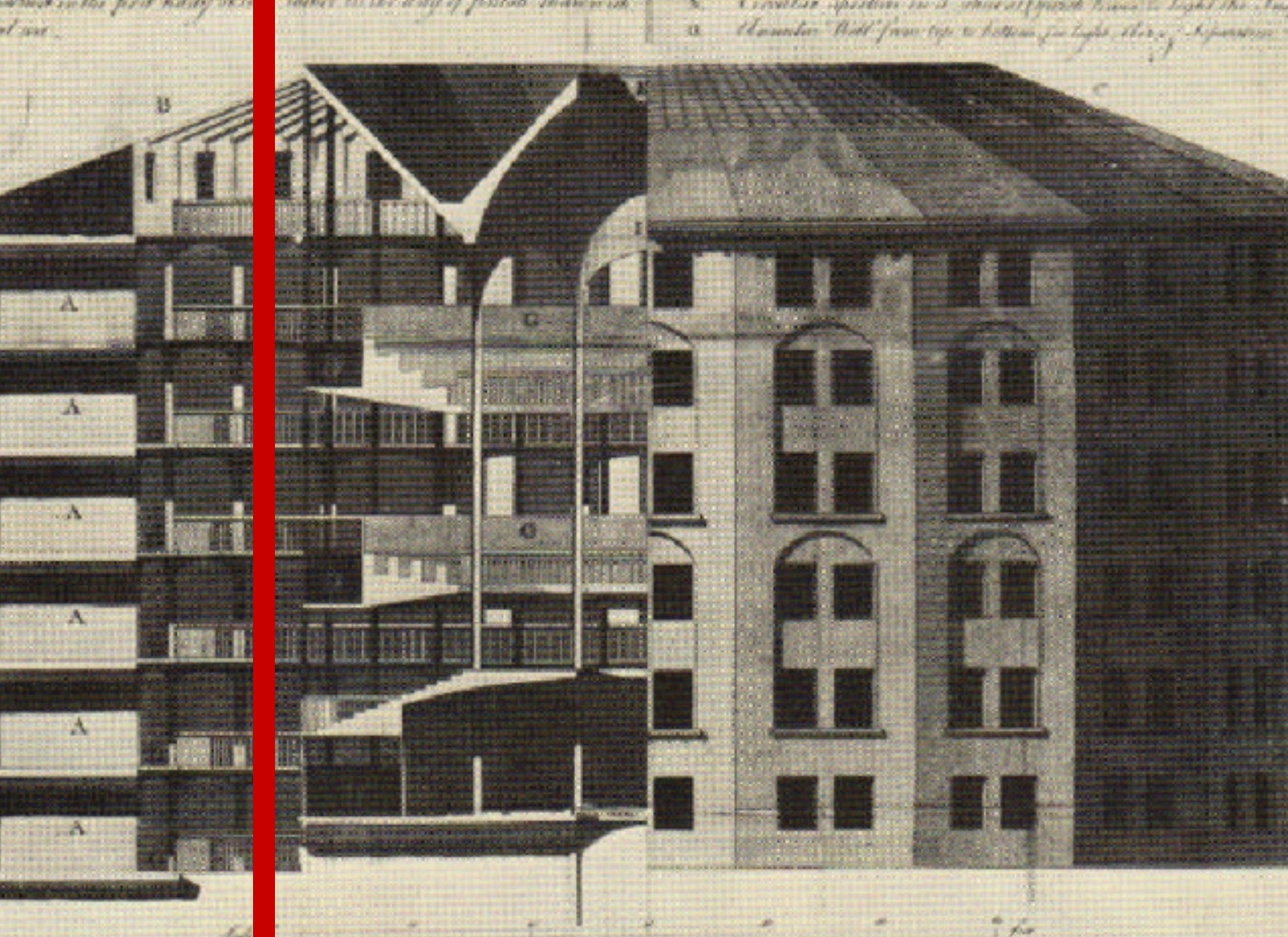


# LABOURING BEHIND BARS: ASSESSING INTERNATIONAL LAW ON WORKING PRISONERS

## APPENDIX

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# Labouring behind bars

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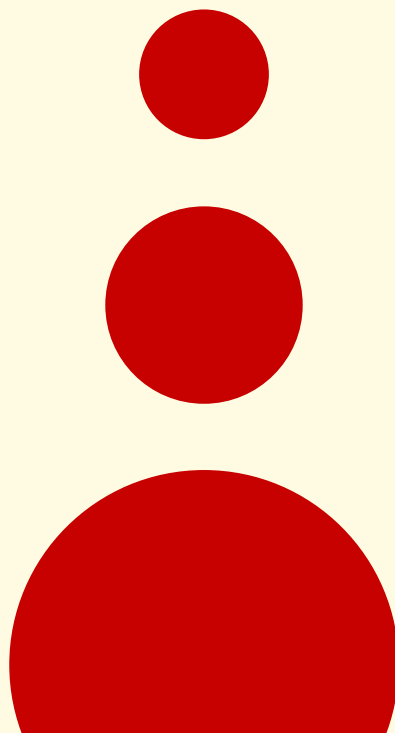
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# 1. Introduction

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International human rights law creates clear and unambiguous labour rights, applicable to all work done in the free economy. These fundamental rights include the right to pay, the right not to be forced to work, and the principle of voluntarism (i.e. that work should be chosen, and that it should be possible for workers to decline work without suffering a penalty). Generally, however, when prisoners work they do not have the same rights and freedoms as other workers.

There are, nonetheless, both binding laws and frameworks of 'soft', non-binding, law which apply to prison work. This Appendix supplements our briefing on the international normative frameworks surrounding prison work with a more detailed, fully referenced survey of these laws.



