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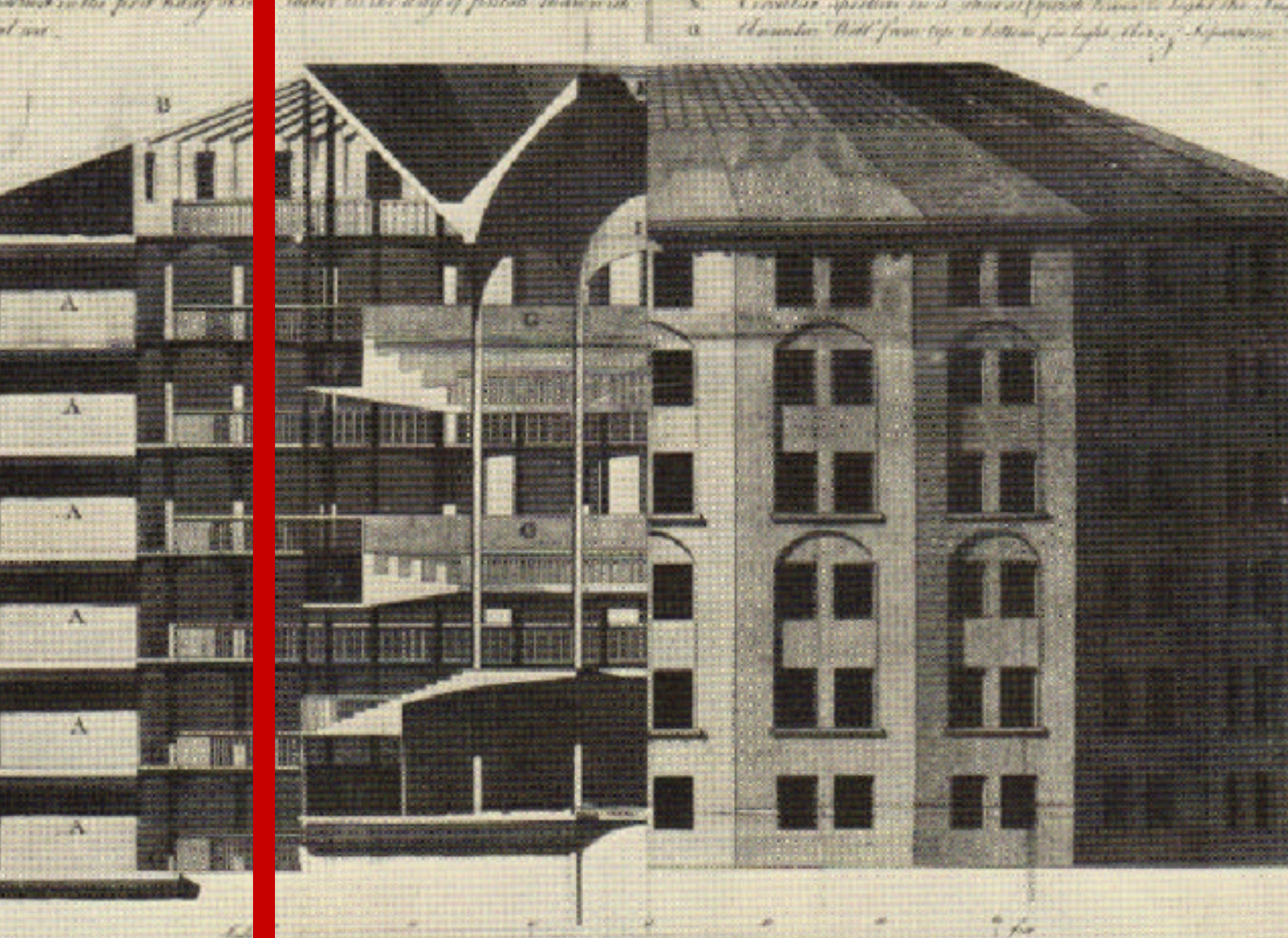
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# LABOURING BEHIND BARS: ASSESSING INTERNATIONAL LAW ON WORKING PRISONERS

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November 2023



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# Labouring behind bars

## Assessing international law on working prisoners

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## Executive Summary

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Most people serving a sentence of imprisonment will work while in custody, whether performing domestic or maintenance tasks for the prison, or producing goods or services, usually with the involvement of businesses, charities, or other non-state providers. Under international law, as well as most national legal systems, working prisoners enjoy far fewer legal protections than free workers. They typically receive little or no pay and have little protection against coercion or poor working conditions. At least one-fifth of the world's prisoners are estimated by the International Labour Organisation to be working in conditions of abusive labour exploitation.

### International law on prison work – gaps, inconsistencies, controversy

The legal framework on prison work contains gaps and inconsistencies, leaving working prisoners open to exploitation. It also presents barriers to wider engagement from business and voluntary sector stakeholders in the prison labour market.

There are two main sources of law relevant to prison work: binding international treaties and accompanying guidance on their interpretation; and non-binding 'soft law'. The relevant binding law comprises the International Labour Organisation's two forced labour conventions, one adopted in 1930, and the other in 1957. In essence, these carve out exceptions for prison labour so that it does not fall foul of the prohibition on forced labour, provided certain conditions are met. Both conventions have been implemented in most countries' legal systems, with notable exceptions (the USA has not ratified one of them). Recent years have seen challenges by the UK and several other states to the ILO's interpretation of provisions relating to the involvement of non-public entities in running prisons and providing work to prisoners.

The second main source of law is found in non-binding global or regional minimum standards for prison management, including the United Nations' Standard Minimum Rules for the Treatment of Prisoners (known as the Nelson Mandela Rules) and the European Prison Rules. These state that work in prison should not aggravate the suffering inherent in the loss of liberty; and should be organised with a view to prisoners' reintegration into society. They also require a minimum set of protections relating to health and safety, pay, and purpose.

