effect on January 1, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined,

²⁸¹ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force January 1948), Article XX (e) [GATT].

²⁸² Patricia Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal For Addition to the World Trade Organization" (1996) 11 Am. U. J. Int'l L. & Pol'y 18.

²⁸³ W. A. Dymond, "Core Labour Standards and the World Trade Organization Labour's Love Lost" Canadian Foreign Policy ISSN 1192-6422 Vol. 8, No. 3 (2001), online: University of Toronto <<http://chass.utoronto.ca/clea/confpapers/WDymond.pdf>>.

²⁸⁴ Donna L. Bade, "Human Rights, Corporate Responsibility, and Economic Sanctions" (2000) 8 Tulsa J. Comp. & Int'l L. 6.

²⁸⁵ *Ibid.*

produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.²⁸⁶

The regulations prohibit the import of goods made by three categories of labour:²⁸⁷ convict, forced or indentured labour under penal sanctions. Section 1307 only defines forced labour as “all work or service which is exacted from any person under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily.”²⁸⁸ The other categories of prison labour are not defined by the statute.

Furthermore, it is interesting to note that the statute provides that any good, “wholly or in part mined, produced, or manufactured” using prison labour, is prohibited.²⁸⁹ Thus, if the product is not manufactured using prison labour, but, for example, if the raw material is derived with the use of this labour, it is still prohibited.²⁹⁰

The reason for the drafting of this statute was economical.²⁹¹ It contains a “consumptive demands” exemption.²⁹² Thus, if the goods are necessary to the United States demand, either because they are not manufactured within the United States or because the domestic production is insufficient, they can be nevertheless be imported.²⁹³ In the 1994 *China Diesel Imports v. United States*, there was a discussion on whether the

²⁸⁶ *Tariff Act*, 19 U.S.C. §1307 (1930).

²⁸⁷ *Bade*, *supra* note 284 at 7.

²⁸⁸ *Tariff Act*, 19 U.S.C. §1307 (1930).

²⁸⁹ *Bade*, *supra* note 284 at 7.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.* at 8.

²⁹² *Ibid.*

²⁹³ *Ibid.*

“consumptive demands” exemption was to be applied to all three categories of prison labour.²⁹⁴ In this case, the product had been manufactured in Chinese prisons. China Diesel Imports argued that the product was exempted from the importation prohibition of section 1307, based on the fact that it had been manufactured using convict labour. The United States Court of International Trade, however, judged that the exemption only applied to products manufactured using forced or indentured labour, but not to products manufactured using convict labour.

VI. Different State Models

As mentioned earlier, the federal legislation allows states to implement private sector prison industries. However, not all states have implemented them.²⁹⁵ Therefore, the legislation regarding private sector involvement in prison labour varies considerably from one state to another.²⁹⁶ In some states, inmates are required to work, while in others, labour for private entities is voluntary.²⁹⁷ Furthermore, inmates’ wages vary greatly. In some states, they are as low as U.S. \$ 0.14 an hour, while in Utah, for example, they are of \$ 8 an hour, which corresponds to the market rate.²⁹⁸ This last case is however very rare.

There are three different models of joint ventures under which the P.I.E.C.P. operates: the employer model, the customer model and the manpower model. The most

²⁹⁴ *China Diesel Imports v. United States*, 870 F. Supp. 347 (C.I.T. 7 December 1994).

²⁹⁵ Gallagher and Edwards, *supra* note 157 at 94.

²⁹⁶ Robbins, “The Legal Dimensions of Private Incarceration”, *supra* note 185 at 610.

²⁹⁷ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 10.

²⁹⁸ International Confederation of Free Trade Unions, “Internationally-Recognized Core Labour Standards in the United States: Report for the WTO General Council Review of the Trade Policies of the United States” (16 January 2004), online: ICFTU <<http://www.icftu.org/www/pdf/usclsreport2004.pdf>>.

common model (62%) is the employer model, where the state prisons provide the space and the inmates, and the corporations employ, supervise and train the inmates.²⁹⁹ In the customer model, the corporation contracts with the prison to provide a product at a certain price. In this model, it is the prison that employs, supervises and trains the inmates.³⁰⁰ Finally, in the manpower model, the company employs the inmates, but they are supervised and trained by the prison.³⁰¹ In California, inmates work in the customer or joint venture model.³⁰² In Washington State, inmates work in the employer and customer model of private sector involvement.³⁰³ In South Carolina, prisoners work in the manpower model.³⁰⁴ Florida, however, is characterized by a system of privatized administration of correctional work programmes.³⁰⁵

a. California

i. Context

Historically, California has been one of the most 'social' states of the United States, known as the world leader in education and public health.³⁰⁶ However, in the past two decades, a new trend has changed the situation considerably. The budgets are now massively spent on repression and incarceration. In the early 1980s, the prison population was of 22,500,³⁰⁷ while it was of 200,000 in 1999.³⁰⁸ One of the explanations for this

²⁹⁹ Chang and Thompkins, *supra* note 4 at 59.

³⁰⁰ U.S., National Institute of Justice, George Sexton, *Work in America's Prisons: Joint Ventures with the Private Sector* (1995), online: National Institute of Justice <<http://www.ncjrs.org/pdffiles/workampr.pdf>>.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 19.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.* at 23.

³⁰⁶ Loïc Wacquant, *Les prisons de la misère* (Paris, Raisons d'Agir, 1999) at 74.

³⁰⁷ Franklin E. Zimring, *Prison Population and Criminal Justice Policy in California* (California: Berkeley, Institute of Governmental Studies, 1992) at 1.

dramatic increase in the incarceration rate is the enactment of the “three strikes and you’re out” legislation in 1994, the most severe in the United States. It provides that after the commission two crimes, the commission of a third one, even if very minor, leads to an imprisonment term of 25 years.³⁰⁹ Furthermore, unlike other states, California’s law provides that when persons who have been convicted previously of any felony offence are convicted again, they are sentenced to double the prison term they should normally serve.³¹⁰ In addition, the law provides that they must serve at least 80% of their term.³¹¹

This law has had many dramatic consequences both for the offenders and for the taxpayers. For example, in 1995, a man stole a bottle of vitamins worth \$ 20 in a supermarket in California.³¹² Due to his prior convictions and the “three strikes and you’re out” law, he received a sentence of 25 years of imprisonment.³¹³ Without this law, he would have received a maximum sentence of six months for his offence.³¹⁴ In addition, the monetary cost to Californian taxpayers for this single sentence is over half a million U.S. dollars.³¹⁵

³⁰⁸ Wacquant, *supra* note 306.

³⁰⁹ James Austin and John Irwin, *It's About Time: America's Imprisonment Binge*, 3rd ed. (California: Wadsworth, 2001) at 196.

³¹⁰ Austin, *supra* note 123 at 242.

³¹¹ *Ibid.*

³¹² Marc Mauer, “Why are Tough on Crime Policies So Popular?: Despite the promises of political leaders and others who have promoted them as effective tools for fighting crime, “tough on crime policies” have proved to be costly and unjust” (1999) 11 *Stan. L. & Pol’y Rev* 9.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

ii. Prison Labour Legislation

In 1990, Californians approved the *Prison Inmate Labor Initiative of 1990*, which authorized the use of inmate labour by private sector joint ventures.³¹⁶ This program was authorized as part of the Prison Industries Certification Program of 1979. The California Penal Code provides that “the compensation of prisoners engaged in programs pursuant to contract between the Department of Corrections and joint venture employers ... shall be comparable to wages paid by the joint venture employer to non-inmate employees performing similar work for that employer.”³¹⁷ However, these wages are subject to deductions for taxes, room and board, victim restitution and family support,³¹⁸ up to a maximum of 80% of the wages.³¹⁹ Paragraph 2717.8 of the *California Penal Code* provides that inmates are not eligible for unemployment benefits.³²⁰ The California Department of Corrections, in order to encourage employers to hire inmates, promotes that “businesses can set up operations inside California State Prisons and hire inmates at competitive wages.”³²¹ According to the Department, some of the benefits for employers to hire inmates are “no benefit expenses (retirement, vacation, sick leave, medical benefits)”, “discount rates on Workers’ Compensation Insurance” and an “on-call labor pool.”³²²

³¹⁶ *California Penal Code* § 2717.3.

³¹⁷ *Ibid.* § 2717.8.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.* § 2717.9.

³²¹ USA, California Department of Corrections, *Joint Venture Program* (2003), online: California Department of Corrections, <http://www.corr.ca.gov/InstitutionsDiv/INSTDIV/programs/programs_JointVenture.asp>.

³²² *Ibid.*

b. Washington

Washington State was the first state to enact a "three strikes" legislation.³²³ Unlike California though, the Washington legislation provides an exhaustive list of crimes for which the offender must be convicted three times before the law can be applied.³²⁴ It requires that all prisoners participate in work programs.³²⁵ Inmates may participate in either a "free venture employer model" of private sector involvement or in a "free venture customer model."³²⁶ In the free venture employer model, the private entity that utilizes inmate labour compensates and supervises the inmates.³²⁷ In the free venture customer model, the local authority compensates and supervises the labour.³²⁸ Concerning compliance with *Forced Labour Convention No. 29*, the free venture employer model clearly poses problems because it does not meet the requirement of supervision and control by public authority provided by article 2(2)(c).³²⁹

c. South Carolina

In South Carolina, inmates also take part in private sector work programmes.³³⁰ Participation in these programmes is voluntary.³³¹ Paragraph 24-3-315 of the *Code of Laws of South Carolina* provides that rates of pay must not be less than "those paid and provided for work of similar nature in the locality in which the work is performed."³³²

³²³ Austin, *supra* note 123 at 240.

³²⁴ *Ibid.* at 248.

³²⁵ *Revised Code of Washington* § 72.09.460 and § 72.64.030.

³²⁶ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 20 and *ibid.* § 36.110.020(5).

³²⁷ *Ibid.* § 36.110.020(5).

³²⁸ *Ibid.*

³²⁹ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 20.

³³⁰ *Ibid.* at 22.

³³¹ *Code of Laws of South Carolina*, § 24-3-315.

³³² *Ibid.*

However, prisoners' 'wages' are paid directly to the Department of Corrections.³³³

Furthermore, inmates are not eligible for unemployment compensation.³³⁴

d. Florida

In Florida, inmates are required to work,³³⁵ sometimes being employed directly by a private entity.³³⁶ Compensation is credited to an account for the inmate from which deductions for court-ordered payments are made.³³⁷ Two conditions apply: inmates are not eligible for worker compensation³³⁸ and "no inmate compensated ... by the corporation or the department shall be considered as an employee of the state, the department, or the corporation."³³⁹

Most of the prison labour in Florida is run by Prison Rehabilitative Industries and Diversified Enterprises (PRIDE).³⁴⁰ PRIDE is a private, not-for-profit corporation, which was created in 1981.³⁴¹ It operates 40 industries in 21 prisons in Florida.³⁴² In 1999, Florida authorized PRIDE to participate in the P.I.E.C.P.³⁴³ PRIDE runs prison industries in correctional institutions operated by the Florida Department of Corrections.³⁴⁴ It may also enter into contracts with private entities and with contractors that operate a private

³³³ *Ibid.*, § 24-3-430(H).

³³⁴ *Ibid.*, § 24-3-430(G).

³³⁵ *Florida Statutes*, § 946.002(1).

³³⁶ *Ibid.*, § 946.513(1).

³³⁷ *Ibid.*

³³⁸ *Ibid.*, § 946.513(2).

³³⁹ *Ibid.*, § 946.514(2).

³⁴⁰ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 24.

³⁴¹ PRIDE Enterprises, online: PRIDE Enterprises <<http://www.pridefl.com/defcorp.htm>> [PRIDE Enterprises].

³⁴² PRIDE Enterprises, *Annual Report 2003*, online: PRIDE Enterprises <<http://www.pridefl.com/2003AnnualRep.pdf>>.

³⁴³ PRIDE Enterprises, *supra* note 341.

³⁴⁴ Fenwick, "Private Benefit from Forced Prison Labour", *supra* note 6 at 24.

correctional facility.³⁴⁵ In 2002, PRIDE trained 3,346 inmates who worked in various industries, farms and operations.³⁴⁶

³⁴⁵ *Florida Statutes*, § 946.5025.

³⁴⁶ Prison Rehabilitative Industries and Diversified Enterprises (PRIDE), online: Florida Department of Corrections <<http://www.dc.state.fl.us/pub/annual/0203/pride.html>>.

CHAPTER 3: Prison Labour for Private Corporations: The Debate

I. The Goals of Incarceration

The traditional goals of incarceration are incapacitation, deterrence, retribution and rehabilitation.³⁴⁷ Historically, incapacitation has been the first goal of imprisonment. It can be defined as “the physical restraint of a person to prevent the commission of further criminal acts.”³⁴⁸ Proponents of the theory of incapacitation argue that “if you take criminals off the street for a longer period of time, the crimes he or she would have committed in that time will be prevented and the crime rate will drop.”³⁴⁹

Another justification for incarceration is deterrence. The idea is to prevent actions that violate the criminal law by the threat of punishment.³⁵⁰ Proponents of the deterrence theory argue that “if prison sentences are longer and prison conditions are harsher, potential offenders will decide that it is not worthwhile to commit crimes they otherwise would have committed.”³⁵¹ This is the theory that motivated the “tough on crime” policies in the United States, including the famous “three strikes” law movement.