## 2. Binding law: slavery and forced labour treaties

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International law has long contained provisions aiming to eliminate objectionable labour practices. However, defining objectionable labour practices has always posed difficulties. The earliest treaties still relevant in the contemporary context date from the 19th century. They focused on the abolition of chattel slavery: the assertion of, and trade in, property rights over other human beings. However, governments tolerated other similar practices (such as indentured labour or the exploitative use of prisoners' labour), in part because the cheap labour they provided was indispensable in colonial and imperial state-building. As a result, 'abolishing chattel slavery as a juridical status did not automatically banish from the world everything that all the various abolitionists had argued was intolerable about slavery'.<sup>1</sup>

### 2.1. Slavery Conventions

The 1926 Slavery Convention defined slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.<sup>2</sup> It required states to abolish 'slavery in all its forms', but did not elucidate what was meant by forms of slavery other than chattel slavery. It also permitted forced labour—that is, work performed involuntarily and under the threat of a penalty, but without the assertion of property rights over the worker. However, forced labour was only allowed if it was 'exacted for public purposes'. Responsibility for its governance rested with 'the competent central authorities of the territory concerned'.<sup>3</sup>

The Slavery Convention was supplemented in 1956, with the definition of slavery expanded to include other practices, including debt bondage.<sup>4</sup> The Convention has been ratified by 99 states, including Brazil, the UK, and the USA.<sup>5</sup>

### 2.2. ILO Forced Labour Conventions

Subsequent international treaties have expanded the labour practices states have agreed to ban beyond chattel slavery. The International Labour Organisation (ILO) has adopted two Forced Labour Conventions: Number 29 (concluded in 1930) and Number 105 (concluded in 1957). Both contain provisions relevant to work done by prisoners, and both clarified further the circumstances in which the Slavery Convention's general (and vague) 'public purposes' exemption could be applied. Signatories to these treaties committed to enact, in their own national law, prohibitions against 'forced labour', a term defined by Convention 29.

#### 2.2.1. The 1930 Forced Labour Convention

The ILO Forced Labour Convention (Number 29 of 1930) aimed to eliminate various forms of exploitative compulsory labour, among which were some forms of prison labour then in existence. One of its targets was the use of prison labour by profit-making entities. For some time, state authorities in many countries had hired prisoners out to work for private interests in factories, farms, plantations, and the like. Workers typically received little or no pay, and faced highly exploitative and often dangerous working conditions. Often, they were imprisoned on flimsy pretexts, with conviction rates sometimes driven more by the demands of employers for cheap labour than by actual crime rates. In the racially segregated Jim Crow states of the USA, for example, it was common for Black workers to be convicted by White juries for non-payment of an alleged debt, or to face imprisonment for 'crimes' such as vagrancy, using bad language, or other 'offences against decency'. Such practices were wide open to abuse and corruption, and amounted to a racialised system of social control.<sup>6</sup>

To address these practices, the 1930 Convention expanded the protections in the Slavery Convention by creating the new legal category of 'forced labour'. It is defined in the Convention as follows:

‘Forced or compulsory labour’ shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.<sup>7</sup>

However, the Convention also makes five exemptions, in effect spelling out in greater detail the ‘public purposes’ exemption in the Slavery Convention, and specifying circumstances in which states could permissibly compel forced labour. These included military conscription, compulsory work in response to a disaster, and (most importantly for current purposes) prison labour:

the term ‘forced or compulsory labour’ shall not include: [...] Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired out to or placed at the disposal of private individuals, companies, or associations.<sup>8</sup>

The implications of Article 2(2)(c) are that under the Convention, compulsory prison labour is permissible (i.e. it is not ‘forced labour’ for the purposes of the Convention), provided three conditions have been met. Prisoners required to work under compulsion by states:

1. must have been convicted of a crime by a court;
2. must do work that is supervised and controlled by a public authority; and
3. must not be hired out to or otherwise made to work for private entities, if the previous two conditions are not met.

A further point to note relates to the definition in Article 2(1). Work not done under compulsion—that is, for which a prisoner has ‘offered himself voluntarily’—also cannot be ‘forced labour’. The Convention is silent on what it could mean for prisoners to ‘offer [themselves] voluntarily’ in the prison context, although this is clarified further in ILO guidance materials, which are summarised in section 4.1 below.

In effect, this means that work done by convicted prisoners under the direct supervision and control of a prison operated by the state is exempt from being defined as ‘forced labour’, or covered by the Convention. So is work which convicted prisoners do ‘voluntarily’. But work done by convicted prisoners which involves a non-state body in any way—whether it is a private company operating a prison, or a not-for-profit business providing vocational training to prisoners, or work on a contract held by a state-operated prison, to take three contrasting examples—is ‘forced’, and thus illegal, if it is in any way ‘compulsory’.

The Convention thus sought both to end the most egregious prison labour practices, while permitting states to continue using them, albeit in more tightly defined circumstances than before. As historians have recently commented about this contradiction, it is partly explained by the historical norms of the time: ‘the colonial roots of [the Convention’s] standard-setting are unmistakable’.<sup>9</sup> In 1930, when the Convention was written, it was still a common practice for colonial states to extract forced labour from their colonised racial majority populations to carry out state-building infrastructure projects such as road-building.

Thus the Convention bears the imprint of retributive understandings of punishment, in which sentenced prisoners are understood to owe a ‘debt to society’, to be discharged through their work. Yet in bearing this imprint, the Convention also created a double standard: that it was unacceptable for prisoners’ labour to be exploited *for private profit*, but that it was acceptable for their labour to be exploited *for the public good*.

### 2.2.2. The 1957 Abolition of Forced Labour Convention

Contradictions and problems in the original ILO Convention became evident over time. Some related to the exemption created by the 1930 convention for forced labour exacted because of a conviction. In the 1930s and subsequently, authoritarian states (such as Nazi Germany) commonly detained political opponents and

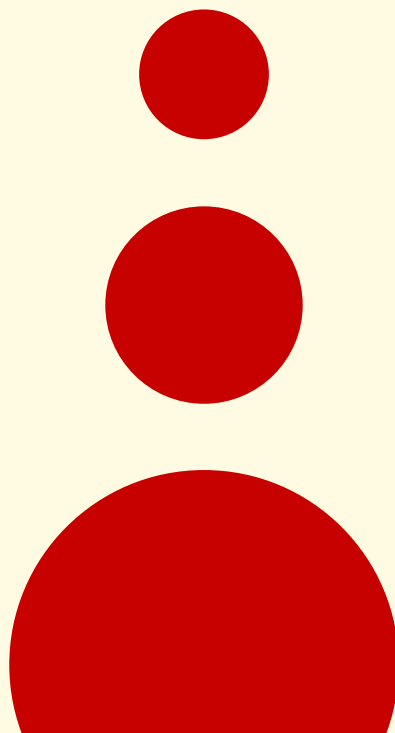
forced them to undertake public works. Such political prisoners were in an ambiguous position: since they had often been convicted of crimes they could legally be forced to work; but these convictions often related to their political activities, their racial identities, or other characteristics (such as trade union membership) which were protected by human rights instruments. Moreover, the courts which had convicted them were often subject to political interference, and were not operating according to the rule of law. As such, their detention and labour were clearly abusive, but were also arguably permissible under the 1930 Convention.<sup>10</sup>

Elsewhere, states such as China were using the forced labour of their citizens for economic development projects (such as the Great Leap Forward). The justifications offered for these practices were similar to those used by European states in their colonial empires: they focused on a notional public good.<sup>11</sup> Again, this form of forced labour was not clearly excluded by the 1930 Convention.