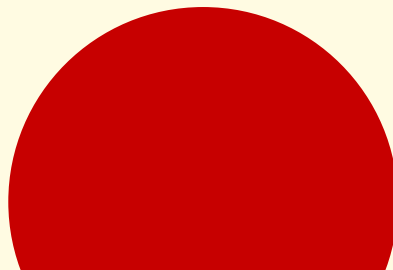
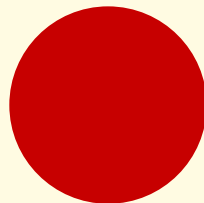
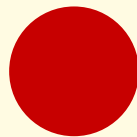
### Claims made about prison work – and the reality

Many claims are made about how prison work will benefit prisoners themselves, prison administrations, and wider society. Some claims relate to direct results for prisoners and prison-leavers such as the chance to earn money, gain sentence remission or other privileges, and to obtain skills, qualifications, self-confidence – and eventual employment. Other claims are made about societal benefits, including through reduced reoffending, or when labour shortages are eased through prison labour and the hiring of prison-leavers. Although some of these claims are reasonable, prison work rarely meets the expectations of it, not least because so much of it is unskilled, and simply sustains the prison's operation. Skilled work is hard to come by in prison and can be resource-intensive to provide, given the need for supervision and training, and the associated security and administrative challenges. Where higher skilled, better paid prison jobs are available, they tend to be allocated to prisoners closest to release.

### Towards greater coherence – key questions for stakeholders

Could a more detailed and coherent set of standards better protect working prisoners against exploitative labour conditions? Would clearer, more consistent regulation of both public and non-public entities help to foster more effective prison work initiatives, producing more opportunities for prisoners and prison-leavers? This briefing paper concludes with some key questions, which we invite stakeholders to join us in grappling with, including:

- Are stronger safeguards needed to protect prisoners against coerced labour and other exploitation?
- How should work by prisoners be rewarded, considering that human rights standards on imprisonment require 'equitable remuneration'?<sup>1</sup>
- Should prisoners' wages reflect rates of pay for similar work outside prison? What (if anything) can justifiably be deducted?
- How best can the rehabilitative or resocialising aims of prison work be realised in practice?
- Is more involvement – and investment – from non-state actors needed, if prison work is to achieve its potential benefits?
- What incentives should states be permitted to offer businesses and other stakeholders to encourage them to engage prisoner labour?



# 1. Introduction: Prisoners, work, and human rights

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Around the world, [at least eleven million people are imprisoned](#), either pre-trial or following conviction. Most sentenced prisoners will work while in custody. Some work in conditions that the International Labour Organisation (ILO) classifies as ‘forced labour’, under the definitions established by the 1930 Forced Labour Convention. The ILO estimates that, between 2017 and 2021, around 2.2 million people worldwide were being subjected to ‘abuses of compulsory prison labour’. This estimate, if accurate, means that at least one-fifth of the world’s prisoners are currently being subjected to abusive labour exploitation according to the ILO’s definition.

Prison work is an inherently controversial issue, engaging multiple rights set out in international and regional human rights instruments. It does so both because prison work is done in prison, and because it is work. Generally, human rights instruments seek to prevent exploitative workplace practices; in the prisons context, they require that work—like imprisonment itself—should not aggravate the suffering already inherent in the loss of liberty and all it entails. Work should be designed to inflict mental or physical suffering. They also provide that work should, as far as possible, be organised with prisoners’ release and reintegration into society in mind. Yet, people who work in prison do so while held against their will, often in conditions of material deprivation. Work done under these conditions can only be called ‘voluntary’ in a highly qualified sense. Prisoners have little or no choice as to the work they do, in many cases are not free to decline to work, and may incur punishments or loss of privileges for refusing to work. In most other social contexts, these are working conditions which would be illegal—often criminally so.

Most countries’ legal systems, however, carve out an exception for prisoner-workers, permitting the state to require them to work—sometimes for no pay, but typically for very low rates of pay.

There are, even so, multiple potential benefits to prison work. For example, [ICPR’s recent research](#) indicated that prisoners who could not work (when prison regimes around the world were restricted during the COVID-19 pandemic) reported many negative consequences, including to their mental and physical wellbeing. At the minimum, work may mitigate some harmful impacts of imprisonment. At best, it may increase prisoners’ prospects of successful reintegration into society, potentially also benefitting society by reducing recidivism.

## 1.1. Aims of this paper

ICPR is working on an international [comparative research project](#) which will produce case studies and other findings on this topic, drawn from three contrasting countries: Brazil, the United Kingdom, and the United States. This briefing paper, the first publication from the project, has two main aims:

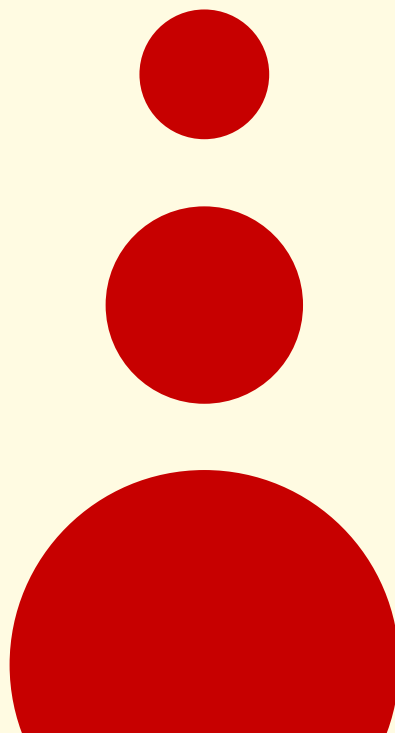
1. To review the major international norms and legal frameworks applicable to prison work; and
2. To reflect on the long-standing assumptions about prison work and prison labour which underpin these frameworks, asking how well they withstand scrutiny.