Retribution is another goal of imprisonment. Proponents of the retribution theory argue that the victims of a crime have the right to see their perpetrators punished.³⁵²

³⁴⁷ See Daniel L. Low, “Nonprofit Private Prisons: The Next Generation of Prison Management” (2003) 29 N.E.J. on Crim. & Civ. Con. 1 and Dennis M. Ryan, “Criminal Fines: A Sentencing Alternative to Short-Term Incarceration” (1983) 68 Iowa L. Rev. 1288.

³⁴⁸ *Ibid.*

³⁴⁹ Low, *supra* note 347 at 11.

³⁵⁰ Ryan, *supra* note 347 at 1288.

³⁵¹ Low, *supra* note 347 at 18.

³⁵² *Ibid.* at 20.

Retribution is “a manifestation of the natural human desire for revenge”,³⁵³ –“an eye for an eye”.³⁵⁴ Some authors contest this goal arguing that criminals are not always morally responsible for their acts.³⁵⁵ Furthermore, a number of crimes are victimless, because they do not injure anyone.³⁵⁶ For example, “narcotics offenses (...) often result in harsh penalties even though they do not palpably injure anyone.”³⁵⁷ Unlike the other goals of incarceration, retribution does not aim to reduce the rate of criminality.³⁵⁸

Finally, rehabilitation is an important goal of incarceration. It is designed to change the criminal’s behaviour rather than punish him for past offences.³⁵⁹ Proponents of the rehabilitation theory argue that criminals are often not adjusted psychologically and socially, and must therefore be rehabilitated.³⁶⁰ Means of rehabilitation in prison include therapy, training and employment.

The objective of rehabilitation particularly gained in importance in the 1960s, when many authors argued that it should be the only goal of incarceration.³⁶¹ However, in the 1970s, this goal started to be contested because statistics showed that prisons did not rehabilitate prisoners.³⁶² A recent study conducted in the United States demonstrates that, from 1990 to 2000, over 60% of released prisoners were rearrested.³⁶³ This shows that the

³⁵³ Ryan, *supra* note 347 at 1288.

³⁵⁴ Low, *supra* note 347 at 20.

³⁵⁵ Ryan, *supra* note 347 at 1288.

³⁵⁶ Low, *supra* note 347 at 20.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ Ryan, *supra* note 347 at 1288.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ Evans, *supra* note 169 at 524.

current system does not contribute in a significant way to the rehabilitation of offenders.³⁶⁴ One scholar argues that the current incarceration system does not rehabilitate because:

[it] consists mainly of placing one or two offenders in a cell, and leaving them in that cell for the majority of the day. Caging men up like animals and treating them as less than human creates rage and helplessness ... Because of this rage and helplessness, and because of knowledge gleaned from fellow inmates, these newly-released prisoners will be more dangerous upon leaving prison than they were when they entered it.³⁶⁵

In regards to the objectives of restoration and deterrence, Chief Justice Burger, former Chief Justice of the United States Supreme Court declared:

We have learned from sad experience over the last quarter of a century that, although each of these factors [deterrence, retribution, or rehabilitation] must be taken into consideration, our prisons have deterred few, if any, except the inmates-while they are incarcerated, we have rehabilitated very few, and society's retribution has not had a measurable, affirmative effect ... What we are doing is not working and ought to be changed.³⁶⁶

He thus concluded that the solution was work and training.³⁶⁷

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.* at 524-525.

³⁶⁶ Pyle, *supra* note 11 at 167, quoting Chief Justice Warren Burger.

³⁶⁷ *Ibid.* at 179.

II. The Objectives of Prison Labour

a. In General

“A key issue to consider ... is whether work carried out by prisoners has real benefits in terms of their rehabilitation, or whether the prisoners are simply being exploited as cheap labour with little benefit to the prisoners.”³⁶⁸ Prison labour raises the important question of whether its objective is punitive or corrective and rehabilitative.³⁶⁹ It is difficult to deny that work can have very beneficial effects on prisoners. Nevertheless, depending on the conditions in which it is practiced, prisoners can also be subject to abuses. In this case, the work does not attain the objective of rehabilitation. Instead, it can serve the goal of social control or be used by private firms to make profit by the exploitation of a very vulnerable labour force. As one scholar notes, “inconsistency of goals and the masking of genuine motives under the guise of prisoner ‘rehabilitation’ are particularly marked in the history of prison industries.”³⁷⁰ Theoretically, prison labour has six main objectives: rehabilitation, financial benefits, reduction of idleness of inmates, restoration, punishment and deterrence.

b. Rehabilitative Objectives and Reduction of Recidivism Rates

In theory, the most important goal of prison labour is rehabilitation.³⁷¹ The idea is that through work, the prisoner will acquire skills, work habits and professional

³⁶⁸ Ethical Trading Initiative, “Prison Labour” ETI Roundtable (November 2002), online: ETI <<http://www.ethicaltrade.org/Z/lib/2002/11/agm-rtwksp1/index.shtml>> [ETI, “Prison Labour”, November 2002].

³⁶⁹ David Ziskind, “Forced Labor in the Law of Nations” (1980) 3 Comp. Lab. L. 256.

³⁷⁰ Ernie S. Lightman, “The Private Employer and the Prison Industry” (1982) 22:1 Brit. J. Criminol. 36, quoting E. Johnson, “Prison Industry”, in Carter, R., et al. (eds). *Correctional Institutions*, New York: Lippincott.

³⁷¹ See Pyle, *supra* note 11 at 169, Swepston, *supra* note 28 at 360, and Standard Minimum Rules, *supra* note 52.

experience.³⁷² He or she will also acquire social and personal skills through the contact with the other workers.³⁷³ “The vocational skills [inmates] gain from the programs can help them find employment after release, providing them more stable and secure lives, and decreasing the likelihood of recidivism.”³⁷⁴

Research shows that most inmates were unemployed and had no employment skills or a high school education before they committed their offence.³⁷⁵ A survey conducted by the United States Justice Department showed that 41% of inmates had less than twelve years of education.³⁷⁶ It is therefore possible to conclude that education and employment reduce the possibility of committing crimes. As a consequence, inmates who acquire skills and work habits in prison work programs will have greater chances of finding a job once they are released. This will therefore reduce the chances of recidivism.

However, in order for prison labour to be rehabilitative for prisoners, they must acquire “meaningful employment skills and habits.”³⁷⁷ They must participate in work programs that will lead them to future employment opportunities. “Employment must have a positive impact on prisoners.”³⁷⁸ Unfortunately, however, it seems that, in practice, this is rarely the case. Most prisoners have jobs which require very low skills and which are often not performed by ‘free’ workers. For example, tasks can include data

³⁷² Colin Fenwick, “Regulating Prisoners’ Labour in Australia: a Preliminary View” (2004) 77 University of Melbourne Legal Studies Research Paper 18 [Fenwick, “Prisoners’ Labour in Australia”].

³⁷³ Phelan, *supra* note 213 at 1758.

³⁷⁴ Low, *supra* note 347 at 22.

³⁷⁵ Pyle, *supra* note 11 at 169.

³⁷⁶ *Ibid.*

³⁷⁷ Phelan, *supra* note 213 at 1758.

³⁷⁸ Pyle, *supra* note 11 at 169.

entry, answer telephones, shovel manure and make circuit boards,³⁷⁹ which does not, most of the time, permit them to acquire “marketable skills.”

c. Financial Objectives

Prison labour is also a way to reduce the costs of incarceration, mostly in countries like the United States or the United Kingdom where these costs are very significant and continue to increase considerably each year.³⁸⁰ Keeping prisoners in prison is very expensive. “To keep one person in an American prison costs more than the total cost of one student in a graduate school in the most expensive American university.”³⁸¹ Proponents of private sector involvement in inmate industries argue that prisons could instead become a source of revenue.³⁸² The production of goods and services by inmates from prison industries can cover some or all of the costs linked to incarceration,³⁸³ also prisoners can be used to construct prisons and to keep facilities running.

Furthermore, inmates are paid very low wages. Thus, a lot of profit can be made from their labour and deductions can be made from their ‘wages’ for room and board. Deductions are also usually made from the prisoners’ ‘wages’ for family support (prisoners help their families financially while they are in prison.)³⁸⁴ Finally, prison labour for private entities also helps stimulate the private sector.³⁸⁵

³⁷⁹ Al Klasbatalemo, “The Prison Industrial Complex” (2002) online: A-infos <<http://www.ainfos.ca/02/dec/ainfos00487.html>>.

³⁸⁰ Fenwick, “Prisoners’ Labour in Australia”, *supra* note 372 at 19.

³⁸¹ Warren E. Burger, “The High Cost of Prison Tuition” (1986) U. Miami L. Rev. 908.

³⁸² Phelan, *supra* note 213 at 1754.

³⁸³ Lightman, *supra* note 370 at 36.

³⁸⁴ Phelan, *supra* note 213 at 1756.

³⁸⁵ *Ibid.* and see Chapter 3, III, a, iii.

d. Reduce Idleness of Inmates

Life in prison often leads to boredom and idleness of inmates. This in turn often entails security and discipline problems. “When prisoners spend hours sitting in their cells they must occupy their time with thinking, and these thoughts usually turn to determining how to escape from prison or how to hurt other people in prison, whether it be fellow prisoners or the prison guards.”³⁸⁶ Thus, prison labour keeps the inmates busy, and therefore also reduces security problems. For that reason, it is often perceived as a management tool for prisons.³⁸⁷ In addition, “work instils a sense of satisfaction, thus minimizing the chance for violent confrontations that often serve as an emotional outlet.”³⁸⁸ It also exhausts prisoners and can therefore contribute to reducing their potential violence.³⁸⁹

e. Restorative Objectives

The offender’s crime does not only affect the victim, but also his family and society in general. Prison labour therefore also has the function of making the prisoner pay his debt to society and continue to support his family.

With restorative justice, we hold offenders accountable and make victims the center of the criminal justice process. The corrections system ought to first assess the amount of coercive authority necessary to ensure public safety, but once you’ve disposed of that, we can hold the offender accountable, making him right

³⁸⁶ Evans, *supra* note 169 at 525.

³⁸⁷ Fenwick, “Prisoners’ Labour in Australia”, *supra* note 372 at 18.

³⁸⁸ Phelan, *supra* note 213 at 1754.

³⁸⁹ *Ibid*

the harm he has done to the victim and the community, in a punishment that is as much as possible visible to the public and related to the harm done.³⁹⁰

f. Punitive Objectives

Some work programs which impose hard labour can serve as a “means of physically punishing offenders.”³⁹¹ The Chang gangs which appeared in Alabama in 1995 are a good example of hard labour as punishment.³⁹² However, some argue that very monotonous jobs and the payment of very low wages are also a form of hard labour which serves the goal of punishment of the criminals.³⁹³

g. Deterrence

In this context, prison labour can also serve as deterrence for the criminal and also for other potential criminals. This is one of the reasons why some people argue that prison labour should be as visible to the public as possible.

h. Why Do Prisoners Sometimes Choose To Work?

Some prisoners work because they are compelled to work by the law or by the prison administration rules. Others work because they risk sanctions such as solitary confinement or they are denied privileges if they refuse to work. In this second case, the inmates can be considered as having been compelled to work.³⁹⁴ However, some

³⁹⁰ *Ibid.*, quoting Joseph Lehman, Commissioner for Corrections in Maine.

³⁹¹ *Ibid.* at 1752.

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ See Chapter 1, II, b, i., 3a).

prisoners choose to work voluntarily. One might wonder why they would “take jobs they would probably refuse in the free world even if paid a higher rate?”³⁹⁵

First, some prisoners work to keep themselves busy. “Prisoners will often choose to do unskilled work compared to being locked up for 23 hours a day, and will prefer to have the extra income even if it is considerably less than minimum wage.”³⁹⁶ Second, prisoners work in order to develop skills or to acquire work experience during their time in prison.³⁹⁷ They can thus increase their chances of being employed after their release. Third and most of all, on the contrary of what is generally believed by the public, inmates often have to pay for room and board in prison. They also have to pay for all amenities for themselves and often have to pay financial support to their families.³⁹⁸ In addition, inmates often agree to work for private corporations because “the wage offered by government prison industries is so meagre that the wages offered by the private sector become attractive in comparison.”³⁹⁹

III. Arguments in Favour of Prison Privatization and Prison Industrialization

a. Reduction of Costs Linked to Prison Overcrowding

The primary explanation for the privatization movement is prison overcrowding.⁴⁰⁰ For example, in the United States, overcrowding is now so dramatic that some state

³⁹⁵ Chang and Thompson, *supra* note 4 at 62.

³⁹⁶ ETI, “Prison Labour”, *supra* note 368 at 2.

³⁹⁷ Lippke, *supra* note 168 at 544.

³⁹⁸ *Ibid.*

³⁹⁹ Chang and Thompson, *supra* note 4 at 62 and see Chapter 2, III, e, i & ii.