A subsequent Abolition of Forced Labour Convention addressed these shortcomings in the original framework.<sup>12</sup> Its signatories undertook to pass national legislation forbidding compulsory labour to be used in any form for any of the following purposes:<sup>13</sup>

- 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;
- as a method of mobilising and using labour for purposes of economic development;
- as a means of labour discipline;
- as a punishment for having participated in strikes;
- as a means of racial, social, national or religious discrimination.

The underlying definition of forced labour created by the 1930 Convention remained largely unchanged by the 1957 Convention. The latter instead merely set out further exemptions to the provisions permitting prisoners who have been convicted of a crime to be required to work.



## 3. Binding law: human rights treaties

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Several other human rights treaties do not specifically regulate prison work, but create general protections for people in prison.<sup>14</sup> These protections are binding on states which ratify the treaties, and hence affect prison work.

### 3.1. The European Convention on Human Rights

The European Convention on Human Rights (ECHR) applies in the 46 European countries which have ratified it, and its implementation is overseen by the European Court of Human Rights, itself a body of the Council of Europe (CoE). Only two European countries are not among the ratifying states: Russia was expelled from the CoE in 2022, and Belarus never joined after it became independent following the collapse of the Soviet Union in 1991.

The ECHR prohibits all forms of torture or inhuman or degrading treatment and punishment, as well as slavery and 'forced or compulsory' labour.<sup>15</sup> It exempts work 'required to be done in the ordinary course of detention' from this prohibition (including work done by prisoners temporarily released from prison), provided that the person's detention complies with the provisions of the ECHR: for example, after conviction by a competent court, or where detention is deemed necessary pre-trial, to prevent flight from justice or the commission of an offence.<sup>16</sup> This wording differs from the ILO Convention, which explicitly exempts work by persons convicted of a crime from the prohibitions against forced labour but does not extend this to pre-trial detainees.<sup>17</sup>

### 3.2. The American Convention on Human Rights

The American Convention on Human Rights has been signed by both Brazil and the USA, but ratified only by Brazil.<sup>18</sup> It prohibits slavery, the slave trade, and forced labour, but exempts compulsory prison labour from this prohibition in certain circumstances, including where the law of a country provides for the penalty of 'deprivation of liberty at forced labour'; or where 'work or service [is] normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority'.<sup>19</sup> Thus the American Convention also does not prevent pre-trial detainees from being required to work.

Uniquely among binding treaties, the American Convention states that prison work must not 'adversely affect the dignity or the physical or intellectual capacity of the prisoner'.<sup>20</sup> Other than this, however, it says little on the matter of work in prison, except that it follows the ILO Conventions in requiring the forced labour of prisoners to be carried out under the supervision and control of public authorities, and in not allowing prisoners to be placed at the disposal of private interests or individuals.<sup>21</sup>

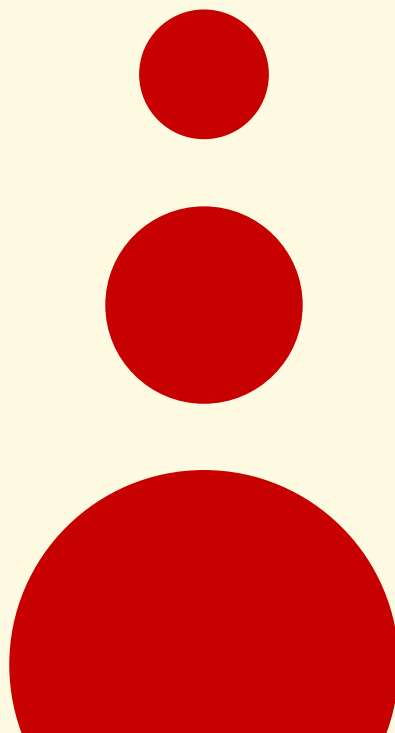
### 3.3. The International Covenant on Civil and Political Rights

The UN's International Covenant on Civil and Political Rights (ICCPR) is binding upon the 173 countries that have ratified it. Brazil, the UK, and the USA are among them, and as a result 'undertake to respect and ensure to all individuals within [their] territory and subject to [their] jurisdiction' the rights that the Covenant confers.<sup>22</sup>



It places a general prohibition on torture or cruel, inhuman, or degrading punishment or treatment, and it duplicates the general prohibitions against slavery and forced labour that are to be found in the ILO conventions. Again, like the ILO conventions, it permits 'hard labour' to be imposed as punishment for a crime,<sup>23</sup> where the punishment is a criminal sentence defined within the national law of a country. It also specifically exempts from the prohibition on forced labour '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 during conditional release from such detention'.<sup>24</sup> Similarly to the European Convention on Human Rights, the ICCPR permits states to force anyone to work if they have been detained lawfully (whereas the ILO conventions require that they must have been convicted of a crime). In the ICCPR, too, therefore, pre-trial prisoners can be required to work.

Separately, the ICCPR also stipulates that the aims of 'the penitentiary system' generally should be the 'reformation and social rehabilitation' of prisoners.<sup>25</sup> Similar aims for prison regimes are set out, and developed more fully, in non-binding 'soft law' standards, which are discussed in greater detail below.



## 4. Non-binding ‘soft’ law

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In addition to binding treaty law, there are three main sources of ‘soft law’ on prison work: first, guidance materials published by the ILO on the Forced Labour Conventions; second, rules published by different international bodies on prison administration, prison conditions, and the treatment of prisoners.