We use the paper to ask whether the current international normative frameworks—key elements of which derive from the late colonial era—can effectively safeguard prisoners from the forms of abuse and exploitation often seen in today’s prison labour practices. In doing so, we further ask: are the international legal instruments on prison labour ripe for review and replacement?

## 1.2. Definitions

We define ‘prison work’ to include structured and routinised tasks, performed within or outside prisons by sentenced prisoners, either because they are required to by law, or because the prison rewards participation through pay or other incentives such as remission of their remaining sentence. Beyond our scope in this briefing and project are any activities which might otherwise fit this description, but which are essentially or primarily educational, or focused on addressing the individual causes of offending behaviour (such as substance misuse, or attitudes and thinking).

Historically, some kinds of prison work have—especially when they are done for private sector organisations and might generate profit—been referred to as ‘prison labour’. We use the broader term ‘prison work’ to include work done for public, private or voluntary sector bodies, recognising that much of the work prisoners are typically required to do generates no private sector profit at all. This reflects a key point made in this paper: that prisoners may be exploited even if they are not working for private interests.





## 2. International law on prison work

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Under international law, as well as most national legal systems, prisoners who work enjoy far fewer legal protections than free workers, typically receiving little or no pay, and very limited protection against coercion or poor working conditions. In this section, we describe the limited rights that international law does provide, and examine some gaps and shortcomings in the overall normative framework.

A more detailed review of relevant international law is in the [Appendix](#) to this briefing. Our aim here is to summarise the two principal sources of human rights and forced labour provisions relevant to prison work: binding international treaties and accompanying guidance, and non-binding ‘soft law’.

### 2.1. Binding treaties

Binding treaties require member states which adopt and ratify them to incorporate their main provisions into national law. The most important treaties in this context are the International Labour Organisation’s two forced labour conventions: Convention Number 29 of 1930, and Convention Number 105 of 1957. Both are very widely ratified: as of June 2023, the 1930 Convention was law in 181 states and was due to become law in two more (Brunei and China) before June 2024. Meanwhile, the 1957 Convention was law in 178 countries and due to enter into force in two more (China and Japan) by August 2023. The United States, with the largest number of prisoners of any country worldwide, is among the six countries which have not ratified the 1930 Convention.<sup>2</sup> Nine countries have not ratified the 1957 Convention, though the United States has. Between them, the two conventions make the following main provisions in relation to prison work:

1. They create a legal category, ‘forced labour’, and define various forms of abusive labour practices which fall into it and are prohibited;
2. They create five exemptions from this general prohibition, all describing situations in which states (and only states) can extract compulsory labour;<sup>3</sup>
3. They include compulsory work done by prisoners among these exemptions so that such work is not illegal ‘forced labour’, provided the following conditions are met:
  - a. the prisoners have been convicted of a crime by a court;
  - b. their crime must not be one of political opposition, nor a punishment for labour activism or participation in strikes;
  - c. the work must not be imposed as a means of racial, social, national, or religious discrimination, nor as a means of securing economic development for the state; and
  - d. the work must be ‘supervised and controlled’ by a public authority and prisoners must not be ‘hired to or placed at the disposal of private individuals, companies, or associations’.<sup>4</sup>

It follows that the conventions allow prisoners to be required to work if the work is either provided directly by the state, or provided by a non-public entity (whether an individual, a business seeking profits, or a not-for-profit organisation) and supervised by the state. In the latter case, the ILO’s subsequent guidance requires that the work be ‘voluntary’ and provided on terms and conditions approximating those offered to free workers, including relating to pay and other protections.

In effect, then, states can decide for themselves what forms of work they can legally compel prisoners in directly operated prisons to do, including for no pay. Work in public prisons is constrained only by domestic law and politics.

The ILO takes a strict interpretation of the conventions and accompanying guidance, and treats all prison work involving private entities identically: the work must be done voluntarily (i.e. not be compulsory), it must be on pay and conditions approximating those available outside prison, and it must be done under the 'supervision or control' of a public authority. In this strict interpretation, prisoners should not be liable to any penalty at all for declining to work, and their terms and conditions (e.g. pay, accident insurance, working hours, etc.) must approximate those which would apply to free workers doing the same work. As we show later in this briefing, this requirement is not honoured by all states and has become the subject of long-running disputes between the ILO and member states.

## 2.2. Soft law and guidance

In addition to the ILO conventions and accompanying guidance, there are two other main sources of 'soft law' and guidance on prison work: the UN Standard Minimum Rules for the Treatment of Prisoners (widely known and referred to here as the Nelson Mandela Rules or NMRs) and the European Prison Rules (EPRs). The Nelson Mandela Rules, having been adopted by the UN General Assembly, cover all 193 UN member states. However, they are neither binding nor enforced by any court, so their practical impact is limited to forming the basis of guidance materials provided by UN bodies to member states. The European Prison Rules, meanwhile, cover only the 46 states of the Council of Europe. They arguably have more practical impact because the European Court of Human Rights refers to them regularly in its case law on prison conditions, which is binding.

The NMRs and the EPRs contain broadly similar relevant content, which we summarise as follows:

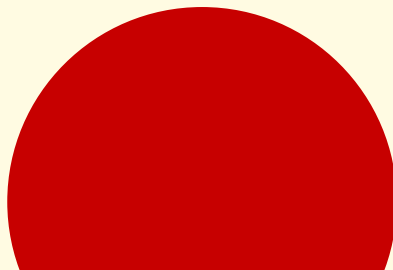
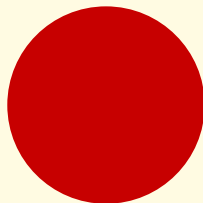
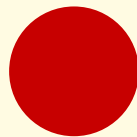
- They set the overarching objective that prison regimes should, whenever possible, be designed to prepare prisoners for release. In the NMRs, this is to be the 'primary' objective of imprisonment, and hence of prison work;
- At the same time, they allow for different prison regimes and different security measures to be applicable to different prisoner groups. This affects prison work because, in effect, it means that not all prisoners can or must be offered the same work opportunities;
- They permit prisons to compel prisoners to work, but also state that
  - work must not aggravate the suffering associated with the loss of liberty
  - work should (wherever possible) be voluntary, chosen by prisoners, and directed at their long-term social reintegration
  - work must (wherever possible) offer vocational skills prisoners can use after release
  - prisoners must be paid 'equitably', while permitting prisons to hold back some of their wages for family support, saving towards release, and covering immediate needs
  - health and safety standards and other working conditions should be broadly equivalent to those which apply to employers outside prison; and finally,
- They allow prisons to form partnerships with private organisations to give prisoners work and training opportunities, provided prisoners' individual interests are not subordinated to the profit motive or the needs of the private organisation.