⁴⁰⁰ Pozen, *supra* note 26 at 261.

courts have considered the prison conditions in a number of local jails to be in violation of federal and state Constitutions.⁴⁰¹

i. The Causes of Prison Overcrowding

1. Rising Crime Rates

Some scholars argue that the dramatic increase in incarceration rates in the United States is linked to an increase in the number of crimes committed.⁴⁰² Many, however, argue that the level of violent crime in the United States has decreased in the past years.⁴⁰³ For example, from 1991 to 1997, violent crime decreased by 19%, while the United States prison population increased by 51%.⁴⁰⁴ In fact, over half of the United States inmate population is incarcerated for non-violent offences such as drug offences, burglaries and violations of immigration laws. It is thus difficult to say that the considerable increase in the prison population in recent years is a response to a more violent society.

2. Stricter Sentencing Laws

On the other hand, the “get-tough movement” against crime contributes significantly to the overcrowding problem. This “war on crime” and the harsher sentences that it entailed began in the 1970s in the United States.⁴⁰⁵ It got even harsher in the 1980s.⁴⁰⁶ The legislation includes for example the “three strikes and you’re out”

⁴⁰¹ Pyle, *supra* note 11 at 152.

⁴⁰² See Eric Schlosser, “The Prison-Industrial Complex” (1998) 282: 6 *The Atlantic Monthly* 52, quoting the economist and legal scholar Michael K. Block.

⁴⁰³ See e.g. Mauer, *supra* note 312 at 10.

⁴⁰⁴ *Ibid.* at 9.

⁴⁰⁵ *Ibid.* at 10.

⁴⁰⁶ *Ibid.*

sentences, the implementation of other longer sentences and the constraint of parole eligibility.⁴⁰⁷ Today, despite this overcrowding problem, governments and parliaments continue to enact harsher legislation.

The public continues to seek tougher legislative and judicial responses to crime.

As a result, legislators have enacted anti-crime legislation that has exacerbated the overcrowding problem.⁴⁰⁸

3. War on Drugs

The “war on drugs” began in the United States when states started adopting harsh legislation against drug possession and trafficking.⁴⁰⁹ In 1986, the *Anti-Drug Abuse Act* imposed minimum sentences (ten or twenty years) for certain drug offences.⁴¹⁰ In 1988 and 1990, Congress increased these mandatory minimum sentences.⁴¹¹ Today, more than half a million Americans are incarcerated for non-violent drug law violations.⁴¹²

4. Efforts Against Illegal Immigration

Furthermore, in recent years, particular efforts have been made to fight against illegal immigration in the United States. According to a recent study, in 2002, 17% of the United States federal prison population were illegal aliens.⁴¹³ This means that 17% of the

⁴⁰⁷ Pyle, *supra* note 11 at 154.

⁴⁰⁸ *Ibid.* at 153.

⁴⁰⁹ Julian Roberts, Loretta J. Stalans, David Indermur and Mike Hough, *Penal Populism and Public Opinion* (Oxford: Oxford University Press, 2003) at 144.

⁴¹⁰ Pyle, *supra* note 11 at 154.

⁴¹¹ *Ibid.*

⁴¹² “Prison Industrial Complex: Drug War Gulags”, online: Corporatism <<http://corporatism.tripod.com/gulags.htm>>.

⁴¹³ Steven A. Camarota, “The High Cost of Cheap labor: Illegal Immigration and the Federal Budget” (August 2004), online: Center for Immigration Studies <<http://www.cis.org/articles/2004/fiscal.html>>. Illegal aliens are non-citizens who (a) enter the United States without having been admitted after inspection or without presenting themselves for inspection, or (b) legally enter the United States but who subsequently

U.S. \$ 4.1 billion prison budget of the federal prison system was spent on the incarceration of illegal aliens,⁴¹⁴ thus representing U.S. \$ 697 million.

ii. The Effects of Prison Overcrowding

The most significant and problematic effect of overcrowding is a deterioration of prison conditions.⁴¹⁵ In the United States, in 2002, 25 states as well as the Federal system were operating at or above their highest capacity.⁴¹⁶

Due to overcrowding, state governments often use dormitory housing in which fifty or more prisoners may sleep together in a single large room. This arrangement not only deprives inmates of their privacy, but also allows prisoners to remain essentially unsupervised during the night.⁴¹⁷

In addition, bad prison conditions lead to problems of violence between inmates and an increase in prison deaths.⁴¹⁸ In some cases, there have even been reports of an increasing number of male prisoner-on-prisoner sexual abuses.⁴¹⁹ Furthermore, overcrowding causes serious control problems, which put the prison staff and the public in general in insecurity.⁴²⁰ With too many inmates for the prison guards to control, the chances of prisoners escaping prisons are clearly more important.

violate a condition of their visa, for example, by remaining in the United States beyond the period authorized or by committing a criminal offence.

⁴¹⁴ *Ibid.*

⁴¹⁵ Pyle, *supra* note 11 at 154.

⁴¹⁶ BJS, *Prisoners in 2002*, *supra* note 10 at 7.

⁴¹⁷ Pyle, *supra* note 11 at 154.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.* and Human Rights Watch, "No Escape: Male Rape in U.S. Prisons" (April 2001), online: Human Rights Watch < <http://www.hrw.org/reports/2001/prison/report.html> >.

⁴²⁰ Pyle, *supra* note 11 at 154.

On an economical level, overcrowding clearly also causes a significant increase in incarceration costs. In the United States, the annual cost of keeping a prisoner in prison is of about U.S. \$ 30,000.⁴²¹ In 2001, for example, states spent U.S. \$ 29.5 billion on prisons. Finally, as mentioned earlier, prison overcrowding contributes to create “hidden unemployment”, by removing people from the workforce.⁴²²

iii. Private Sector Involvement: A Solution to Overcrowding?

The first benefit of the private sector involvement in the prison industry is to reduce the costs of incarceration. In practice, privately operated facilities usually charge their customers a daily rate for each inmate.⁴²³ Prisoners, with their work, can produce most of the goods and services that keep a prison running.⁴²⁴ Often, in the United States prison labour is used to construct the correctional facilities.⁴²⁵

Inmates do everything from “virtually every aspect of a construction job, including concrete casting, carpentry, plumbing and electrical work” to landscaping after the facility is completed.⁴²⁶

Proponents of private sector involvement in prison industries argue that the production of goods and services by inmates can even cover all of the incarceration costs.⁴²⁷

⁴²¹ *Ibid.* at 156 and U.S., Bureau of Justice Statistics, James J. Stephan, *State Prison Expenditures, 2001*, Bureau of Justice Statistics Special Report (2004) at 2.

⁴²² See Chapter 2 I. c.

⁴²³ Schlosser, *supra* note 402 at 61.

⁴²⁴ Phelan, *supra* note 213 at 1755.

⁴²⁵ *Ibid.*

⁴²⁶ Garvey, *supra* note 150 at 375, quoting *Using Inmates to Build Prisons Said to Ease Costs, Teach Skills*, *Crim. Just. Newsl.* (Nat'l Council on Crime & Delinq., Ann Arbor, Mich), 15 September 1987, at 3.

⁴²⁷ Phelan, *supra* note 213 at 1754.

A number of studies show that private prisons do save money (between 10 and 15%) compared to publicly operated prisons.⁴²⁸ According to the study established by Adrian T. Moore,

... the key to the lower costs of the private sector is competition. In order to win contracts-and keep them- a firm must be efficient. The private sector saves money by doing a number of things differently from government.⁴²⁹

However, other studies do not show a significant difference in costs between privately operated facilities and publicly operated facilities. The United States General Accounting Office report states that even when looking at five studies comparing operational costs of service at private and public correctional facilities in the largest state industries in the United States, no conclusions can be drawn about cost savings because there is little difference or mixed results between public and private prisons.⁴³⁰

One American scholar, Stephen P. Garvey, proposes to go further than the current practice and suggests a totally open market for prison goods and labour. This means “allowing prisoners to sell their labor to private firms and allowing private firms to sell prison-made goods without restriction.”⁴³¹ He argues in favour of a return to the “contract system”⁴³², which was known and applied in the North of the United States until the end

⁴²⁸ Fourteen independent cost comparison studies have shown this. See Adrian T. Moore, “Private Prisons: Quality Corrections at a Lower Cost” (1998) 240 Policy Study 1 and 10-11.

⁴²⁹ *Ibid.* at 1.

⁴³⁰ U.S., General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service*, Letter Report, GAO/GGD-96-158 (1996) [General Accounting Office, “Private and Public Prisons”].

⁴³¹ Garvey, *supra* note 150 at 375.

⁴³² *Ibid.*

of the nineteenth century.⁴³³ However, he suggests that the number of inmates eligible to work should not be limited, and that the firms should not be required to pay minimum wage.⁴³⁴ He argues that:

[G]iven the additional costs of doing business inside prison (e.g. additional security costs), few industries will find it worthwhile to set up shop behind prison walls if they are forced to pay inmates the prevailing wage. If few firms have an incentive to invest in prison industries, it doesn't matter whether prison-made goods can be sold on the open market, since few goods will ever produced.⁴³⁵

According to him, the market should set the inmate wage, which would probably be just below the minimum wage.⁴³⁶

Finally, the involvement of the private sector in prison industries also contributes to "facilitating private industries' access to the prison work force" and thus contributes to "stimulating the private sector."⁴³⁷

Private businesses that open work facilities within prisons or hire inmates to work outside reap a number of specific benefits, which range from the receipt of rent-free space to the ability to pay workers lower wages. One report commented that businesses can get "the cream of the crop from a pool of cheap labor, not to mention the use of ... [a] brand new air-conditioned factory space, rent free."⁴³⁸

⁴³³ See Chapter 2 II.

⁴³⁴ Garvey, *supra* note 150 at 376.

⁴³⁵ *Ibid.* at 373.

⁴³⁶ *Ibid.* at 376.

⁴³⁷ Phelan, *supra* note 213 at 1756.

⁴³⁸ *Ibid.* at 1756-1757.

b. Reduce Recidivism and Provide Marketable Skills For Inmates

Many proponents of private sector involvement in prison industries argue that only private corporations can give inmates working skills that will help them find employment when they are released.⁴³⁹ As mentioned earlier, several studies show that inmates who participated in work programs are less likely to commit other crimes after release than those who didn't.⁴⁴⁰ Furthermore, when prisoners work for private companies, they perform jobs that they would be more likely to perform in the free world than if they only work for the government. Thus, they are more likely to find jobs once they are released.

Companies that have employed or that currently employ inmate workers include "Allstate, Best Western, Dell Computer, Eddie Bauer, Hawaiian Tropical Products, J. C. Penney, Kmart, Kwalu Inc., Konica, Lockhart Technologies, McDonald's, Merrill Lynch, Microjet, Microsoft, New York, New York Hotel and Casino, Nike, No Fear Inc., Omega Pacific, Parke-Davis, Planet Hollywood, Prison Blues (jeans), Shearson Lehman, Starbucks, Target, TWA, Victoria's Secret, Union Bay, Upjohn, Washington Marketing Group."⁴⁴¹

c. Private Prisons: A Better Management and More Flexibility?

According to proponents of prison privatization, privately operated prisons are more efficient, better managed, more flexible and more competitive than publicly operated prisons.

⁴³⁹ Pyle, *supra* note 11 at 167.

⁴⁴⁰ Chang and Thompson, *supra* note 4 at 62.

⁴⁴¹ Erica Barnett, "Prison Blues; Starbucks, Nike, others profit from inmate labor [at U.S. prisons]", In *These Times* (4 Mar 2002), online: Business & Human Rights Resource Center <<http://www.businesshumanrights.org/Categories/Issues/Labour/Prisonlabour>>.

Since their success hinges on delivering the same product as the government but at lower cost, or a better product at a cost-effective price, [firms] turn to new management approaches, new monitoring techniques, and administrative efficiencies- in a word, innovation.⁴⁴²

Generally, private firms use more innovative design techniques, in order for fewer personnel to be needed to monitor the inmates.⁴⁴³ “The design of a facility alone can save large sums of money in personnel costs, if constructed to make use of modern monitoring technology.”⁴⁴⁴ In addition, they use fewer administrative personnel and minimize the use of overtime.⁴⁴⁵ Finally, they are also better managed.

Freedom from bureaucratic purchasing rules and procedures lets private operating firms shop locally for the lowest-cost necessary supplies and services.

This saves both time and money.⁴⁴⁶

d. Are Private Prisons An Improvement of the Quality?

Proponents of prison privatization argue that private entities have better management skills, more innovation skills, and that they will bring more technology and comfort in prisons.⁴⁴⁷ “Private operators, knowing they could be replaced if they fail to deliver, have strong incentives to provide quality service.”⁴⁴⁸

⁴⁴² Moore, *supra* note 428 at 16.

⁴⁴³ *Ibid*

⁴⁴⁴ Low, *supra* note 347 at 44.

⁴⁴⁵ Moore, *supra* note 428 at 16.

⁴⁴⁶ *Ibid.* at 18.

⁴⁴⁷ Goyer, *supra* note 3.

⁴⁴⁸ Moore, *supra* note 428 at 21.