### 4.1. ILO guidance on the Forced Labour Conventions

The explicit provisions of the Forced Labour Conventions are brief and non-specific, meaning that there is a need for materials on how to interpret and apply them. The ILO monitors compliance through regular reports prepared for the International Labour Conference, and is advised by its Committee of Experts on the Application of Conventions and Recommendations (henceforth, the CEACR), which publishes guidance on how the conventions should be interpreted and applied in light of new developments.

ILO guidance is not, in itself, legally binding, but is often referred to by a range of other actors including trade unions, employers, and auditors that companies use to inspect labour standards along global supply chains.<sup>26</sup> The ILO itself also produces guidance materials for businesses.<sup>27</sup> Thus, the CEACR’s views are influential.

The CEACR specifically addressed the topic of private sector prison labour at the International Labour Conference in 2007, prompted by the growing trend in many countries for states to contract with private companies to operate prisons on their behalf.<sup>28</sup> This practice, unknown at the time the 1930 Convention was concluded, has ambiguous status under its provisions. States which contracted out their prisons in this way argued that the companies operating them were, effectively, acting in place of the state. This, they contended, meant that work done by prisoners in privately operated prisons was exempt under the Convention.

This posed a challenge to the CEACR’s settled position on prison labour done for private entities. Although it had previously recognised there could be benefits when prisoners worked for private companies, the CEACR’s view had been that to comply with the 1930 Convention, such work *could not* be compulsory, and instead had to be ‘voluntary’. Since ‘voluntariness’ in the prison context is difficult to define, the CEACR had developed two main indicators by which ‘voluntariness’ could be assured.<sup>29</sup> Its view was that both of the following had to be in place:

1. Freely given informed consent on the prisoner’s part; and
2. Conditions of work which approximate those in a free labour relationship.

The first indicator seeks to ensure that prisoners who work are making a real choice to do so, and not working merely because doing so is preferable to confinement in a cell, nor because they expect to lose privileges or be penalised if they do not. However, freely given informed consent to the work is not enough on its own, in the CEACR’s view: the conditions of work should also ‘approximate’ those which would apply in a free labour relationship. The CEACR has also declined to provide general ‘checklists’ by which work by prisoners for non-public entities could be assessed, instead suggesting that it is for states’ labour standards inspectorates (or equivalent bodies) to consider schemes on a case-by-case basis, referring to a range of other working protections which employers might seek to bypass by employing prisoners who lack ‘full’ employment rights and thus access to these protections. The CEACR is clear that this does not mean prisoners will necessarily enjoy full free market labour rights; rather, individual examples of prison work for non-public entities would have to be considered against the prevailing conditions for ‘free’ labour on a case-by-case basis:

Such conditions [approximating a free labour relationship] would not have to emulate all of the conditions which are applicable to a free market but in the areas of wages, social security, safety and health, and labour inspection, the circumstances in which the prison labour is performed should not be so disproportionately lower than the free market that it could be characterized as exploitative.<sup>30</sup>

The onus is therefore on private organisations which use prison labour to demonstrate that they are not exploiting, or are not perceived to be exploiting, prisoners' labour. The ILO has declined to publish binding checklists or detailed guidance materials, but the CEACR's emphasis on consent and working conditions approximating a free labour relationship is accompanied in its own reports by clear guidance on interpretation, some of which appears to be the reference point for further materials published by a range of other organisations which advise businesses on forced labour more generally.<sup>31</sup> Non-public entities which engage prisoners as workers are advised by the CEACR<sup>32</sup> to satisfy themselves that:

- the worker was convicted of a crime in a court of law;
- the worker has offered themselves voluntarily for the work, with their consent recorded formally, for example in a written work agreement;
- the worker should be able to withdraw their agreement to work;
- the worker should not be under any form of pressure or under any threat of a penalty; this includes both punishments and lost privileges incurred for not working, including adverse impacts on parole decisions,<sup>33</sup> and
- their working conditions, including pay, should 'approximate a free labour relationship'. The ILO provides indicators including a wage close to the equivalent wage that would be paid for the same work in the community, and social security and health and safety protections which are the same as those for free workers.<sup>34</sup>

The CEACR also recognises that under some circumstances, prisoners working for private organisations might derive benefits *for themselves*, for example if they acquire new skills or offers of employment after release. Its position (and the ILO's) is that these benefits are not enough in themselves to make the work 'voluntary' and thus guard against it being exploitative. Instead, the above conditions need to apply, and (consistent with the conventions) there needs to be 'effective, regular, and systematic' supervision of the work by a public authority competent to inspect labour practices.<sup>35</sup>

The CEACR considers that *any* work done by prisoners for a private entity—voluntary sector and not-for-profit organisations are included under this definition—falls under these requirements. Hence, *all* the following examples would be subject to the CEACR's 'voluntariness' requirement, although they are not (on the face of it) all potentially equally exploitative:<sup>36</sup>

1. Work for a private entity as part of an educational or training scheme, whereby the prisoner obtains qualifications;
2. Work in workshops within the prison whereby the prisoner produces goods sold to private entities in the open market;
3. Work done by the prisoner outside the prison for a private entity as part of a pre-release scheme;
4. Work (such as cleaning or catering) which contributes to the operation of correctional facilities managed by private entities; and
5. Work with private firms outside the prison, which prisoners go to during the day, and return at night.

The effect of the CEACR's guidance is that, as a whole, compulsory work by prisoners is subject to no regulation at all if it is done directly for the state (for example in a publicly operated prison). If, on the other hand, it is done with any involvement by a non-public entity, then it is potentially forced labour, with the onus placed on the entity to assure itself of the worker's consent, and to offer working conditions approximating those of a free labourer, for example by using the CEACR's guidance points described above. In effect, this sets a far higher bar for private companies and voluntary sector organisations than for public bodies seeking to offer work opportunities to prisoners. As we show in the main briefing, states which oppose the CEACR's interpretation of the conventions have argued that it presents unnecessary and unreasonable obstacles to private companies becoming involved in providing prisoners with potentially rehabilitating work opportunities.

In short, private and voluntary sector entities are constrained in providing work opportunities in prison, but states largely have a free hand.