## 2.3. Summary: binding treaties and ‘soft law’

Taken together, then, the relevant international law and guidance:

1. permits states to deny working prisoners employee status and employment law protections;
2. permits states to compel prisoners to work, including for no pay, when the work is for a state entity (such as the prison itself); but
3. requires work done by prisoners for non-public entities to be voluntary, supervised by a state body, and subject to additional protections relating to the prisoner’s pay and working conditions.

Overall, while some soft law protections for prison workers imitate employment rights, they are not employment rights. They generally offer minimal protection against exploitative or unsafe working conditions. Most countries’ national laws reflect this, offering far weaker statutory protections to working prisoners than to free workers. The binding provisions of the two ILO conventions are now almost a century old, lack detail, and leave much to interpretation, leading several states to dispute their meaning in open challenge to the ILO. We will return to this after considering some claimed advantages of prison work and whether they bear scrutiny.



## 3. Claims commonly made for prison work

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Various kinds of claim are made about the benefits of prison work. We summarise these, before going on in Section 4 to consider the realities of prison work.

### 3.1. Prisoners will benefit

#### 3.1.1. While in prison

It is claimed that work benefits incarcerated people in various ways. They may obtain privileges, progress to less restrictive regimes, gain remission on their sentence, build a favourable record for pre-release risk assessments, or earn money for food, toiletries, or phone calls, all of which can alleviate the hardships of prison life. Compared to being confined to small cells all day, working might contribute to physical and mental well-being, providing opportunities to interact with others and be physically active. Claims are also made about the potential of work to improve morale, confidence, and self-esteem.

However, claims regarding the benefits of work for those in custody should be approached cautiously, considering the context. Factors such as low (or no) prison pay, the typically inflated costs of prison goods and services, and the nature of the work on offer, will determine the true value of the work. Individuals who have unpaid, poorly paid, coerced, uninteresting, or unpleasant work will derive less benefit from their work and may question its value or legitimacy.

#### 3.1.2. After release

It is also claimed that work in prison aids rehabilitation and reintegration into society, by helping prisoners acquire skills and positive habits. Such claims are frequently valid, as prisons often contain large contingents of socially marginalized individuals with limited educational and work backgrounds. In the United Kingdom and many other countries, more policy focus is placed on this claimed benefit than on the in-prison benefits discussed above.

However, not all prisoners will derive post-release benefits from prison work without other support. Interventions providing training, qualifications, housing and addiction support, and psychological therapies may also be necessary for successful long-term reintegration. Furthermore, restrictions based on the nature of their offences typically limit the types of job ex-prisoners can pursue after release. Multiple factors, including the individual, their sentence, the nature of their work in prison, and the conditions of their release, will influence their progress and employment prospects.

### 3.2. Prisons will benefit

Claims regarding the benefits of prison work also extend to prisons themselves. It is argued that prisons with high levels of engagement in work are more likely to maintain order and experience lower rates of negative outcomes, such as self-harm, suicide, violence, and poor mental and physical health. Additionally, involving prisoners in tasks to support the functioning of the prison (such as cleaning, building maintenance or food preparation) can save on running costs. Maintenance tasks are typically low-paid or unpaid, since they tend not to make any profit for the prison. They do, however, represent reduced costs for prison administrations, since free workers would otherwise have to be employed to perform them.

Research strongly supports the notion that prisons with structured, purposeful routines provide healthier, less harmful environments compared to prisons where activity levels are minimal and lock-up. However, establishing and maintaining such regimes is resource-intensive and requires, at a minimum, a basic level of security, which prisons with insufficient or fluctuating staff to prisoner ratios struggle to provide. Providing adequate work and activity spaces for prisoners is virtually impossible in overcrowded or dilapidated prisons,

or where there are insufficient experienced staff. Operationally, many prisons find it easier and less risky not to provide structured work programmes for prisoners.

Furthermore, requiring prisoners to work to help keep the prison running raises concerns about potential exploitation, due to the typically minimal rates of pay available for such work and the limited alternatives on offer. The practice is nevertheless widespread, often constituting the main (or only) type of work available to prisoners.

### 3.3. Society will benefit

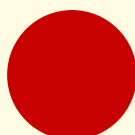
Another claim made for prison work is that society as a whole benefits from prisoners working while in custody, primarily through a decrease in reoffending by ex-prisoners. It is also argued that businesses and government agencies gain advantages from prison work schemes: for example, by hiring prisoners and ex-prisoners, they save on recruitment and training costs, benefit from a highly motivated workforce, and improve staff retention rates. By contracting with prisons, it is claimed, they can also plug gaps in local or national labour markets, paying lower wages than they would to free workers or obtaining goods and services (including for prisons themselves or other state entities) at below-market cost. Benefits accrue in turn to company shareholders, taxpayers and the public purse.

These claims too should be approached with caution. Extensive research demonstrates that individuals who have a stable job to go to after release are less likely to reoffend, but the causal relationship is not clear. Does employment by itself reduce the risk of reoffending? Or are prisoners motivated to seek, find, and maintain employment already less likely to reoffend? The answer depends on the specific context and people the claim is being made about; generic claims that prisoners generally will benefit are hard to support. We should be sceptical about the value to society of prison work that does not improve prisoners' chances of finding and sustaining employment after release, or which simply maintains the prison's operation.