Quality of prisons includes the safety of inmates, the safety of correctional officers, the number of incidents, education programs, the number of escapes, the amount of substance abuse, and rehabilitation, social and recreational services.⁴⁴⁹ According to a number of quality comparison studies that have been done in the United States, Australia and the United Kingdom, private entities performed better than public entities in most of those fields.⁴⁵⁰

Conversely, the United States General Accounting Office's report states that "the two studies that addressed quality of life reported either equivocal findings or no differences between private and public facilities."⁴⁵¹ In reality, it is very difficult to evaluate the quality of prison facilities, rendering extremely the comparison of the quality in publicly and privately operated prisons. While proponents argue that private prisons will "bring better technology and innovation to the provision of correctional services", opponents argue that private prisons are of lesser quality because "companies motivated solely by profit will be forced to cut corners and maximize returns by minimising investment."⁴⁵²

e. Are Objectives of Prison Labour Attained?

As mentioned earlier, the objectives of prison labour are rehabilitation, financial benefits, reduction of idleness of inmates, restoration and deterrence.

⁴⁴⁹ *Ibid.* at 23.

⁴⁵⁰ *Ibid.*

⁴⁵¹ General Accounting Office, "Private and Public Prisons", *supra* note 429 at 1. The two studies reviewed the New Mexico and Tennessee systems.

⁴⁵² Goyer, *supra* note 3.

Concerning rehabilitation, Chang and Thompkins argue that prison industries do not necessarily reduce recidivism and provide skills for inmates.⁴⁵³ First, inmates who participate in work programs are often those who were employed before they were incarcerated.⁴⁵⁴ Second, “most prison industries offer only low-skill and labor-intensive jobs, which are unlikely to provide inmates marketable skills, training, or experience.”⁴⁵⁵ Thus, often, the work performed by inmates for private companies or in privately run facilities does not help rehabilitate inmates in order for them to find jobs after release.⁴⁵⁶ For example, in 1998, in the United Kingdom, inmates at the Blackenhurst prison were employed cleaning out concrete mixers.⁴⁵⁷ “As this work could not be done on the free labour market, its rehabilitative value must be doubted.”⁴⁵⁸ In private prisons in the United Kingdom, prisoners’ tasks include assembly of TV aerials, packing of balloons, assembly of lawn aerators, cleaning of aluminium moulded parts for machinery, packing of household textiles and production of pallets.⁴⁵⁹

Regarding financial benefits, a variety of studies have been published that often give different results. Proponents of prison privatization argue that studies show that prisons can be run less expensively by private companies. Opponents of prison

⁴⁵³ Chang and Thompkins, *supra* note 4 at 62.

⁴⁵⁴ *Ibid.* at 62.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Fenwick, “When Privatization means exploitation”, *supra* note 62 at 43.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Ethical Trading Initiative, “Prison Labour” ETI Roundtable, (5 February 2004), online: ETI <<http://www.ethicaltrade.org/Z/lib/2004/02/rt9-prislab/ETI-RTPrisonLab-200402.pdf>> at 4 [ETI, “Prison Labour”, 2004].

privatization, however, argue that other studies show the contrary. According to them, “cost savings are an unfounded claim made by private prison proponents.”⁴⁶⁰

In the United States, from a governmental perspective, studies that were done in Florida and Arizona found no evidence of cost savings in private prisons.⁴⁶¹ However, studies that were done in Louisiana, Tennessee and Texas found that contracting out to private companies did reduce the costs to the correctional agencies.⁴⁶² Thus, the United States General Accounting Office concluded that “nationwide, the existing evidence on cost performance was inconclusive.”⁴⁶³

Prison labour does indeed reduce the idleness in prisons, but it must be noted that this objective can be accomplished whether the labour is performed for private entities or for the state. Thus, involvement of the private sector in prison industries is not necessary to achieve the goal of keeping inmates busy.

Finally, concerning restoration, some argue that prison labour for private entities does not fulfil this goal because the offender does not pay his debt to society but to a private entity.

When the state puts prisoners to work in public or community work, in theory the benefit of such prison labour goes to the whole of society. When the state indents prison labour to private industries for private profit, while punishment

⁴⁶⁰ John G. DiPiano, “Private Prisons: Can They Work? Panopticon in the Twenty-First Century” (1995) 21 N.E.J. on Crim. & Civ. Con. 171.

⁴⁶¹ Pozen, *supra* note 26 at 273.

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

continues to be in the name of society, the benefits from prisoners go to private interests...⁴⁶⁴

IV. Arguments Against Involvement of Private Sector With Inmate Labour

a. Poor Working Conditions

In general, inmates are poorly paid for their labour.⁴⁶⁵ They are generally not entitled to minimum wage. For example, in Queensland, Australia, prisoners are paid between AU \$ 2.04 and A.U. \$ 3.99 a day.⁴⁶⁶ In the United States, inmates in federal prisons work for an average of U.S. \$ 0.12 to U.S. \$ 0.40 an hour.⁴⁶⁷ Finally, in the United Kingdom, in 1998, inmates were paid an average of £ 7.00 a week while the federal minimum wage at the time was of £ 3.60 an hour.⁴⁶⁸ Furthermore, they are generally deprived of all other labour rights such as collective bargaining, unemployment compensation, worker's compensation and workplace's safety.⁴⁶⁹ As mentioned earlier, the United States Supreme Court, in *Jones v. North Carolina Prisoner's Labor Union* denied prisoners' right to organize, join and solicit other inmates to join unions.⁴⁷⁰

Richard L. Lippke distinguishes two aspects of the right to work: the right to be free from forced labour and the right to be provided access to paid labour.⁴⁷¹ The first aspect includes the right to control one's labour, which "requires that one be free to

⁴⁶⁴ "Prison Labour: Inmate Work Policies", *The Jobs Letter* No. 70 (22 December 1997), online: Jobs Letter <<http://www.jobsletter.org.nz/jbl07011.htm>>.

⁴⁶⁵ Goyer, *supra* note 3 at 43.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Chang and Thompkins, *supra* note 4 at 61.

⁴⁷⁰ *Jones v. North Carolina Prisoners' Labor Union, Inc.*, *supra* note 275.

⁴⁷¹ Lippke, *supra* note 168 at 535.

determine when to employ it, with whom, under what conditions, and in exchange for what benefits.”⁴⁷² This author suggests that prison labourers should be paid the prevailing industry wage.⁴⁷³ First, he argues that “because the restrictions on their movements, prisoners are in an extremely disadvantageous position when it comes to obtaining a fair wage for their labor”, and they must be protected from exploitation.⁴⁷⁴ Second, he argues that low prison labour wages will have the effect of lowering wages paid to ‘free’ labourers.⁴⁷⁵ Finally, he argues that private corporations who do not have access to prison labour are disadvantaged in comparison to those who do.⁴⁷⁶

He also suggests that prisoners should be entitled to unemployment and accidental injuries compensation.⁴⁷⁷ He gives the example of prisoners whose families depend on their labour for financial support.⁴⁷⁸ The most controversial issue regarding labour rights given to prisoners are the rights to form unions, engage in collective bargaining and the right to call strikes.⁴⁷⁹ According to Colin Fenwick, “the inability to form a union precludes prisoners from combining to bargain over their poor working conditions.”⁴⁸⁰ This is one of the reasons why inmates have such poor labour conditions. In general, Richard L. Lippke argues that:

[W]hile free laborers are and arguably ought to be protected from extreme forms of market exploitation, state-enforced minima with regard to hours and health

⁴⁷² *Ibid.* at 536.

⁴⁷³ *Ibid.* at 552.

⁴⁷⁴ *Ibid.* at 553.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.* at 554.

⁴⁷⁹ *Ibid.* at 555.

⁴⁸⁰ Fenwick, “Prisoners’ Labour in Australia”, *supra* note 372 at 39.

and safety are just that-minima. Free laborers find themselves nonetheless sometimes performing dangerous, physically exhausting, or mentally stultifying labor. They, at least, can (in theory, if not always in reality) walk away from such labor and seek work more than their liking. Under compelled work schemes prison laborers will lack comparable freedom. This not only denies them the ability to exercise their autonomy, it may threaten its constitutive abilities and dispositions. Menial labor, in particular, deadens the minds of those who perform it and is apt to render them more pliable to manipulation by others. ... One particularly effective way to prevent [the abuse] would be to permit inmates to refuse to labor or to walk away from it without incurring further sanctions.⁴⁸¹

One of the main arguments to justify these low wages is that inmates are less productive than 'free' workers.⁴⁸² Thus, lower wages and poor labour conditions are a way of making prisoners look attractive in the eyes of private employers.⁴⁸³ However, this reasoning is contested by several scholars, including Colin Fenwick, who argues that "in March 2000, 47 out of 49 jurisdictions in the United States reported that their prison industry operations were either self-sufficient or profitable."⁴⁸⁴

Other scholars also argue in favour of the payment of minimum wages at least and the application of other labour rights to working prisoners.⁴⁸⁵ William P. Quigley argues

⁴⁸¹ Lippke, *supra* note 168 at 543.

⁴⁸² Goyer, *supra* note 3 at 43.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ See e.g. Quigley, *supra* note 111 at 1175.

that assuring inmate workers a decent job for decent wages is not only important for the inmates but it is also for the good of society in general.⁴⁸⁶

Almost all people in prison have families on the outside. And almost all of the people in prison are coming out. The common good of all people, inside and outside of prison, strongly suggests that a system of rehabilitative prison work that pays a decent wage is in the common interest. Therefore, justice demands it is time for universal opportunity to work in prison and fair pay for those who work. Work in prison at decent wages will help prisoners become employable after release, provide them with an income to support their families, and permit time to be filled with meaningful activity, thus helping advance rehabilitation in prison and reducing recidivism upon release.⁴⁸⁷

b. Corner Cutting and Cream Skimming in Private Prisons

Furthermore, private prisons are often criticized for cutting corners in order to maximize profit.⁴⁸⁸ “Corner cutting by private prisons, it is charged, will mean poor food and less of it, fewer services and cheaper labor with lower professionalism and less training.”⁴⁸⁹ Opponents of prison privatization argue that it is impossible to reduce costs of incarceration without also reducing “the quality of the work force and, with it, the conditions of confinement for prisoners.”⁴⁹⁰

Private prisons are also contested for cream skimming. They are accused of only housing “those who will comprise a prison population that is easily managed, leaving

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.* at 1175-1176.

⁴⁸⁸ See DiPiano, *supra* note 460 at 181.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ See *ibid.*

public prisons with only difficult cases.”⁴⁹¹ Some scholars contest this assumption.⁴⁹² John G. DiPiano argues first that privatization plans do not necessarily call for cream skimming.⁴⁹³ He also argues that if privately operated facilities housed the most easily manageable inmates, this would not necessarily affect the public budget since “privatizing prisons is one way to avoid additional costs in housing more prisoners.”⁴⁹⁴ Finally, he argues that “if a panoptic prison model were used only to house minimum offenders, any savings realized from profit generated by such facilities could be used to ease public burden in managing more difficult offenders.”⁴⁹⁵

c. Problem of Monitoring of Private Prisons

Opponents of prison privatization often argue that private prisons are much harder to monitor than public ones.

When the government transfers correction facilities to the private sector, it will have greater difficulty in monitoring what actually goes on inside. To make sure its policies are being implemented and to protect the constitutional rights of the inmates incarcerated there, supervisors and “watchdogs” will have to be sent to observe what goes on.⁴⁹⁶

Furthermore, in the case of private prisons, there is a great need for regulations in order to “assure that society’s interest come before those of the corporations.”⁴⁹⁷

⁴⁹¹ *Ibid.* at 183.

⁴⁹² See *e.g. ibid.* at 183-184.

⁴⁹³ *Ibid.* at 183.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ Joseph E. Field, “Making Prisons Private: An Improper Delegation of a Governmental Power” (1987) 15 *Hostra L. Rev.* 671.

⁴⁹⁷ Evan Sycamnias, “All prisons should be managed by private enterprise. The pros and cons” (10 October 1997), online: Uplink Productions <<http://www.uplink.com.au/lawlibrary/Documents/Docs/Doc17.html>>.

d. Trends Towards Privatization

i. Context

The idea of the delegation of public powers to private entities arose in the 1980s. In the United States, Ronald Reagan was a big supporter of this trend. At the time, the public was asking for “tough on crime” legislation and harsher criminal sentences.⁴⁹⁸ Thus, rapidly, with the rise of the prison population in many industrialized countries, especially in the United States, the United Kingdom and Australia, the corrections industry became one more target of the privatization trend. Thus, the idea and practice of prison privatization and private sector involvement in correctional industries must be seen in the general context of the 1980s trend towards privatization.⁴⁹⁹

ii. Constitutionality of the Delegation of the Incarceration Function to the Private Sector

Opponents of prison privatization argue that the delegation of the power to incarcerate inmates to private entities is an improper delegation of governmental power. The American Bar Association, for example, argues that the delegation of the authority to punish for crime, an essential governmental function, is unconstitutional.⁵⁰⁰ In the United States, the non-delegation doctrine is based on article I of the *United States Constitution* and on the due process clauses provided in the Fifth and Fourteenth Amendments.⁵⁰¹ Article I of the American Constitution states that “all legislative Powers herein granted shall be vested in a Congress of the United States.” This clause can be interpreted as a

⁴⁹⁸ Chang and Thompson, *supra* note 4 at 47.