## 4.2. Rules on the treatment of prisoners

The UN Basic Principles for the Treatment of Prisoners summarise, in basic terms, the principles guiding the administration of prison work. Principle 8 states that:

Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.<sup>37</sup>

These principles are expanded on in detailed rules on the treatment of prisoners, published by both the United Nations and the Council of Europe. The UN Standard Minimum Rules for the Treatment of Prisoners (UNSMRs) were originally published in 1955, with the most recent revision in 2015; they have been known since then as the Nelson Mandela Rules (NMRs). The European Prison Rules (EPRs), meanwhile, were originally adopted by the Council of Europe in 1973, with a comprehensive revision adopted in 2006 and a more recent revision in 2020. The two sets of rules contain the most comprehensive and detailed human rights standards on imprisonment.<sup>38</sup>

Both sets of Rules are 'soft law': they are provided to states as guidance and do not create binding obligations. But they may influence national law if given effect in national legislation, or through their use as a reference point by relevant courts (such as the European Court of Human Rights), or through the sizeable and growing body of accompanying commentary and guidance materials based on them which make recommendations to practitioners and policymakers.<sup>39</sup> Thus, although states are not obligated to incorporate either set of Rules into national law, they remain influential, within the wider body of international normative standards, as the most 'detailed and explicit' guidance on how prisons should be managed.<sup>40</sup> This does not mean that actual prison conditions always reflect their recommendations,<sup>41</sup> but they carry a normative force which governments acknowledge even if they fail to implement them perfectly.

### 4.2.1. General provisions

The two soft law frameworks on human rights and prison management have numerous features in common and offer considerably more guidance than the ILO framework on overarching questions such as the purpose of imprisonment and of prison work.

They both offer general guidance on *the purposes of imprisonment*, something which only the ICCPR (among relevant binding treaties) attempts. The EPRs acknowledge that prison sentences may be imposed with more than one aim in mind (e.g. deterrence, punishment, rehabilitation), but prescribe that prisons must be managed to ‘facilitate the reintegration into free society of persons who have been deprived of their liberty’.<sup>42</sup> The NMRs are more explicit still: they prioritise a specific aim, stating that the *primary* purpose of imprisonment should be ‘to protect society against crime and to reduce recidivism’.<sup>43</sup> Both therefore aim for benefits to society as a *whole*; benefits to the prisoner may occur, but are incidental.

Maintaining this broad objective of preparation for release, both sets of Rules also recognise that depriving a person of their liberty in itself causes suffering. They create general expectations that conditions of imprisonment should not aggravate the suffering created, in the first place, by the deprivation of liberty. The NMRs insist that imprisonment generally should not “aggravate the suffering inherent in such a situation”; similarly, the EPRs insist that “the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment”.<sup>44</sup>

Relatedly, they therefore also set out a principle of ‘normalisation’: conditions in prison should, as closely as possible, resemble those outside. Prisons are not, in any sense, ‘normal’ environments, so the implications of this requirement are complex. The ‘normalisation’ principle appears to create a general right for prisoners to be held in conditions which are as close as possible to the ‘normal’ world. In practice, however, this principle is in tension with two other aims endorsed by both the EPRs and the NMRs: first, that prisons should prepare prisoners for their eventual release;<sup>45</sup> and second, that security restrictions may vary between individuals based on an assessment of the security risks they pose.<sup>46</sup>

In effect, this facilitates the creation of incentives and privileges which prisons can use to promote compliance among prisoners. In practice, therefore, ‘normalisation’ and preparation for release are linked: ‘more normal’ prison conditions are conditional on compliant behaviour, and to some extent also on a person’s sentence characteristics.<sup>47</sup> And the *most* ‘normal’ working conditions, including prison work most closely resembling work in the outside world (for example, work done on day release from prison), are typically reserved for prisoners who are compliant and held in lower-security prisons, including those who are closer to the date of release.

It follows that prison work may be more ‘abnormal’ for those early in a sentence, or who are held in high-security conditions. This means that the ‘normalisation’ principle applies differentially: though it intends to guarantee more ‘normal’ prison conditions for *all*, in practice it guarantees that more favourable, ‘normal’ prison conditions can be used as an incentive, and made available as a priority to some groups of prisoners over others.<sup>48</sup>

#### 4.2.2. Provisions on work

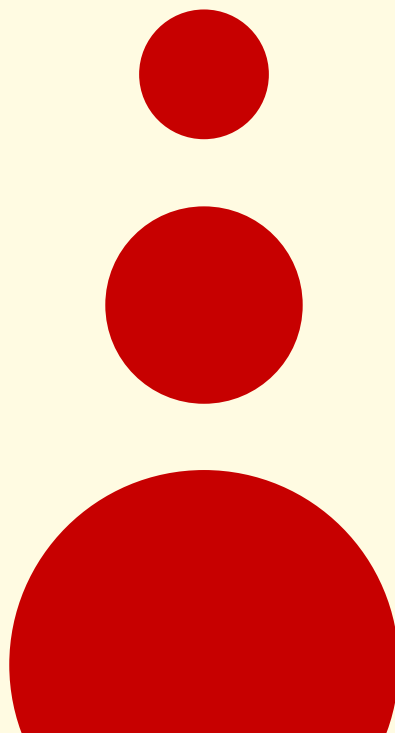
The EPRs’ and NMRs’ provisions on prison work have to be understood in this wider context. Prison work, along with the rest of prison regimes, should aim to prepare prisoners for release and reintegration; work is not to be used as a punishment.<sup>49</sup>

Wherever possible, prisoners should be able to gain vocational skills through work that they can use after release.<sup>50</sup> There are provisions on ‘equitable remuneration’: work in prison should be paid, and prisoners should be able to put their earnings towards their needs, towards financial contributions to their families, and towards saving for their release.<sup>51</sup>

There are provisions on working conditions, requiring prisoners’ health and safety at work and their working hours to be protected no less rigorously than for workers outside prison.<sup>52</sup>

Finally, there are provisions linking 'aftercare' arrangements with work: prison administrations should take steps to ensure that 'released prisoners [...] have suitable homes and work to go to' or should be 'assisted in finding suitable accommodation and work'.<sup>53</sup>

Although the two sets of Rules make broadly similar provisions on work, the main point of difference relates to pay: the European Prison Rules explicitly seeks to prevent mismatched incentives which might cause prisoners to seek paid work during the sentence, rather than addressing their training or education needs: 'education shall have no less a status than work within the prison regime and prisoners shall not be disadvantaged financially or otherwise by taking part.'<sup>54</sup>



## 5. Summary

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There are two main sources of human rights law relevant to prison work: binding international treaties and ‘soft law’.