### 3.4. Summary: general claims require cautious evaluation

States can legally restrict prisoners' freedoms and their rights as workers. However, for many prisoners, effective support to secure and maintain employment post-release will require more than just reinstating these rights and freedoms. This is because so many prisoners were already excluded from the job market due to poverty or low educational attainment; imprisonment merely added to their earlier exclusion. When considering the benefits claimed for prison work, it is crucial to understand this context, and to distinguish between mitigating the negative impact of imprisonment itself and addressing pre-existing social disadvantages.

Even poorly paid and unskilled work opportunities offering minimal qualifications can alleviate some of incarceration's worst effects, such as the boredom and inactivity of 'dead time' during the sentence, and the associated risks of violence and self-harm. However, this does not guarantee positive post-release outcomes; the long-term impact of this kind of work, particularly on the motivation of prisoners serving lengthy sentences, remains unclear. Criminal involvement often stems from a belief that there are no opportunities for lawful success or prosperity. Unfulfilling, poorly paid prison work could reinforce this belief. As a result, it is essential to approach claims about prison work with due scepticism.



## 4. The realities of prison work

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It is difficult to obtain reliable data on prison work or make statistical comparisons between countries. Governments publish different statistics, some publish virtually none, and those they do publish describe different kinds of activity and are of differing quality. Few countries allow independent scrutiny of their prison work programmes, and prisons are notoriously difficult places in which to conduct independent research. All of this makes fair and meaningful comparisons between countries difficult.

Even so, available evidence suggests that the realities of prison work do not support many of the positive claims made about its effects. This section draws on our review of international research literature and of data and legal and policy materials on prison work in the three countries we are currently researching: the United Kingdom, the United States, and Brazil. It aims to provide a useful contextual frame, within which claims often made about the benefits of prison work can be assessed, and in which discussion of potential new approaches might be grounded. In each of the following thematic sections, we give country-specific examples drawn from our recent research.

### 4.1. What kinds of work do prisoners do?

Most prison work involves low-paid or unpaid ‘maintenance’ tasks that sustain and support the prison and its residents. These tasks encompass ‘domestic’ functions like catering, cleaning, laundry, and waste management, but may also include some kinds of administrative support, mentoring, and rehabilitation services. Roughly 80% of prison work in the United States falls under this category, according to a 2022 estimate by the American Civil Liberties Union. Limited data from the United Kingdom and Brazil suggest a similar pattern, though reliable information is difficult to find.

Another type of work, often referred to as ‘prison labour’ or ‘prison industries’, involves prisoners producing goods or services for sale outside the prison. Some production facilities operate in partnership with external entities, while in certain places (including many US states), prison authorities run large-scale production enterprises of their own. Prison labour is usually subject to tighter regulation than maintenance work because if it generates a profit, some perceive this as exploitative. It is also commonly expected that prison industries should not compete in the market against external businesses, which cannot match their low labour costs. US federal law even criminalises certain interstate trade in prison-made goods and services, to limit exploitation and protect the working conditions of non-incarcerated workers. Obtaining reliable and comparable figures is challenging, but the ACLU’s estimate suggests that around 20% of prison work in the United States falls into the prison industries category. In England & Wales, around 15% of the prison population worked in prison industries workshops before the COVID-19 pandemic. (No post-pandemic data have been published.)

### 4.2. Enforced inactivity

Prisoners commonly suffer from high levels of inactivity, for various complex reasons. In many, it is the norm for prisoners to be inactive and confined to their cells during the working day. Data from our [World Prison Brief](#) database show that over 60% of countries operate their prison systems over their designed capacity. When they do, pressures on staffing and other resources may be acute. Staff shortages are common in developed and less developed countries alike, and prisons have no control over the number of inmates they receive: they must generally accommodate and engage whoever is sent to them from a court or transferred from another facility.

It follows that many prisons lack the necessary facilities, space, and investment to provide work opportunities for prisoners. Security challenges also play a role: managing the movement of prisoners to workplaces requires adequate supervision and staffing. Additionally, competing priorities arising from other prison functions (such as family visits, security searching, or education) can all limit a prison's capacity to organise itself around the routines necessary for productive workplaces.

In some prisons, the function or security level of the establishment can regularly lead to very low numbers of prisoners engaged in work. In much of Brazil, for example, high security or closed regime prisons are severely overcrowded and understaffed. Staff mainly control the prison perimeter, resulting in minimal formal supervision inside, and almost no prisoner work opportunities. These prisons are largely controlled by criminal factions, leading to enforced inactivity, thriving informal economies, and high levels of violence.

To take another example, in the United States and the United Kingdom, prisons holding predominantly pre-trial and short-sentenced detainees experience transient populations and overcrowding and typically have low work participation. Conversely, prisons with stabler, longer-term populations sometimes find it easier to organise higher levels of activity, provided they are adequately staffed. This is particularly true of medium to low security facilities, where managing internal prisoner movements may be less complicated.

### 4.3. Low paid, low-skilled, low-motivation activities

Prison work typically offers extremely low wages compared to work outside of prison. In certain jurisdictions, like Texas and other southern states of the United States, work is unpaid. Elsewhere, prison wages are usually far below minimum pay rates that apply to the wider workforce.

In England & Wales, the minimum hourly wage outside prison is £10.42, but working prisoners earn a minimum of £4 per week (unchanged since 2002, when the national hourly minimum was £4.10). Prison governors can pay more to incentivise some jobs, and some pay as much as £30 or £40 per week (equivalent to around £0.11 per hour, assuming a 35-hour week), but the norm is far lower. Similarly, in the US, the ACLU estimates that wages for maintenance work range from \$0.13 to \$0.52 per hour, and for prison labour, from \$0.30 to \$1.30 per hour. This is compared to a federal minimum wage of \$7.25, and per-state minimum rates, which are often higher. Therefore, prison wages in these countries are typically a fraction of what would be considered legal in other contexts. In Brazil, the law mandates that working prisoners must receive a wage equivalent to at least three-quarters of the national minimum wage. Many, however, receive far less, and official data show 53% receive only sentence remission as compensation for their work.