⁴⁹⁹ Pozen, *supra* note 26 at 269.

⁵⁰⁰ Chang and Thompson, *supra* note 4 at 553.

⁵⁰¹ Laura Suzanne Farris, “Private Jails in Oklahoma: An Unconstitutional Delegation of Legislative Authority” (1998) 33 Tulsa L.J. 961.

prohibition for Congress to delegate its legislative powers.⁵⁰² In practice, delegation of legislative powers can be made either to public entities or to private entities.⁵⁰³

In order to determine whether a delegation is admissible, a three-part test has been developed by United States courts.⁵⁰⁴ First, the court must determine whether the delegation involves a private interest. If this is the case, there may exist a “danger of private interests influencing decisions.”⁵⁰⁵ Second, the court must determine whether the statute “contains an intelligible principle”, whether it delegates “a limited or narrow scope of power” and whether it contains specific procedural requirements.⁵⁰⁶ Third, the court must determine whether there has been “a clear policy decision by the legislature.”⁵⁰⁷

It has been argued that prison privatization is a violation of all three of these requirements.⁵⁰⁸ “Private motives, lack of clear and limited statutes, and lack of policy decisions make the delegation of legislative authority to private prisons constitutionally suspect.”⁵⁰⁹ Private entities have a private motive to exploit prisons. They seek to “maximize profits by cutting corners, at the detriment of inmates and at the risk of society.”⁵¹⁰ As an opponent of prison privatization puts it,

⁵⁰² See *ibid.* at 962.

⁵⁰³ See *ibid.*

⁵⁰⁴ See *ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *North American Safety Valve Indus., Inc. v. Wolgast*, 672 F. Supp. 488 (D.K. Cir. 1987).

⁵⁰⁷ Farris, *supra* note 501 at 967.

⁵⁰⁸ *Ibid.* at 968.

⁵⁰⁹ *Ibid.*

⁵¹⁰ DiPiano, *supra* note 460 at 186.

[N]ot only is corrections one of the government's most basic responsibilities, it is probably the most sobering. The ability to deprive citizens of their freedom, force them to live behind bars and totally regulate their lives, is unlike any other power the government has. The responsibility for corrections goes beyond issues of cost efficiency and touches on whether a private company should be able to regulate the affairs of a citizen deprived of his freedom.⁵¹¹

According to this author, "prison privatization represents the government's abdication of one of its most basic responsibilities to its people."⁵¹²

e. Private Sector Involvement: Creation of an Incentive to Increase the Prison Population?

It is clearly in the interest of private entities involved in correctional industries to expand their market and thus for the incarceration rate to increase.⁵¹³ In the United States, studies show that states which had more private contracts in 1996 had higher incarceration rates the year after.⁵¹⁴

Corporations in the prison industry market have the incentive to increase the prison population.⁵¹⁵ Generally, privately operated facilities charge their customers a daily rate for each inmate.⁵¹⁶ The more inmates in the correctional facility, the cheaper the charges per inmate.⁵¹⁷ "When every bed is filled, the private person company, the bed broker, and

⁵¹¹ Field, *supra* note 496 at 669.

⁵¹² *Ibid.* at 668.

⁵¹³ Chang and Thompkins, *supra* note 4 at 53.

⁵¹⁴ *Ibid.*

⁵¹⁵ Robbins, "The Impact of the Delegation Doctrine", *supra* note 29 at 913.

⁵¹⁶ Schlosser, *supra* note 402 at 61.

⁵¹⁷ *Ibid.*

the county can do quite well.”⁵¹⁸ Furthermore, an interesting solution to the problem of prison overcrowding can be found in alternative methods to incarceration such as increased parole, probation, community programs and electronic monitoring.⁵¹⁹ Private prisons will tend to be against these alternative methods. One opponent of prison privatization states:

[Pr]ivate companies, which have a vested interest in keeping their prisons full in order to maximize profits, will likely discourage alternatives such as increased parole, probation, and community based programs. In addition, in order to protect their investment, they will likely lobby for longer sentences and reduced use of probation and parole. Therefore, while keeping the prisons filled is clearly in the best interests of the prison-for-profit companies, one must ask whether it is in the public's best interest.⁵²⁰

Another scholar argues that it is not appropriate to operate prisons with a profit motive because private prisons will have the incentive to build more and more jails and prisons.⁵²¹ “And if they are built, we will fill them.”⁵²² Finally, “to be profitable, prison industries will likely hire inmates serving longer terms to reduce retraining and turnover costs.”⁵²³ It is thus in the interest of these corporations that inmates stay the longest possible in prison.⁵²⁴

⁵¹⁸ *Ibid.*

⁵¹⁹ Field, *supra* note 496 at 670.

⁵²⁰ *Ibid.* at 671.

⁵²¹ Robbins, “The Impact of the Delegation Doctrine”, *supra* note 29 at 815.

⁵²² *Ibid.*

⁵²³ Chang and Thompkins, *supra* note 4 at 62.

⁵²⁴ *Ibid.*

f. Prison Labour for Private Corporations: Impact on the Labour Market and Unfair Competition

As mentioned earlier, private sector involvement in the prison industry disappeared in the beginning of the twentieth century mostly because of the consistent fight from labour unions arguing that it constituted unfair competition to ‘free’ labourers. In the past twenty years, again, unions have been fighting once again against this unfair competition. “As long as unemployment exists, any prison inmate who works is, theoretically, displacing a non-inmate worker.”⁵²⁵

Furthermore, prison labour not only displaces the jobs of the ‘free’ labourers, but it can also have the effect of downing the existing wages and other labour rights that labour unions have fought for years to obtain. Finally, prison labour is also contested for creating unfair competition to the companies who do not have access to this form of labour. In this way, private companies who are present in the prison industry have an advantage over the others, and thus create unfair competition.

However, in the United States, the Prison Industries Enhancement Certification Programme provides that wages must be comparable to minimum wage. Thus, the problem of unfair competition only arises when the wage paid in the free labour market exceeds minimum wage.⁵²⁶ For example, in Austin Texas, about 130 workers earned U.S. \$ 10 an hour assembling electronic circuit boards for Lockhart industries.⁵²⁷ In 1993, the

⁵²⁵ Hauck, *supra* note 184 at 286.

⁵²⁶ Goyer, *supra* note 3 at 44.

⁵²⁷ *Ibid.*

company closed the Austin industry.⁵²⁸ However, it reopened shortly after in a private prison as part of the P.I.E.C.P. where inmates were paid only minimum wage for the same job.⁵²⁹

Nevertheless, as it is now, prison labour is probably too insignificant to have a real impact on the labour market. However, economists point out that with a continuous increase of the incarceration rate and a growing involvement of the private sector in prison industries, this impact will become more and more significant. Unskilled labour will be displaced in prisons. This will eventually depress the wages of the 'free' workers.⁵³⁰

Others argue that in reality, prison labour competes with Third World labour.⁵³¹ The report of the American National Institute of Justice argues that "everyone benefits from joint ventures."⁵³²

Companies are attracted to working with prisons because inmates represent a readily available and dependable source of entry-level labor that is a cost-effective alternative to work forces found in Mexico, the Caribbean Basin, Southeast Asia, and the Pacific Rim countries. "Domestic content is an important benefit of using a prison-based work force compared with using an

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ Chang and Thompkins, *supra* note 4 at 62.

⁵³¹ See Jim Hightower, "The Next Best Thing to Slaves" (3 July 2004), online: Flat Rock Forests Unitholder Organisation <http://flatrock.org.nz/topics/prisons/made_in_the_usa.htm>.

⁵³² U.S., National Institute of Justice, George Sexton, *Work in America's Prisons: Joint Ventures with the Private Sector* (1995) at 3.

offshore labor market,” says one industry executive. “We can put a Made-in-the-U.S.A. label on our product.”⁵³³

Thus, firms are turning to the United States prisons for low-cost labour instead of outsourcing to countries like China or India. In practice, this is the case for example in for telemarketing-type tasks in a dozen states like California, Oregon and Iowa.⁵³⁴ The Worker members of the ILO argue that “the exploitation of private prison labour [is] a way for developed countries to compete with the lower labour costs in developing countries.”⁵³⁵

g. Is Allowing People to Profit from Punishment Morally Unacceptable?

Other critics of private sector involvement in prison industries argue that it is immoral to allow private entities to make profit from punishment. They say that it is “the state’s moral duty to punish.”⁵³⁶ This issue is more ethical and moral than legal. It is often argued that the power to administer justice can be exercised by the government because of the “social contract”, and because of the legitimacy of the government.⁵³⁷

Under our system, we agree to accept the laws of society and the power of the state to enforce these laws. When we violate these laws, we agree to let the state punish us. We accept such an arrangement because, like a covenant, it has benefits and burdens. We accept the law because while it punishes us, it also protects us. Yet our acceptance of the law will only continue if it is made and

⁵³³ *Ibid.*

⁵³⁴ Jeff Neal, “Outside the Box: Companies Using Prisons For Outsourcing Needs” (5 August 2004), online: Optionetics <http://www.optionetics.com/articles/article_full.asp?idNo=10847>.

⁵³⁵ ILO, *Examination of individual case concerning Convention No. 29, Forced Labour, 1930 United Kingdom (ratification: 1931)*, Report I (B), ILC, 88th Sess. (2001).

⁵³⁶ Sarah Armstrong, “Sentencing: Bureaucracy, Private Prisons, and the Future of Penal Reform” (2003) 7 Buff. Crim. L. R. 299.

⁵³⁷ See Field, *supra* note 496 at 673.

enforced by a separate body known as the State through its authorized agents.

Once laws are made or sought to be enforced by those other than the accepted entity of the State (*i.e.*, private interests), the social contract has been violated.⁵³⁸

h. Private Non-Profit Prisons: An Alternative?

Some scholars argue that non-profit private prisons are the solution to the problem. This type of institution would have the advantages of private sector management without having the disadvantages of for-profit firms. Daniel L. Low argues that

[A] third type of prison, non-profit private prisons, may be able to succeed where government and for-profit firms have failed. A non-profit private prison would be largely free from political restraints and profit constraints.⁵³⁹

On the one hand, government prisons “face political pressures that favour the warehousing of prisoners instead of their rehabilitation.”⁵⁴⁰ Governments are obviously influenced by the voters. Thus, for example, in the current American context, “politicians are afraid of appearing weak on crime and coddling criminals, so they advocate longer sentences, harsher prison conditions, and decreased spending on inmate programs.”⁵⁴¹ On the other hand, private prisons are motivated by profit. The benefit they may make will be distributed to the shareholders and will therefore not be spent on improving prison conditions or rehabilitation programs unless this entails an increase of their profit.⁵⁴²

⁵³⁸ *Ibid.*

⁵³⁹ Low, *supra* note 347 at 33.

⁵⁴⁰ *Ibid.* at 2.

⁵⁴¹ *Ibid.* at 5.

⁵⁴² *Ibid.* at 7.

In contrast, according to Daniel L. Low, “nonprofit organizations tend to be driven by ideology- a sense of purpose and mission.”⁵⁴³ Unlike for-profit prisons, non-profit prisons are not motivated by profit. Thus, they are more legitimate and considered more trustworthy.⁵⁴⁴ In addition, they are more flexible than governmental prisons because they are free from all the political and legal constraints that governments face.⁵⁴⁵ Finally, non-profit organizations would certainly contribute greatly to the rehabilitation of inmates.

The likely *raison d’être* of a nonprofit organization would be to improve rehabilitation programs, so the prison would likely measure success by its ability to improve rehabilitation, and the staff of the organization would likely focus on this goal.⁵⁴⁶

Such an entity could take the form of a non-profit foundation.⁵⁴⁷ It would receive funds from the government and donations from individuals and foundations.⁵⁴⁸ Furthermore, instead of distributing the profits to the shareholders like private prisons do, the funds could be reinvested to reduce recidivism.⁵⁴⁹ All extra resources could be used for rehabilitation programs and to improve inmates’ working conditions.⁵⁵⁰

Corrections Corporation of America, the largest for-profit prison company, reported in 1997 that it spent \$ 30.51 per inmate a day, but received an average payment of \$ 42.72, leaving a gross profit of \$ 12.21. If nonprofits received a

⁵⁴³ *Ibid.* at 51.

⁵⁴⁴ *Ibid.* at 63.

⁵⁴⁵ *Ibid.* at 51.

⁵⁴⁶ *Ibid.* at 53.

⁵⁴⁷ Sycamnias, *supra* note 497.

⁵⁴⁸ Low, *supra* note 347 at 7-8.

⁵⁴⁹ *Ibid.* at 2.