The most important binding treaties are the ILO Forced Labour Conventions of 1930 and 1957. If read and interpreted alongside the ILO’s published guidance materials, they may be summarised as making the following main provisions:

- They create a legal category, ‘forced labour’;
- They exempt compulsory work in prisons from being classified as illegal ‘forced labour’, providing the following conditions are met:
  - the work is done by people who were convicted of a crime;
  - the crime must not be one of political opposition, nor a punishment for labour activism or participation in strikes;
  - the work must not be imposed as a means of racial, social, national or religious discrimination or as a means of economic development; and
  - the work must be done under the ‘supervision and control’ of a public authority;
- They provide that work by prisoners which is ‘voluntary’—in the sense of being freely consented to and done under working conditions approximating those in a free labour relationship—may, on a case-by-case basis, be determined not to be exploitative and ‘forced’ under the convention.

The effect of the two conventions, taken together, is that work in which prisoners are ‘hired to or at the disposal of’ private entities may be more strictly regulated than work done directly for the state. In the latter case, it is effectively assumed that the involvement of state agencies guarantees that the work fulfils some public interest.

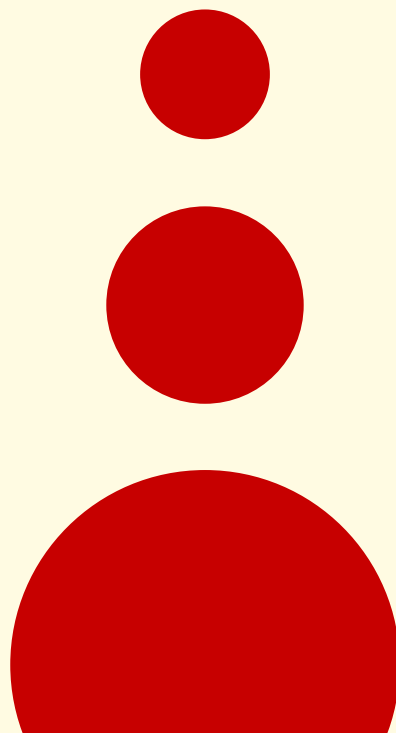
Besides the Forced Labour Conventions and the accompanying guidance materials, the most important and detailed relevant ‘soft law’ derives from the NMRs and the EPRs. The NMRs are more widely applicable, but the EPRs arguably have more practical impact (because the European Court of Human Rights refers to them in its case law, which is binding).<sup>55</sup> Both sets of Rules provide more detailed guidance than the ILO framework regarding how, in practice, those responsible for managing prisons are to balance these considerations.

The provisions of the NMRs and EPRs on prison work are broadly similar, and are consistent with the wider aim of minimising the adverse impacts of imprisonment over and above those inherent in being deprived of liberty and separated from society in the first place. Their most important provisions relating to prison work are as follows:

- They set the overarching objective that imprisonment should, as far as possible, aim to prepare prisoners for release (and in the NMRs, this should be its ‘primary’ objective);
- They require working conditions, like other aspects of prison regimes, to be as ‘normal’ (i.e. similar to the outside world) as possible, but:
  - they tacitly permit prisons to make some aspects of prison regimes more ‘normal’ than others;
  - they tacitly permit the application of more ‘normal’ conditions to be conditional on prisoners’ individual behaviour;

- They permit prisoners to be made to do compulsory work; but
- They provide that work must not be punitive, by specifying that it must not be 'afflictive'<sup>56</sup> and that it must 'be approached as a positive element of the prison regime and shall never be used as a punishment';<sup>57</sup> and
- They expect work to be voluntary, chosen by prisoners, and directed at their long-term social reintegration, wherever this is possible; and finally
- They allow work to be provided for prisoners by private organisations, but require their individual interests to not be subordinated to the profit motive or the needs of the private organisation.

Taken together, then, the relevant (hard and soft) international law allows states to withhold ordinary employment rights from working prisoners. At the same time, it requires them to extend some protections to prisoners which are applicable to free workers (such as against unsafe working practices and occupational injury). Generally, however, these protections are discretionary and not enforceable in the same way as 'ordinary' labour rights, largely because the working relationship between prisoners and the organisations providing them with work is not a contractual one. Thus, while the protections for prison workers *imitate* certain employment rights, they are not employment rights, and they largely offer weaker protections against exploitative or unsafe working conditions.





# Notes

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<sup>1</sup> Laura Brace and Julia O’Connell Davidson, ‘Slavery and the Revival of Anti-Slavery Activism’, in *Revisiting Slavery and Antislavery*, ed. Laura Brace and Julia O’Connell Davidson (Cham: Springer International Publishing, 2018), 18, [https://doi.org/10.1007/978-3-319-90623-2\\_2](https://doi.org/10.1007/978-3-319-90623-2_2); see also Tommy Lott, ‘Contextualizing Slavery’s Wrongness’, in *Revisiting Slavery and Antislavery*, ed. Laura Brace and Julia O’Connell Davidson (Cham: Springer International Publishing, 2018), 35–63, [https://doi.org/10.1007/978-3-319-90623-2\\_2](https://doi.org/10.1007/978-3-319-90623-2_2).

<sup>2</sup> League of Nations, ‘Slavery Convention’, 25 September 1926, art. 1(1), <https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention>.

<sup>3</sup> League of Nations, ‘Slavery Convention’, art. 5.

<sup>4</sup> United Nations, ‘Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery’ (United Nations, April 1956), <https://www.ohchr.org/en/instruments-mechanisms/instruments/supplementary-convention-abolition-slavery-slave-trade-and>.

<sup>5</sup> ‘Ratification’ is the act whereby a state indicates its consent to be bound by a treaty. Usually, it is governments which sign treaties; ratification is the process permitting further scrutiny of the treaty by whichever entity (such as a parliament) is empowered for this purpose. Often, ratification of a multilateral treaty commits states to enact some or all of the treaty provisions into their domestic law, by which any rights created in a treaty may become enforceable in domestic courts. Ratification may also commit states to comply with monitoring and reporting arrangements included in the treaty, for instance through regular reporting to ‘depository’ bodies such as the United Nations or the International Labour Organisation.