While prisoners are exempt from major expenses like housing, the provision of basic goods, including toiletries, is usually minimal. Prisoners are typically expected to purchase these items (and services like phone calls to family) from approved suppliers, at prices frequently much higher than those outside of prison. Many countries also make deductions from prisoners' wages, for a range of purposes including victim support, contributions to bed and board, court-ordered restitution fees, and so on. It can be challenging, in these circumstances, for prisoners to meet their needs, and low pay and high costs mean that many prisoners receive substantial financial support from family members. Working can alleviate this financial burden on families, but only if the pay is adequate.

Moreover, the ability to pay low wages indirectly incentivises the provision of low-quality, unrehabilitative work opportunities. Especially in larger facilities holding prisoners who may be some years from release, it can be of overriding importance—because it is in the interests of prison order—to keep as many prisoners occupied as possible. Prison authorities are, in effect, faced with a choice: either invest limited resources in equipment, training, or staffing which might yield more positive long-term impacts for some prisoners; or favour opportunities which will keep larger numbers of prisoners active in low-skilled or unskilled work. In England & Wales, for example, 59% of prison labour contracts between 2018 and 2021 were for unskilled assembly and packing work, with far smaller numbers involved in more skilled forms of work or work resulting in qualifications. Similarly, research in the United States has shown that many prisoners primarily engage in work such as food packing, with only a smaller number accessing motivating and skilled opportunities more likely to benefit them after release.

Some prison-leavers will face release conditions, parole terms, or welfare sanctions that penalise them and can lead to their recall to prison if they fail to find and maintain employment. If they cannot support themselves financially, this can trap them in low-waged, precarious work, forcing them to accept whatever is available and preventing them from pursuing training or educational opportunities that could lead to better employment.

Overall, prison work is often undertaken by prisoners more because the alternatives are unappealing, than because it is intrinsically motivating or understood by them to generate a positive long-term impact. Many prisoners come from disadvantaged backgrounds with limited qualifications and education, which can affect their efficiency and productivity in the workforce. However, providing high-quality work or training opportunities to prisoners requires investment, and may incur political opposition—particularly during challenging economic times.

#### 4.4. Choice and coercion

As already explained, states can legally force prisoners to work, and penalise them if they will not. However, in most cases, they do not need to rely on coercion through penalties of this kind. Prison work is scarce, material conditions are harsh, and prisoners may find any form of work preferable to confinement in a cell. The need to purchase basic items can make it difficult to refuse even poorly paid and exploitative work.

Instead of coercion, prison administrations often use work opportunities—especially more desirable ones—to incentivise good behaviour. ‘Real work’ opportunities and vocational training are often reserved for those nearing release, a strategy which also promotes the efficient use of resources invested in such opportunities.

However, it also sends an unmistakable message to prisoners: that they must take what work they are offered, that initiative and hard work are only loosely and indirectly linked to rewards, and that only those fitting certain systemic criteria will access the ‘best’ jobs.

After release from prison, parole conditions and welfare sanctions can replicate these conditions, while the lack of earnings, savings, or relevant qualifications acquired during a sentence may combine to exclude ex-prisoners from more favourable, stable, and better-paid employment opportunities.

Consequently, the concept of ‘voluntariness’ in prison work needs to be qualified. In reality, prisons frequently channel prisoners towards low-quality work, restricting who can benefit from higher-quality opportunities and training. Such opportunities may be limited, inaccessible, or non-existent because of factors that have nothing to do with whether a prisoner is ready to work—for example, whether they are held in a long-term or high-security prison, or how many years they have left to serve of their sentence. While they are in prison, they typically receive meagre wages or no wages at all, and rely on financial support from family to meet their needs. Working conditions and prisoner protections vary: in the United Kingdom, there are discretionary employment-like safeguards concerning health and safety, but they are unenforceable. In contrast, many states in the United States provide minimal or no workplace health and safety protections for prisoners, leading to unsafe and exploitative working conditions.

#### 4.5. Involvement by non-public partner entities in prison work

Involvement by non-public entities in prison work can take many forms. In most countries including all three of Brazil, the United Kingdom, and the United States, for-profit companies operate entire prisons (or provide services within prisons) under government contract. Similarly, the operators of both public and private prisons in all three countries contract with buyers, equipping prison workshops and using prisoner labour to produce goods and services which go on to be sold beyond the prison.

Yet not all non-state entities involved in prison work act entirely under a profit motive. In some Brazilian states, a network of religious not-for-profit organisations operate semi-autonomous units within state prison systems, under contract from state governments. And in both the United Kingdom and the United States, a



range of charities, not-for-profit organisations, and social enterprises operate with a mixture of philanthropic and state funding, providing services including vocational training and paid work for prisoners.

In the United Kingdom, increasing the involvement of non-public-sector partner organisations in prison work has been a significant policy focus recently, driven in part by wider economic changes including the labour shortages which followed the COVID-19 pandemic and the United Kingdom's departure from the European Union. Where prisoners work for outside non-state organisations on day release from open prisons, they are paid the minimum wage with some additional deductions, a practice which is seen as preparing them for release, by enabling them to build up some savings. But if they engage in this kind of work within closed prisons, they are not. Similarly, those who work in prison workshops producing goods and services under contract for outside buyers are not paid the minimum wage.

In the US, the Prison Industries Enhancement Certification Program (PIECP) allows limited private sector involvement in providing higher-quality vocational training and work opportunities, but benefits only some prisoners due to the requirement for companies to pay the minimum wage. Meanwhile, public sector bodies like municipalities and schools can exploit inexpensive prisoner labour for public works, for example by buying furniture and other goods made at scale through state-owned correctional industries corporations.