⁵⁵⁰ *Ibid.* at 3.

similar per diem in their government contracts, they could increase expenditures on inmates by 40 percent. ... This would allow them to substantially increase the amount spent on reducing recidivism. ... If the surplus of \$ 12.21 were available to nonprofits, they could triple spending on inmate programs, and still have over \$ 5 left for other improvements.⁵⁵¹

Critics of non-profit organizations argue that they will spend a lot of money on fundraising and thus reduce their efficiency.⁵⁵² Furthermore, in practice, religious organizations are the most frequent non-profit organizations. This poses a serious problem of separation between the church and the state.⁵⁵³ Finally, non-profit prisons will be dependent on donors and volunteers in order to function. Daniel L. Low concludes:

Of the three types of prisons, nonprofit private prisons have the potential to be the superior form of ownership. They can combine the flexibility of a private prison with the incentive structure of a nonprofit organization. Nonprofit prisons offer the vision of a new type of prison: a prison focused on rehabilitating rather than warehousing inmates; a prison dedicated to humane rather than abusive treatment of inmates; a prison that treats inmates as people who should be a part of society, not marginalized and isolated; a prison that educates, trains, and rehabilitates rather than ignoring inmates' needs; a prison that returns inmates to society less rather than more likely to commit crimes; a prison that aims to decrease rather than increase incarceration rates.

⁵⁵¹ *Ibid.* at 55.

⁵⁵² *Ibid.* at 63.

⁵⁵³ *Ibid.* at 65.

CHAPTER 4: Application and Evolution of International Standards Regarding Private Sector Involvement in Prison Industries

I. Application of International Standards

a. Compliance with International Labour Standards

i. Application of ILO Standards

Not all work performed by prisoners is prohibited labour in international law. Work for the government, even if it is mandatory, is not considered forced labour. The type of prison labour with which international law is concerned is work for the private sector. However, “there is no direct rule of international law that prohibits governments from contracting prisons to the private sector.”⁵⁵⁴

In the interpretation of the *Forced Labour Convention No. 29*, the ILO has repeated many times that the practice of prisoners working for private corporations is inconsistent with the Convention, “except with the formal consent of prisoners and when guarantees and safeguards with regard to wages and social security are given so that the labour relationship can be regarded as a free one.”⁵⁵⁵

Thus, in order for the international provisions regarding prison labour to be respected, two main conditions must be met. The first condition is the formal consent of the prisoner. The second condition is the “payment of wages and social security benefits that reflect conditions similar to those on the free market.”⁵⁵⁶ The ILO Committee of

⁵⁵⁴ Chris Weaver and Will Purcell “The Prison Industrial Complex: A Modern Justification for African Enslavement?” (1998) 41 *How. L.J.* 377.

⁵⁵⁵ ETI, “Prison Labour” 2004, *supra* note 459 at 3.

⁵⁵⁶ *Ibid.*

Experts has stressed in numerous cases that the argument that prisoners are supposedly less productive than 'free' labourers does not justify payment of wages below the ones established by the market.⁵⁵⁷

In the case of privately run prisons, compliance with the requirement of "supervision by a public authority" provided by article 2(2)(c) of *Forced Labour Convention No. 29* is difficult to meet in practice. Furthermore, when inmates work for private employers, the requirement that "prisoners must not be hired to or placed at the disposal of private individuals, companies or associations" is not fulfilled. Private prisons are thus only permitted under international law if the work is voluntary. However, as mentioned earlier, work can only be voluntary if there is formal written consent of the prisoner, if he or she does not risk sanctions or risk losing privileges if he or she refuses to work, and if the working conditions are similar to those applied to the same type of work when performed in the free labour market.⁵⁵⁸

ii. Compliance in Practice

As mentioned earlier, in a number of countries, work is performed by prisoners for private entities. Most of the ILO observations concerning Conventions No. 29 and No. 105 on prohibition of forced labour relate to countries of the Organisation for Economic Co-operation and Development (OECD).

The exploitation of private prison labour [is] not marginal. It [is] a growing practice in many developed countries and [is] in fact the aspect of the Convention

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Fenwick, "When Privatization means exploitation", *supra* note 62 at 44-45 and Report ILO 2001, *supra* note 34, para. 128-143.

[29] that [is] most often violated in developed countries. To characterize this practice as marginal or as somehow less important [is] to contend that the violation of Convention No. 29 by developed countries [is] of less concern to the Committee than the allegedly more serious violations found in other member States.⁵⁵⁹

The key indicator to measure compliance with forced labour provisions is “whether countries have ratified the ILO conventions on forced labour (convention 29 and 105).”⁵⁶⁰ Most countries have ratified both forced labour conventions.⁵⁶¹ The United States, however, has not ratified *Forced Labour Convention No. 29*, but ratified the *Abolition of Forced Labour Convention No. 105* in 1991. This Convention prescribes the complete and immediate abolition of any form of forced labour “as a method of mobilising and using labour for purposes of economic development.”⁵⁶² In the United States, “twenty-one states have statutes that compel prisoners to work, and others enforce policies that penalize inmates who refuse to work.”⁵⁶³ Thus, “the use of inmate labor in this manner appears to violate Convention No. 105.”⁵⁶⁴

⁵⁵⁹ ILO, *General Report of the Conference Committee on the Application of Conventions and Recommendations*, 89th Sess., Doc. 19 (2001), online: International Labour Organization <<http://www.ilo.org>> para. 93 [ILO Report Conference Committee 2001].

⁵⁶⁰ ILO, Kanchana N. Ruwanpura and Pallavi Rai, *Forced Labour: Definitions, Indicators and Measurement*, InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, International Labour Office (2004).

⁵⁶¹ In September 2004, Convention No. 29 was ratified by 163 countries and Convention No. 105 was ratified by 161 countries, see International Labour Organization, “Ratification information by Convention” online: International Labour Organization <<http://www.ilo.org/ilolex/english/newratframeE.htm>>.

⁵⁶² Convention No. 105, *supra* note 15, article 1.

⁵⁶³ Chang and Thompkins, *supra* note 4 at 60, citing the AFL-CIO.

⁵⁶⁴ *Ibid.*

Furthermore, in practice, a number of European countries do not completely respect these provisions. With respect to countries in the European Union, the ILO Committee of Experts has criticized France for the lack of employment contract for inmate workers and the absence of their coverage by labour and social security laws.⁵⁶⁵ It has also criticized Germany because prisoners work for private entities without their consent, and because they are not covered by social security legislation.⁵⁶⁶ Austria has been criticized for the lack of a free employment relationship in cases where prisoners work for the private sector.⁵⁶⁷ Spain has not been able to establish that prison work for private corporations is voluntary.⁵⁶⁸

Finally, the most criticized European country concerning compliance with international prison labour standards is the United Kingdom. According to the report, in the United Kingdom, when prisoners work for private corporations in state-run and privately run prisons, they do not work in conditions of a free employment relationship.⁵⁶⁹ “It is clear that, at present, neither national law nor current practice in the UK conforms with ILO standards on prison labour.”⁵⁷⁰

The ILO Committee of Experts on the Application of Conventions and Recommendations continues to criticize several EU countries for the practice of

⁵⁶⁵ International Confederation of Free Trade Unions, “Internationally Recognized Core Labour Standards in the European Union” (July 7 2000), online: ICFTU <<http://www.icftu.org/displaydocument.asp?Index=991210450&Language=EN>> [ICFTU on EU] and ILO, *Individual Observation concerning Convention No. 29, Forced Labour, 1930 France*, (2003), online: International Labour Organization <<http://www.ilo.org>>.

⁵⁶⁶ *Ibid* and ILO, *Individual Observation concerning Convention No. 29, Forced Labour, 1930 Germany* (1999), online: International Labour Organization <<http://www.ilo.org>>.

⁵⁶⁷ *Ibid* and ILO, *Individual Observation concerning Convention No. 29, Forced Labour, 1930 Austria* (2002), online: International Labour Organization <<http://www.ilo.org>>.

⁵⁶⁸ *Ibid.* and ILO, *Individual Observation concerning Convention No. 29, Forced Labour, 1930 Spain* (2004), online: International Labour Organization <<http://www.ilo.org>>.

⁵⁶⁹ *Ibid* and ILO, *Individual Observation concerning Convention No. 29, Forced Labour, 1930 United Kingdom* (1998), online: International Labour Organization <<http://www.ilo.org>> para. 27-32.

⁵⁷⁰ ETI, “Prison Labour” 2004, *supra* note 459 at 2 and see *ibid*.

obliging prisoners to work for private enterprises in conditions which cannot be assimilated to a free employment relationship, i.e. without their consent, at below national minimum wage levels, and without social security coverage. This breaches provisions of Convention No. 29.⁵⁷¹

b. Reasons for Difficulties in Application of ILO Standards

One of the reasons for the difficulties in the application of ILO prison labour standards is that employer members of the ILO have always argued that “the regulation of the right to impose prison labour at the national level was outside the competence of the ILO.”⁵⁷² They have also argued that the effects of prison labour on fair competition were not of the competence of the organization either.⁵⁷³ In addition, they argued that “the Convention was to protect the individual, not fair competition.”⁵⁷⁴

Furthermore, a number of governments such as the United States Government, Australian Government and the Government of the United Kingdom have always defended private prisons. The Australian Government argued that “private contractors who were paid by the government for carrying out public services should be treated on the same footing as governments, and be exempt from allegations of forced labour.”⁵⁷⁵ It also argued that “if it could be demonstrated that appropriate protections, involving a role for the public authorities, were in place for privately managed prisons, then it was of

⁵⁷¹ ICFTU on EU, *supra* note 565.

⁵⁷² ILO Report Conference Committee 2001, *supra* note 558 at para. 93.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.* at para. 99.

no relevance that the prison was privately managed.”⁵⁷⁶ According to the Government of the United Kingdom:

[P]rivate prisons were an integral part of the United Kingdom prison system ... Private sector involvement was needed in order to provide meaningful work for prisoners. In his view, the Committee of Experts’ proposition on the voluntary participation of prisoners in private sector work was wholly unrealistic. ... It was vital that an international Convention of such importance was treated as a living document with a changing interpretation, which reflected the realities of a complex changing world.⁵⁷⁷

c. International Trade Law and Sale of Prison-Made Goods

Article XX (e) GATT allows states to prohibit the importation of prison-made goods, but it does not prohibit the exportation or importation of these goods. However, many countries have adopted national legislation prohibiting the importation of prison-made goods. The United States is one of them.⁵⁷⁸

In practice, however, the national legislation prohibiting the importation of prison-made goods is not always respected. For example, it was revealed a few years ago that goods produced by political prisoners and other prisoners in Chinese prisons were exported to the United States in violation of section 1307 of the *Tariff Act* of 1930.⁵⁷⁹ In 1991, human-rights groups estimated that about \$100 million worth of prison-made

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.* at para. 100.

⁵⁷⁸ Section 1307 of the *Tariff Act of 1930*.

⁵⁷⁹ Fenwick, “Private Benefit from Forced Prison Labour”, *supra* note 6 at 16.

groups were exported annually to the United States.⁵⁸⁰ In 1992, the United States and China reached a *Memorandum of Understanding* (MOU) on prison labour, where China agreed to stop exporting prison-made goods to United States markets.⁵⁸¹ It also allowed United States Customs to request permission to visit Chinese prisons suspected of producing goods for the United States market.⁵⁸²

However, by 1994, it was pretty evident that the Chinese authorities did not respect the 1992 trade agreement.⁵⁸³ Thus, in 1994, the United States and China concluded a *Statement of Cooperation on the Memorandum*, providing specific guidelines for the implementation by China of the MOU.⁵⁸⁴ Both agreements together aimed at putting an end to the importation in the United States of goods produced in Chinese prisons.⁵⁸⁵ Nonetheless, in practice, cooperation from Chinese authorities continued to be insufficient.⁵⁸⁶ The exportation into the United States violates both American law and the two bilateral agreements signed by the United States and China.⁵⁸⁷ However, many argue that the American prohibition on the importation of prison-made goods is purely founded

⁵⁸⁰ *Ibid.*

⁵⁸¹ Daniel C. Turack, "The Clinton Administration's Response to China's Human Rights record: At the Half-way Point" (1995) 3 Tulsa J. Comp. & Int'l L. 1.

⁵⁸² Congressional Executive Commission on China, "Protection of Internationally-Recognized Labor Rights", *CECC Annual Report* (2003), online: CECC <<http://www.cecc.gov/pages/virtualAcad/labor/laborannrept03.php>>.

⁵⁸³ Charles Tiefer, "How Congress Can Effectively Review Relations with China After WTO Accession" (2001) 34 Cornell Int'l L.J. 64.

⁵⁸⁴ U.S.-China Economic and Security Review Commission, "U.S.-China Security Review Commission Policy Paper on Prison Labor and Forced Labor in China" (3 August 2004), online: USCC <http://www.uscc.gov/researchreports/2000_2003/pdfs/flabpol.pdf> at 1 [US-China Policy paper on Prison Labor].

⁵⁸⁵ Tiefer, *supra* note 583 at 66.

⁵⁸⁶ US-China Policy paper on Prison Labor, *supra* note 584.