<sup>6</sup> Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, 1st Anchor Books ed (New York: Anchor Books, 2009); David M. Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (Simon and Schuster, 1997); Genevieve LeBaron, ‘Prison Labour, Slavery, and the State’, in *Revisiting Slavery and Antislavery: Towards a Critical Analysis*, ed. Laura Brace and Julia O’Connell Davidson (Cham: Springer International Publishing, 2018), 151–77, [https://doi.org/10.1007/978-3-319-90623-2\\_6](https://doi.org/10.1007/978-3-319-90623-2_6).

<sup>7</sup> International Labour Organisation, ‘Convention C029 - Forced Labour Convention, 1930 (No. 29)’, 10 June 1930, art. 2(1), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C029](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029).

<sup>8</sup> International Labour Organisation, ‘Convention C029 - Forced Labour Convention, 1930 (No. 29)’, art. 2(2)(c).

<sup>9</sup> Adelle Blackett and Alice Duquesnoy, ‘Slavery Is Not a Metaphor: US Prison Labor and Racial Subordination through the Lens of the ILO’s Abolition of Forced Labor Convention’, *UCLA Law Review*, 2021 2020, 1512.

<sup>10</sup> Gerard de Jonge, ‘Still “Slaves of the State”: Prison Labour and International Law’, in *Prison Labour: Salvation or Slavery? International Perspectives*, ed. Dirk van Zyl Smit and Frieder Dünkel, 1st (reissued) (Routledge, 2018), 313–34, <https://doi.org/10/jdft>.

<sup>11</sup> de Jonge, ‘Still “Slaves of the State”’.

<sup>12</sup> International Labour Organisation, ‘Convention C105 - Abolition of Forced Labour Convention, 1957 (No. 105)’, 25 June 1957, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100\\_ILO\\_CODE:C105:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C105:NO).

<sup>13</sup> International Labour Organisation, ‘Convention C105 - Abolition of Forced Labour Convention, 1957 (No. 105)’, art. 1.

<sup>14</sup> We have not covered the African Charter on Human and People’s Rights here; although it prohibits slavery generally, it makes no mention of forced labour, and contains no provisions on prison work. There is no equivalent regional rights charter for Asia.

<sup>15</sup> Council of Europe, ‘European Convention on Human Rights’, 1950, art. 4, <https://www.echr.coe.int/Pages/home.aspx?p=basictexts>.

<sup>16</sup> Council of Europe, ‘European Convention on Human Rights’, art. 5.

<sup>17</sup> Colin Fenwick, ‘Private Use of Prisoners’ Labor: Paradoxes of International Human Rights Law’, *Human Rights Quarterly* 27, no. 1 (February 2005): 281, <https://doi.org/10.1353/hrq.2005.0005>.

<sup>18</sup> Organisation of American States, ‘American Convention on Human Rights (‘Pact of San Jose’)’ (Organisation of American States, 22 November 1969), [https://www.icnl.org/wp-content/uploads/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.icnl.org/wp-content/uploads/treaties_B-32_American_Convention_on_Human_Rights.pdf).

<sup>19</sup> Organisation of American States, ‘American Convention on Human Rights (‘Pact of San Jose’)’, art. 6(2), 6(3).

<sup>20</sup> Organisation of American States, ‘American Convention on Human Rights (‘Pact of San Jose’)’, art. 6(2).

- <sup>21</sup> Organisation of American States, ‘American Convention on Human Rights (‘Pact of San Jose’), art. 6(3); see also Fenwick, ‘Private Use of Prisoners’ Labor’, 282.
- <sup>22</sup> United Nations General Assembly, ‘International Covenant on Civil and Political Rights’, 16 December 1966, art. 2, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.
- <sup>23</sup> United Nations General Assembly, ‘International Covenant on Civil and Political Rights’, art. 3(b).
- <sup>24</sup> United Nations General Assembly, ‘International Covenant on Civil and Political Rights’, art. 3(c)(i).
- <sup>25</sup> United Nations General Assembly, ‘International Covenant on Civil and Political Rights’, art. 10(3).
- <sup>26</sup> Luc Fransen and Genevieve LeBaron, ‘Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance’, *Regulation & Governance* 13, no. 2 (2019): 260–79, <https://doi.org/10.1111/rego.12224>; Genevieve LeBaron and Jane Lister, ‘Benchmarking Global Supply Chains: The Power of the “ethical Audit” Regime’, *Review of International Studies* 41, no. 5 (2015): 905–24, <https://doi.org/10.1017/s0260210515000388>; Genevieve LeBaron, Jane Lister, and Peter Dauvergne, ‘Governing Global Supply Chain Sustainability through the Ethical Audit Regime’, *Globalizations* 14, no. 6 (19 September 2017): 958–75, <https://doi.org/10.1080/14747731.2017.1304008>.
- <sup>27</sup> e.g. International Labour Organisation, *Combating Forced Labour - A Handbook for Employers & Business: 2 - Employers’ Frequently Asked Questions*, web pdf vols (Geneva: International Labour Organisation, 2015), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/instructionalmaterial/wcms\\_099624.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_099624.pdf).
- <sup>28</sup> International Labour Organisation, ed., *Eradication of Forced Labour: International Labour Conference 96th Session, 2007*, 1st ed, Report, 96th session, 3, 1B (Geneva: International Labour Office, 2007), 58–66, [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2007\)1B.pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2007)1B.pdf).
- <sup>29</sup> International Labour Organisation (ILO), *Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution) General Report and Observations Concerning Particular Countries* (Geneva: International Labour Office, 2001), 33–48, [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2001-89-1B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2001-89-1B).pdf).
- <sup>30</sup> International Labour Organisation (ILO), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 47.
- <sup>31</sup> Ethical Trading Initiative and Anti-Slavery International, ‘Base Code Guidance: Modern Slavery’ (Ethical Trading Initiative, 11 May 2018), 36–37, [https://www.ethicaltrade.org/sites/default/files/shared\\_resources/eti\\_base\\_code\\_guidance\\_modern\\_slavery\\_web.pdf](https://www.ethicaltrade.org/sites/default/files/shared_resources/eti_base_code_guidance_modern_slavery_web.pdf); International Labour Organisation, *Employers’ Frequently Asked Questions*, 15–16; International Trade Union Confederation, ‘ITUC Mini Action Guide: Forced Labour’ (International Trade Union Confederation, 30 September 2022), 15–16, [https://perc.ituc-csi.org/IMG/pdf/guide\\_forced\\_labour\\_EN.pdf](https://perc.ituc-csi.org/IMG/pdf/guide_forced_labour_EN.pdf).
- <sup>32</sup> International Labour Organisation, *Eradication of Forced Labour: International Labour Conference 96th Session, 2007*, 64–66.
- <sup>33</sup> International Labour Organisation, *Eradication of Forced Labour: International Labour Conference 96th Session, 2007*, 20.
- <sup>34</sup> International Labour Organisation, *Eradication of Forced Labour: International Labour Conference 96th Session, 2007*, 65–66.
- <sup>35</sup> International Labour Organisation, *Eradication of Forced Labour: International Labour Conference 96th Session, 2007*, 66.
- <sup>36</sup> The examples listed here are taken directly from ILO publications: International Labour Organisation, *Eradication of Forced Labour: International Labour Conference 96th Session, 2007*, 61–62; International Labour Organisation, *Employers’ Frequently Asked Questions*, 15–16. Items 1 and 4 in the list are potentially contentious, as we make clear in the main briefing published with this appendix. Item 4 has been the subject of long-running controversy between the ILO and several of its member states.
- <sup>37</sup> United Nations General Assembly. ‘Basic Principles for the Treatment of Prisoners’. United Nations High Commission for Human Rights, 14 December 1990. <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners>, para. 8.
- <sup>38</sup> United Nations General Assembly, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (‘The Nelson Mandela Rules’)* (New York and Geneva: United Nations, 2015), [http://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E\\_ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf); Council of Europe. ‘Recommendation Rec(2006)2-Rev of the Committee of Ministers to Member States on the European Prison Rules’. Council of Europe Publishing, 1 July 2020. <https://rm.coe.int/09000016809ee581>.