In Brazil, the picture is similar in practice to that in the US, although less regulated. Public sector bodies routinely use prison labour, particularly from semi-open prisons which permit prisoners to work outside the prison during weekdays. Brazil has recently legislated to incentivise private companies to contract with prisons for prisoner labour and to place requirements on companies to hire ex-prisoners up to a minimum proportion of its workforce.

Partnerships with outside organisations which provide work and work opportunities for prisoners are often seen as potentially solving difficulties prisons themselves encounter. At best, they can offer prisons investment, and participating prisoners expertise, training, qualifications, and connections to future employment. They may also help to align work and training opportunities in prisons with the jobs that are actually available in the labour markets to which prisoners will be released. If profitable, they could make prison-based production more financially sustainable, and potentially increase wages.

On the other hand, the history of prison labour demonstrates that there are also countervailing risks, which are heightened by the stark disparities of power between prisoners and prison authorities. One risk is corruption. Private entities which pay prisons to use cheap or cost-free prisoner labour in farms and manufacturing facilities have, in the past, funnelled illicit payments to prison officials. Furthermore, some historical evidence demonstrates how non-state bodies lobbied governments for 'tough' sentencing legislation. The resulting increase in the prison population ensured a steady supply of cheap prison labour—the kind of abuse the 1930 Convention aimed to eliminate. The fact remains that prisoners almost always have less access to justice than citizens outside. Their limited or non-existent rights as workers make it difficult for them to effectively raise objections, meaning that fairness and transparency about the aims, objectives, funding, and intended outcomes of partnership models remain critical. However, if they are effectively regulated, they offer substantial benefits.

This has not exhaustively catalogued every model of delivery which exists; the point is simply to note that there is a range of such models. In each example, the likely beneficiaries of the work offered may differ quite substantially. In this context, it may not be appropriate to apply a single model of regulation; particularly not if it *automatically* treats the involvement of non-public bodies as potentially exploitative, without attending to other factors such as the direction of the financial relationships involved, or the aims and objectives of the partnership.

Yet, the ILO framework imposes considerable, and relatively invariant, barriers on partnership initiatives. It requires any work scheme which 'hires' prisoners or 'places them at the disposal of' non-public sector entities to demonstrate that prisoners are working 'voluntarily'. ILO guidance further states such work should be offered on terms and conditions (including pay) which 'approximate' those offered to free workers. As we describe more fully later in this briefing, some governments openly disregard these rules, considering them to unduly constrain the potential benefits of private sector partnerships.

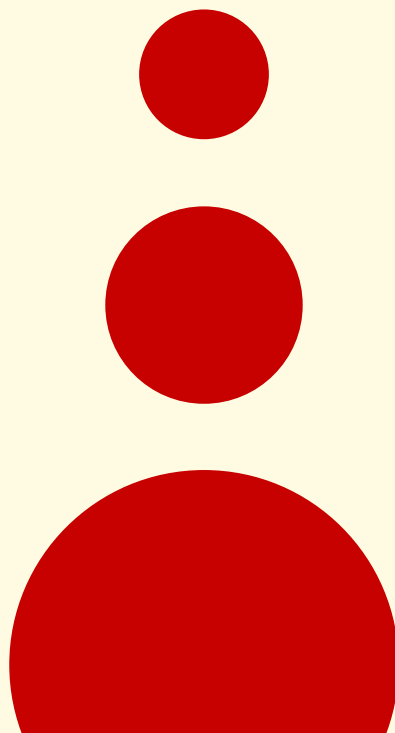
## 4.6. Summary: prison work in reality

For many prisoners, work is not a positive feature of the prison experience. In much of the world, opportunities to work are limited; where work is provided, it is often unremunerative and low skilled. Most work by prisoners simply maintains the prison's operation, serving to subsidise the state for the operational cost of running its prison system. Much prison labour appears highly exploitative, particularly where it is unpaid or low-paid, lacks real voluntariness, and offers no qualifications or rehabilitative value.

There is also a puzzling double standard arising from the fact that both the ILO Forced Labour Conventions and US federal law permit states to require compulsory work from convicted prisoners, while only regulating this work if it is done for non-public entities. Public sector bodies can benefit financially, reducing their costs, by employing prison labour, and there are few binding constraints on the work they can require prisoners to do. Private sector entities, meanwhile, might offer work on terms more likely to benefit prisoners, but are often expected to pay the minimum wage, demonstrate that the work done is 'voluntary', and provide work on terms and conditions approximating those offered in the wider economy.

Prisoners need protection against exploitation of their labour, but there is no evidence that they are at greater risk of exploitation when working for private sector bodies than public sector ones. The risks of exploitation arise when work is unpaid, or poorly paid, or coerced, and when prisoners are funnelled into low-paid, precarious forms of work after a prison sentence. Claims that these kinds of work inculcate good work habits are vague and difficult to evaluate, and there is reason to doubt their credentials as a form of 'rehabilitation'.

Section 3 argued that claims about the benefits of prison work should be carefully evaluated, given the paucity of evidence as to its across-the-board impacts. This section has further underlined that argument, by showing that the realities of prison work often fail to live up to the claimed benefits.



## 5. Shortcomings of the international legal framework

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As the previous section has shown, the international legal framework on prison law is a blend of binding and non-binding provisions which, taken together, do not provide a coherent template for national legislators. In this section, we summarise the key points of disagreement between certain ILO signatory states and the ILO itself on how the Conventions and accompanying guidance materials should be interpreted. We then ask: to what extent can soft law provisions on prison labour help bridge the gaps in the existing legal framework, or provide better protection against exploitative practices?