⁵⁸⁷ Trade Environment Database, "Chinese Prison Labor Trade With The United States", online: American University <<http://www.american.edu/TED/prison.htm>>.

on economical reasons. They denounce the hypocrisy of the United States who has even itself acknowledged that American prison-made goods are exported internationally.⁵⁸⁸

II. Interpretation and Evolution of International Labour Standards

a. Critics Against the ILO

i. Excessive Conventions

Between 1919 and 1939, the ILO adopted 133 international instruments.⁵⁸⁹ However, qualitative changes occurred in the organization after the Second World War.⁵⁹⁰ Many subjects that had not been envisaged in 1939 were therefore covered by the organization.⁵⁹¹ Thus, by 1992, the ILO had adopted a total of 353 international instruments.⁵⁹² “This is indeed an astonishing performance, unmatched by any other international organization.”⁵⁹³ The number of standards included in conventions and recommendations were of over 4,600 in 1990.⁵⁹⁴ As of today, the ILO has adopted 185 conventions and 194 recommendations.⁵⁹⁵

Much criticism has been made about the ILO because of the excessive number of instruments that the organization has produced.⁵⁹⁶ Critics argued that “an ever-expanding

⁵⁸⁸ Jonathan M. Cowen, “One Nation’s Gulag is Another Nation’s Factory Within a Fence: Prison-Labor in the People’s Republic of China and the United States of America” (1993) 12 UCLA PAC. BASIN L. J. 235-236.

⁵⁸⁹ Efrén Cordova, “Some reflections on the Overproduction of International Labor Standards” (1993) 14 Comp. Lab. L. 142.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.* at 145.

⁵⁹³ *Ibid.* at 146.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ Philip R. Seckman, “Invigorating Enforcement Mechanisms of the International Labor Organization in the pursuit of U.S. Labor Objectives” (2004) 32 Denv. J. Int’l & Pol’y 686.

⁵⁹⁶ Ignacio A. Donoso Rubio, “Focus on Labour Law: Economic Limits on International Regulation: A Case Study of ILO Standard Setting” (1998) 24 Queen’s L. J. 209.

body of conventions and recommendations tended to confuse standards and diminish the value and respectability of individual conventions by pairing landmark instruments with banal requirements on sectoral issues.”⁵⁹⁷

ii. Inflexible Conventions

In the past, the ILO has been criticized for producing inflexible conventions. Some critics argued that the ILO, in fact, concentrated more on pursuing its legislative ideals than on searching for flexibility in legislative drafting.⁵⁹⁸ In its conventions, it provided detailed standards, rarely integrated flexible devices, and favoured uniform international standards instead of regional particularities. Thus, many argued that the ILO needed to “adapt its conventions and operations to changing economic conditions.”⁵⁹⁹ The demand came from industrialized countries and developing countries due to the economic downturn in the 1970s.⁶⁰⁰ Industrialized countries felt that “adherence to ILO conventions hampered their ability to respond to these economic changes and imposed excessive costs on the public purse.”⁶⁰¹ This led some industrialized countries to denounce ILO conventions because they found them too rigid.⁶⁰² More recently, however, conventions have been more flexible.⁶⁰³

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.* at 211.

⁵⁹⁹ *Ibid.* at 209.

⁶⁰⁰ *Ibid.* at 212.

⁶⁰¹ *Ibid.* at 213.

⁶⁰² *Ibid.* at 209.

⁶⁰³ Cf. Chapter 4, II. b. The Responses of the ILO.

iii. The Lack of Enforcement Mechanisms

The ILO has different types of enforcement mechanisms including regular periodic reporting by states, a mechanism of representation by employers' or workers' organizations when a member state has failed to implement a ratified convention and a mechanism of complaints, which can be made by one state member against another if both have ratified the ILO convention.⁶⁰⁴ However, the ILO does not have the power to condemn a government or impose sanctions for violations of international labour standards.⁶⁰⁵ Some critics thus argue that the ILO therefore has a tendency for "getting tied up in the politics of the Member states and employee/employer organizations."⁶⁰⁶ Thus, the ILO's enforcement powers of the ILO have been viewed by some as "insufficient ... to meet the task of protecting the rights of workers."⁶⁰⁷

b. The Responses of the ILO

As a response to these criticisms, and in order to adapt to the changes in the world, the ILO has recently expressed the view that there is a "need to adapt standard-setting objectives and methodology to globalization and liberalization."⁶⁰⁸ This was the theme of the 1994 ILO Annual Report.⁶⁰⁹ Furthermore, the 1994 Director General's Report aimed at contributing to re-focusing ILO operations around the protection of basic labour rights.⁶¹⁰

⁶⁰⁴ See articles 22 and 23 of the Constitution of the International Labour Organization and Seckman, *supra* note 592 at 685.

⁶⁰⁵ Melissa Pearson Fruge, "The Laogai and Violations of International Human Rights Law: A Mandate For the Laogai Charter" (1998) 38 Santa Clara L. Rev. 497.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ Seckman, *supra* note 595 at 685.

⁶⁰⁸ Rubio, *supra* note 596 at 224.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.* at 227.

The 1996 Director General's Report also criticized the loss of flexibility due to excessively detailed conventions, and encouraged the ILO to consolidate its standards.⁶¹¹ Thus, the ILO has, in recent years, made an effort to use more general concepts instead of specific goals. It has also made an effort towards more flexibility and "the use of more generic language in its conventions."⁶¹²

c. Impact of Globalization on International Labour Standards

Many governments demand more flexible conventions that are more adapted to the changes in the world and the objective of globalization. As a response to this demand, the ILO has recently declared that "market-oriented principles should be central to its operations, while some government regulation is necessary."⁶¹³ According to one scholar, "the production of ILO instruments and the objectives defined therein are limited by the need to draft instruments that have greater coincidence with local economic and social conditions."⁶¹⁴

However, if flexibility tends to promote ratification of and compliance with conventions, it "conflicts with the ILO's commitment to developing universal standards."⁶¹⁵ Flexibility entails an increase in countries' margins in the adaptation of ILO conventions.⁶¹⁶ This raises the important question of how far an international organization must go in order to obtain ratifications of and compliance with its

⁶¹¹ ILO, *Report of the Director-General: Activities of the ILO, 1996-1997 Committee of Experts on the Application of Conventions and Recommendations, Report I*, ILC, 86th Sess. (1998), online: International Labour Organization <<http://www.ilo.org/public/english/standards/relm/ilc/ilc86/repi-c1.htm>>.

⁶¹² Rubio, *supra* note 596 at 233.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.* at 235.

⁶¹⁵ *Ibid.* at 211.

⁶¹⁶ *Ibid.* at 232.

conventions. If it goes too far, the risk is to take most of the substance out of the conventions and turn them into ‘politically correct’ texts that everyone will agree on, but that prescribe no obligation on states, and thus do not contribute to improve workers’ conditions. One scholar argues that the ILO’s effort to change is a “recognition of the economic limits on what can be achieved through international regulation.”⁶¹⁷

III. The United States and the ILO

a. History

At first, the United States did not join the ILO. It officially joined in 1934.⁶¹⁸ However, it withdrew from the organization in 1977. It argued that the ILO was too politicized.⁶¹⁹

The United States cited the disregard of the tripartite system, the double standard for human rights, the lack of due process, and the increasing politicization of the ILO as the factors most influential in its decision to withdraw ... [It] emphasized that it would return if its concerns were properly addressed.⁶²⁰

As a member of the ILO, the United States had contributed about 25% of the organization’s total budget.⁶²¹ The ILO had to reduce its expenditures by 21.7% because of the United States withdrawal.⁶²² The United States used its withdrawal “as a means of applying economic and political pressure to the organization.”⁶²³ Thus, the ILO had to

⁶¹⁷ *Ibid.* at 211.

⁶¹⁸ Stephen I. Schlossberg, “United States’ Participation in the ILO: Redefining the Role” (1989) 11 Comp. Lab. 67.

⁶¹⁹ David Geraciotti, “ILO Workers of the World”, 10:7 *Multinational Monitor* (1989), online: *Multinational Monitor* <http://multinationalmonitor.org/hyper/issues/1989/07/mm0789_06.html>.

⁶²⁰ Schlossberg, *supra* note 618 at 71.

⁶²¹ *Ibid.*

⁶²² *Ibid.*

⁶²³ *Ibid.*

work to accommodate the United States in order for it to reenter the organization.⁶²⁴ The United States finally rejoined the ILO on February 18, 1980.⁶²⁵

b. Non Ratification of Forced Labour Convention No. 29

In total, today, the United States has only ratified 14 conventions, most of which concern sea regulations.⁶²⁶ One of the main reasons explaining the failure of the United States to ratify most ILO conventions is their concern that there could be a conflict between ratified ILO conventions and national and state laws.⁶²⁷ “[U]nder the current machinery, no ILO convention is forwarded for ratification if such ratification would require a change in U.S. federal and state laws.”⁶²⁸

In recent years, the ILO has decided that eight of its conventions should be considered fundamental.⁶²⁹ In June 1998, the ILO formalized this in the *Declaration on Fundamental Principles and Rights at Work*. The *Forced Labour Convention No. 29* and the *Abolition of Forced Labour Convention No. 105* are among these fundamental conventions. The Declaration states that:

... all Members, even if they have not ratified the conventions in question, have an obligation arising from the very fact of membership in the Organization to

⁶²⁴ *Ibid.*

⁶²⁵ *Ibid.*

⁶²⁶ ILO, online: ILO <<http://www.ilo.org/ilolex/english/newratframeE.htm>>.

⁶²⁷ Seckman, *supra* note 595 at 694-695.

⁶²⁸ *Ibid.* at 695.

⁶²⁹ Melissa Torres, “Labor Rights and the ATCA: Can the ILO’s Fundamental Rights be Supported Through ATCA legislation?” (2004) 37 Colum. J.L. & Soc. Probs. 455. The eight conventions are the Forced Labour Convention No. 29 of 1930, the Abolition of Forced Labour Convention No. 105 of 1957, Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948, Right to Organise and Collective Bargaining Convention No. 98 of 1949, Equal Remuneration Convention No. 100 of 1951, Convention No. 111 on Discrimination (Employment and Occupation) of 1958, Minimum Age Convention No. 138 of 1973 and Convention No. 182 on Worst Forms of Child Labour of 1999.

respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.⁶³⁰

Among these eight conventions, the United States has only ratified two conventions: the *Convention on Worst Forms of Child Labour No. 182* and the *Abolition of Forced Labour Convention No. 105*.⁶³¹ The other countries that have only ratified two or less of the fundamental conventions are the Democratic Republic of Timor-Leste, Vanuatu, the Lao People's Democratic Republic, the Solomon Islands, Myanmar and Oman.⁶³²

The United States acknowledged that there may be a conflict between the practices of private prisons and inmates working for private companies and the requirements of article 2(2)(c) of the *Forced Labour Convention No. 29*. "The greatest potential for inconsistency between the two systems (US and international) appears in the context of

⁶³⁰ ILO, *Declaration on Fundamental Principles and Rights at Work*, ILC, 86th Sess. (1998).

⁶³¹ ILO, *Ratifications of the Fundamental human rights Conventions by country*, online: ILO <<http://www.ilo.org/ilolex/english/docs/declworld.htm>>.

⁶³² ILO, *Ratifications of the ILO Fundamental Conventions* (2004), online: ILO <<http://webfusion.ilo.org/public/db/standards/normes/appl/>>.

prison labour involving the private.”⁶³³ Furthermore, the AFL-CIO “does not think that the United States can, in good faith, submit a Declaration Follow-up report on forced labour to the ILO without acknowledging the serious, unresolved, compliance issues that arise with respect to private prison labour in the country.”⁶³⁴ Finally, according to the International Confederation of Free Trade, “there are grounds for serious concern about commercial production prisoners in the United States.”⁶³⁵

Although the United States has not ratified *Forced Labour Convention No. 29*, the Declaration provides that it must respect its provisions, because it is part of the eight fundamental conventions. “All member countries are required to protect certain rights represented by ILO conventions, regardless of ratification.”⁶³⁶ Some scholars argue that the Declaration could be considered customary international law and must therefore be respected by all countries.⁶³⁷

c. Ratification and Enforcement of Forced Labour Conventions

The solution often suggested in order to ensure compliance with international labour standards, including freedom from forced labour, in the United States is to bring

⁶³³ ILO, *The elimination of all forms of forced or compulsory labour*, United States (2002), online: ILO <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1670> at 39, quoting Janelle Diller, “The Convention Concerning Forced Labour or Compulsory Labour of the International Labour Organization (No. 29) and United States Law and Practice: A Comparative Analysis” (1997).

⁶³⁴ ILO, *Compilation of annual reports by the International Labour Office*, United States, Government, Report preparation (2003), online: International Labour Organization <http://www.ilo.org/dyn/declaris/DECLARATIONAR.Show_ARHTML>.

⁶³⁵ ILO, *Compilation of annual reports by the International Labour Office*, United States, Observations submitted to the Office by the International Confederation of Free Trade (2001), online: International Labour Organization <http://www.ilo.org/dyn/declaris/DECLARATIONAR.Show_ARHTML> [Report U.S. 2001].

⁶³⁶ Seckman, *supra* note 595 at 689.

⁶³⁷ Torres, *supra* note 629 at 456.

forward suits in United States courts with the *Alien Tort Claims Act* (ATCA).⁶³⁸ The ATCA provides that the district courts shall have “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶³⁹ Thus, three conditions must be fulfilled. First, an alien must make the claim. Second, a tort must be alleged. Third, it must violate “the law of nations or a treaty of the United States.”