- <sup>39</sup> e.g. Andrew Coyle and Helen Fair, *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, 3rd ed. (London: International Centre for Prison Studies, 2018), [http://www.prisonstudies.org/sites/default/files/resources/downloads/handbook\\_3rd\\_ed\\_english\\_v5\\_web.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/handbook_3rd_ed_english_v5_web.pdf); UN Office on Drugs and Crime, 'Roadmap for the Development of Prison-Based Rehabilitation Programmes', Criminal Justice Handbook Series (Vienna: UN Office on Drugs and Crime, October 2017), [https://www.unodc.org/documents/middleeastandnorthafrica/2018/Roadmap\\_for\\_the\\_Development\\_of\\_Prison-based\\_Rehabilitation\\_Programmes\\_ENG.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/2018/Roadmap_for_the_Development_of_Prison-based_Rehabilitation_Programmes_ENG.pdf); Dirk van Zyl Smit, *Incorporating the Nelson Mandela Rules into National Prison Legislation: A Model Prison Act and Related Commentary*, Criminal Justice Handbook Series (Vienna: UN Office for Drugs & Crime, 2022), [https://www.unodc.org/documents/justice-and-prison-reform/21-08355\\_Incorporating\\_the\\_Nelson\\_Mandela\\_Rules\\_into\\_National\\_Prison\\_Legislation.pdf](https://www.unodc.org/documents/justice-and-prison-reform/21-08355_Incorporating_the_Nelson_Mandela_Rules_into_National_Prison_Legislation.pdf).
- <sup>40</sup> Fenwick, 'Private Use of Prisoners' Labor', 285.
- <sup>41</sup> Andrew M Jefferson, 'Prison Reform and Torture Prevention under "Compromised Circumstances"', *Criminology & Criminal Justice*, 29 June 2022, <https://doi.org/10.1177/17488958221105442>.
- <sup>42</sup> Council of Europe, *European Prison Rules*, r. 6.
- <sup>43</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 4(1).
- <sup>44</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 3; Council of Europe, *European Prison Rules*, r. 102.2.
- <sup>45</sup> Council of Europe, *European Prison Rules*, r. 6; United Nations General Assembly, *The Nelson Mandela Rules*, r. 4(1).
- <sup>46</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 95; Council of Europe, *European Prison Rules*, rr. 51-53.
- <sup>47</sup> For example, if a prisoner is many years from their earliest possible date of release, it makes little sense for prison systems to hold them in lower-security conditions where they might experience more 'normal' conditions of confinement, because places in lower-security conditions will be needed by other prisoners who are closer to release, who then become a priority. Thus there may be highly compliant prisoners in non-'normal' forms of custody, who are prevented from doing work that might otherwise 'normalise' their existence.
- <sup>48</sup> Jill van de Rijt, Esther van Ginneken, and Miranda Boone, 'Lost in Translation: The Principle of Normalisation in Prison Policy in Norway and the Netherlands', *Punishment & Society*, 23 May 2022, <https://doi.org/10.1177/14624745221103823>.
- <sup>49</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 97(1), 98; Council of Europe, *European Prison Rules*, r. 26.1, 26.3.
- <sup>50</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 98; Council of Europe, *European Prison Rules*, r. 26.
- <sup>51</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 103; Council of Europe, *European Prison Rules*, r. 26.10-12.
- <sup>52</sup> United Nations General Assembly, *The Nelson Mandela Rules*, rr. 101–102; Council of Europe, *European Prison Rules*, r. 26.13-26.16.
- <sup>53</sup> United Nations General Assembly, *The Nelson Mandela Rules*, r. 108(1); Council of Europe, *European Prison Rules*, r. 33.7.
- <sup>54</sup> Council of Europe, *European Prison Rules*, r. 28.4.
- <sup>55</sup> Although the American Convention on Human Rights contains some provisions on prison labour, there is no regional equivalent for the Americas of the European Prison Rules—no 'American Prison Rules'. Moreover, we have not been able to find any instances of case law in the Inter-American Court on Human Rights where it has considered cases relating to prison work.
- <sup>56</sup> United Nations General Assembly, *The Nelson Mandela Rules*, 97(1).
- <sup>57</sup> Council of Europe, *European Prison Rules*, r. 26.1.