“The law of nations” is today called international law.⁶⁴⁰ Customary international law is a fundamental form of international law.⁶⁴¹ According to some scholars, “the prohibition on forced labour, like slavery, is now recognized as a customary international norm.”⁶⁴² Furthermore, according to the ILO, “the prescription of slavery and slavery like practices constitutes a principle recognized by the international community as a whole.”⁶⁴³

Looking at ratifications of the relevant ILO instruments, the principle of eliminating forced or compulsory labour as expressed in Conventions Nos. 29 and 105 has attracted a very high degree of international acceptance. They are the most highly ratified of the fundamental Conventions.⁶⁴⁴

Thus, freedom from forced labour can be considered as part of customary international law.⁶⁴⁵ It can therefore be considered a violation of the law of nations and be subject to a

⁶³⁸ See e.g. *ibid.* at 447.

⁶³⁹ *Alien Tort Claims Act*, 28 U.S.C. § 1350 (2000).

⁶⁴⁰ Pei-Yun Hsu, “Should Congress repeal the Alien Tort Claims Act ?” (2004) 28 S. Ill. U. L. J. 582.

⁶⁴¹ *Ibid.* at 582.

⁶⁴² Torres, *supra* note 629 at 458.

⁶⁴³ Report ILO Stopping Forced Labour, *supra* note 59 para. 32.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

claim under the ATCA.⁶⁴⁶ Of the four fundamental international labour rights, the only one that has been recognized as actionable under the ATCA has been freedom from forced labour.⁶⁴⁷ Thus, “it is likely that ATCA litigation alleging a violation of the prohibition on forced labour will be successful in the future.”⁶⁴⁸

However, even if freedom from forced labour can be considered as a violation of the law of nations, ATCA claims face other obstacles such as the restriction regarding the establishment of personal jurisdiction over the defendant and the state action requirement limitation, which excludes action against “purely private actors.”⁶⁴⁹ Thus, other ways must be found in order to “phase out” commercial production by prisoners in the United States.⁶⁵⁰ The United States should ratify the *Forced Labour Convention No. 29*. In conformity with international standards, it should integrate in its national law a provision prohibiting all the different kinds of forced labour practices, including ‘new’ forms of slavery.

IV. The Evolution of the Interpretation of International Labour Standards: The Role of the ILO

a. Influence of the United States

The United States is the country that gives the largest contribution to the ILO.⁶⁵¹ For the 2004-2005 biennium, it contributed 22% of the ILO’s budget, representing nearly

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.* at 464.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.* at 469.

⁶⁵⁰ Report U.S. 2001, *supra* note 635.

⁶⁵¹ “International Labour Organization” (2004), online: The Briefing Book on International Organizations in Geneva <<http://www.genevabriefingbook.com/chapters/ilo.pdf>>.

one quarter of the total budget.⁶⁵² Furthermore, the ILO has strongly encouraged the ratification by the United States of *Forced Labour Convention No. 29*.

Therefore, its influence on the ILO's policy is important. However, the international forced labour standards are now part of customary international law. Thus, in order to maintain solid international standards and in particular to stop and prevent the development of the 'new' forms of forced labour, the ILO must give clear and non-adaptable interpretations of the forced labour conventions.

It is clear, however, that the ILO is limited in its action by the fact that it is a governmental organization.

One of the two limits placed on the ILO's standard-setting action in the context of globalization [is] that its interlocutors were member States whose will and capacity to follow its guidelines [are] inevitably affected by international competition.⁶⁵³

Thus, the role of implementing international standards regarding prison labour must also be attributed to non-governmental actors.⁶⁵⁴

b. International Solutions

i. An International Ban of All Private Sector Involvement in Prison Industries?

Prison labour for private corporations, when clearly regulated, can certainly contribute to the rehabilitation of inmates. They can acquire skills, work habits and

⁶⁵² *Ibid.*

⁶⁵³ ILO, *The ILO, standard setting and globalization*, ILC, 85th Sess. (1997) para. 84-88, online: International Labour Organization <<http://www.ilo.org/public/English/standards/relm/ilc/ilc85/dg-rep.htm>>.

⁶⁵⁴ See *ibid.*

professional experience while they are incarcerated. Furthermore, by increasing the chances of inmates' employment after release, it can contribute to reducing recidivism rates. This can entail a reduction of the prison population, and a decrease of the incarceration costs. Thus, an international ban of all private sector involvement in prison industries is probably not desirable. However, strict regulations and application of labour and social security legislation are absolutely essential to avoid the abuses and exploitation of prison labourers, and to ensure that the goal of the labour is rehabilitation and not punishment or profit.

ii. An International Ban of Prison Privatization?

The institution of private prisons is difficult to reconcile with the requirements of article 2(2)(c) of *Forced Labour Convention No. 29*: "supervision and control of a public authority", people not being hired to or placed at the disposal of private entities, and real voluntary work. However, much depends in practice on the interpretation that is made of these terms. A clear way of dealing with the numerous legal and moral problems concerning private prisons would be an international ban of prison privatization.

However, independently from a need for an international provision banning the privatization of prisons, "international law that addresses the brutal practices of this industry already exists."⁶⁵⁵ Thus, the existing conventions can at least be used to regulate severely the practices of the private prison industry.⁶⁵⁶ Despite the pressure from certain countries that claim that the institution of private prisons is compatible with international

⁶⁵⁵ Weaver and Purcell, *supra* note 554 at 379.

⁶⁵⁶ *Ibid.* at 380.

labour standards, it is necessary that the ILO clearly establish in its interpretations that mandatory forced labour for private companies is incompatible with the provisions of *Forced Labour Convention No. 29*, even if the work is construction or maintenance of private correctional facilities.

iii. A Ban of the International Sale of Prison-Made Goods?

At the international level, a more realistic step to fight some of the problems linked to private sector involvement in prison industries is legislation banning the international sale of prison-made goods.⁶⁵⁷ Weaver and Purcell argue in favour of placing “pressure on the international community to implement legislation on the ban of the international sale of prison-made goods.”⁶⁵⁸ According to them, this support could also be used to “highlight the hypocrisy in the American policy towards the selling of prison-made goods.”⁶⁵⁹

It is clear that this strategy does not attack the ownership of prisons, and thus does not ban the private prison industry.⁶⁶⁰ Nevertheless, it does “destroy the profit motive of private prisons by limiting the market for these goods.”⁶⁶¹ In fact, pursuing strategies to limit, and in the long run prohibit, the international sale of prison-made goods will certainly contribute to ensuring that private sector involvement in prison industries serves the goal of rehabilitation and not only profit for private actors.

⁶⁵⁷ *Ibid.* at 378.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Ibid.* at 377.

⁶⁶¹ *Ibid.*

Conclusion

Concerning prison labour, organizations and scholars have a tendency to focus on political prisoners or on prison labour when due legal process provisions have not been respected.⁶⁶² However, few focus on ‘regular’ prison labour and the involvement of the private sector in correctional industries. Nonetheless, as demonstrated throughout this thesis, the number of inmates working for private corporations and held in private prisons is increasing considerably. Furthermore, the involvement of the private sector in the prison industry is probably the forced labour issue that raises the most controversy in industrialized countries, especially in the English speaking countries.

In recent years, as the prison population has expanded dramatically and the recourse to private prisons has been considered the ‘new’ alternative to the problem of prison overcrowding, the ILO has nonetheless attached a growing interest to this issue. In 2001, the ILO published a global report on forced labour entitled “Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work”, where it discussed the issue of prison-linked forced labour.⁶⁶³ Furthermore, as preparation for the next Global Report on forced labour, the ILO held, on 19-20 July 2004, a “Research Symposium on Prison Labour and Its Present-day Implications” in Geneva.⁶⁶⁴ In particular, it explored the “recent and ongoing research on prison labour with policy and operational relevance to privatized prisons.”⁶⁶⁵

⁶⁶² ETI “Prison Labour”, November 2002, *supra* note 368 at 2.

⁶⁶³ Report ILO Stopping Forced Labour, *supra* note 59.

⁶⁶⁴ ILO, *Event Details, Fundamental Principles and Rights at Work*, online: ILO <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.EventDetails?var_Language=EN&var_ID=1186>.

⁶⁶⁵ *Ibid.*

Forced labour is largely prohibited by international law. Prison labour, when practiced in violation of international provisions, can be considered a ‘new’ contemporary form of forced labour. However, unlike other forms of forced labour, “compliance with ILO standards is entirely within the power of governments.”⁶⁶⁶

It is governments that decide whether or not to privatize prison operations. It is governments that determine whether or not prisoners will be allowed to work for private interests, regardless of whether prisons are privately run. It is governments that set pay scales for prisoners.⁶⁶⁷

Governments can and should take necessary steps to eradicate this illegal modern form of slavery.⁶⁶⁸ In the case of the United States, the first step would be to ratify the ILO *Forced Labour Convention No. 29* and to take steps to implement the international provisions into national law and practice. “This path would help to ensure (notably) that the U.S. labor market and its workers are not harmed by unfair competition in the new global economy.”⁶⁶⁹

If prison labour for private entities has a purpose today, it must serve the objective of rehabilitation of inmates. Private sector involvement in the penitentiary industry raises a number of concerns that have been underlined throughout this thesis. The biggest risk is that for-profit private corporations put their interest before those of the inmates and those of society. At the rate it is going today, there will also be important consequences for ‘free’ workers because of the unfair competition created by prison labour.

⁶⁶⁶ Fenwick, “When privatization means exploitation”, *supra* note 62 at 45.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Seckman, *supra* note 595 at 698-699.

The only way to contribute to rehabilitation of inmates through prison labour and to avoid the undesirable effects of private sector involvement and the potential exploitation of inmates is to apply labour and social security legislation to inmate workers. They must be entitled to minimum wage and other labour rights and be protected by social security legislation. In my sense, they must also be able to organize and bargain collectively. An international trade provision prohibiting the importation and exportation of prison-made goods would also contribute to avoid the negative effects of prison labour for private corporations.

Proponents of prison privatization often have the primary argument that delegating the incarceration function to the private sector reduces the costs linked to prison overcrowding. Thus, the question of private prisons versus public prisons is often debated on this level. However, the review of the different comparison studies that have been done between public and private prisons leads us to the conclusion that it is quite difficult to compare the cost and quality of different correctional facilities. In the end, public and private facilities probably entail similar results concerning cost and perhaps also quality. Concerning this second aspect, however, the argument of private prisons 'cutting corners' to maximize profit is nevertheless pretty convincing.

The concerns about private prisons are more on a legal, political and moral level. Mandatory work for private entities is current practice in private prisons, at least for the construction and maintenance work of the facilities. International standards prescribe "supervision and control by public authorities" and prohibit the hiring of inmates to

private entities. In my opinion, compliance with these standards is incompatible with the private prison institution. There is a need for a clear position from the part of international organizations, and especially the ILO, on this issue.

The delegation of the incarceration function to the private sector is one step too far in the privatization trend. "The goal of running prisons is too important to leave open to the volatility and questionable motives of the free market."⁶⁷⁰ A serious risk of abuse in private prisons exists. "The presence of a profit motive results in private prisons substituting the goal of the general welfare of society with the goal of profit maximization."⁶⁷¹ Thus, to avoid any potential abuse by the private sector, prisons must remain in the hands of governments or possibly non-profit entities.

Private sector involvement in prison industries and the recourse to private prisons are a response to the problem of overcrowding, entailing considerable costs for society. Over one million people are incarcerated in United States prisons for non-violent offences, such as immigration irregularities, drug use, mental illness, shoplifting and homeless walking in the streets.⁶⁷² Thus, more than half of the United States prison population could be released without posing any danger to the public. On the contrary, their release coupled with community programs and services, such as drug-abuse centres

⁶⁷⁰ Goyer, *supra* note 3.

⁶⁷¹ Field, *supra* note 496 at 662.

⁶⁷² Chang and Thompkins, *supra* note 4 at 63.

or homeless shelters⁶⁷³ would certainly be more effective for ‘rehabilitating’ these ‘offenders’ and “ultimately enhance public safety.”⁶⁷⁴

Thus, instead of private sector involvement in prison industries, another alternative exists to solve the problem of overcrowding: decarceration.⁶⁷⁵ Decarceration means “fewer laws governing individual behaviours, less policing, and shorter sentences.”⁶⁷⁶ It also means finding alternative methods of punishment and rehabilitation besides imprisonment, especially for these non-violent offenders. Decarceration is “eliminating poverty, creating social and welfare programs, education, and job opportunity for the unemployed, and raising the living wages and standards for the employed”,⁶⁷⁷ instead of criminalizing poverty and social marginality.

However, as it is today, the prison-industrial complex is “an artefact of complex ideological, social and political, and economical forces.”⁶⁷⁸ Therefore, dismantling it would require “fundamental changes in the class and racial relations.”⁶⁷⁹ A change in policy is needed. An increase in the level of conscience on this issue, both individually and collectively, is probably the first step in this direction.

⁶⁷³ *Ibid.*

⁶⁷⁴ Fay Honey Knopp & others, *Instead of Prisons: A Handbook for Abolitionists* (Syracuse NY: Prison Research Education Action Project, 1976), chapter 5, citing A Program for Prison Reform at 9.

⁶⁷⁵ Chang and Thompkins, *supra* note 4 at 63.

⁶⁷⁶ *Ibid.* at 64.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*

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