### 5.1. Disagreements over the application of the Forced Labour Conventions

The current binding legal norms surrounding prison work rely on the ILO's 1930 Forced Labour Convention and accompanying guidance issued by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR). This framework governs prison work according to binary distinctions under which work is done either for public or non-public entities. However, the distinction between 'public' and 'private'—never entirely sharp—is less so today than it was in 1930. Not coincidentally, some ILO member states have openly challenged the way the ILO interprets and applies the Convention, leading its provisions regarding prison labour to lack authority and practical effect. The challenges have revolved, largely, around the involvement of the private sector in the criminal justice system.<sup>5</sup>

#### 5.1.1. The ILO's stance

The ILO insists that work for non-public entities must always be voluntary, and must involve pay and conditions approximating those offered to free workers. Thus, it tends not to favour policies which would lead to large numbers of prisoners working for non-public entities.

Its position stems from a strict interpretation of the 1930 Convention, and from its aim to prevent exploitation. Implicit in the ILO's interpretation is a belief that for any non-state body to use imprisoned workers risks exploitation (presumably, because of the profit motive).

#### 5.1.2. Dissent from the ILO's stance

Some ILO member states have challenged this interpretation in their ongoing dialogue with the ILO's monitoring mechanisms. They have defended an increasing hybridisation of prison work, arguing that much has changed since the Convention was written in 1930.

One change these countries have cited concerns the aims of imprisonment: prisons no longer create work opportunities intended to be punitive. Instead, as reflected in international soft law, prison work should aim to rehabilitate prisoners and prepare them for release. This goal, states argue, cannot be achieved by the state acting alone: more involvement—and more investment—by outside (and non-state) actors is needed. They maintain that prisoners' employment prospects over the long term can best be improved by public-private collaboration in prisoners' education, qualifications, and work experience—and closer links between prisons and local employment markets.

A second change cited against the ILO's interpretation is that private sector organisations are now involved in criminal justice systems in ways the 1930 Convention never envisaged. Many of the underlying financial relationships differ from those the framers of the Convention originally sought to eliminate. For example, the framers never imagined a situation where private-sector companies operated entire prisons under contract, or where they provided services such as vocational training, recycling, or food provision. In any of these cases, they may end up with prisoners as workers, and would be making a profit from their contracts. Yet, the companies' services are being commissioned, and paid for or subsidised, by the state. This, states argue,

is not the financial relationship the Convention sought to regulate.

The ILO, by contrast, takes a different position: it classes any situation where prisoners work, and non-public entities are involved in providing the work, as potentially being illegal forced prison labour. In its view, this includes maintenance work done by prisoners in privately operated prisons. It also includes work done by prisoners in public sector prisons, producing goods or services under contract with private companies, even where the work purports to be rehabilitative.

In short, some states view the ILO's strict interpretation of the Convention, and its use of a binary distinction between public and non-public sectors, as outdated and unnecessarily restrictive. They suggest that paying or subsidising non-public entities to offer work and training in prisons potentially benefits prisoners (and society). If so, then profits made by those entities do not automatically risk being exploitative. Consequently, they believe private entities should not have to pay market wages to prisoners, and they also believe that it is appropriate to require prisoners to work for private entities without paying these wages in certain circumstances.

For example, the United Kingdom has argued that prisoners may be required to work for a private company which operates a prison under contract, exactly as they would in a publicly operated prison. This is because "in effect it sees that private company as acting in the place of the state. Several countries, including Australia, Germany, Russia, and Austria, have taken similar lines of argument. The ILO has nevertheless been steadfast in taking an opposite view, holding these countries' practices to be illegal forced prison labour.

The world's largest incarcerator, the United States, has not ratified the 1930 Convention. It has, since 1988, followed a policy of not ratifying any ILO convention unless US federal and state law and practice is already in conformity with its provisions. When it considered ratification of both ILO Conventions in 1991, the US Senate rejected ratification of the 1930 Convention precisely because of this issue: it concluded that "the trend at the state level to subcontract the operation of prison facilities to the private sector [...] conflicts with the requirements of Convention No.29 relating to the circumstances under which the private sector may profit from prison labor".<sup>6</sup> As a result, the US (along with Afghanistan and four Pacific island states) remains one of the six UN members which have not ratified the Convention.

## 5.2. Non-binding soft law standards

As described in Section 2, the ILO Conventions provide little detail on how prison work should be organised, or on its wider purposes. International human rights standards such as the Nelson Mandela Rules require work to be organised to support prisoners' social reintegration after release.

In theory, these provisions can help resolve the tensions highlighted in relation to the Forced Labour Conventions. For example, they establish the purpose of prison work as preparing prisoners for release (whereas the Convention simply allows states to impose compulsory work that is in an undefined 'public interest'). They also clarify that private sector involvement should not prioritize profit. This offers clearer guidance than the ILO convention, which simply opposes public and private entities and interests without further elaboration.

However, as the Rules are non-binding, they offer a weak framework with which to regulate prison work. States can interpret the requirement to 'resocialise' prisoners as they see fit. They can offer work opportunities of any kind, but are unrestrained in doing so: they can easily offer work opportunities claiming that they will benefit prisoners over the long term which are unlikely, in fact, to do so. Prisoners can lodge complaints, but cannot obtain legal redress if they believe they are being exploited. This is because the Rules are incorporated into national law and policy only to the extent that governments want to implement them.

In short, they lack enforceability and binding power. They provide a promising framework by which to regulate prison work, but do not create enforceable rights unless countries incorporate their provisions into domestic law. Thus, they guarantee no means by which to challenge doubtful and excessive claims about the benefits to prisoners of working in custody. Soft law provisions cannot adequately compensate for the gaps in binding law.

### 5.3. Summary: unclear norms and poor compliance

Earlier sections unpacked the main legal and normative provisions on prison work, showing that they consist of a small body of binding (and very non-specific) treaty law, and a larger and more detailed set of 'soft law' and guidance materials. Taken together, these frameworks regulate prison work as though the most fundamental risk of exploitation is created by the profit motive and the involvement of private entities.

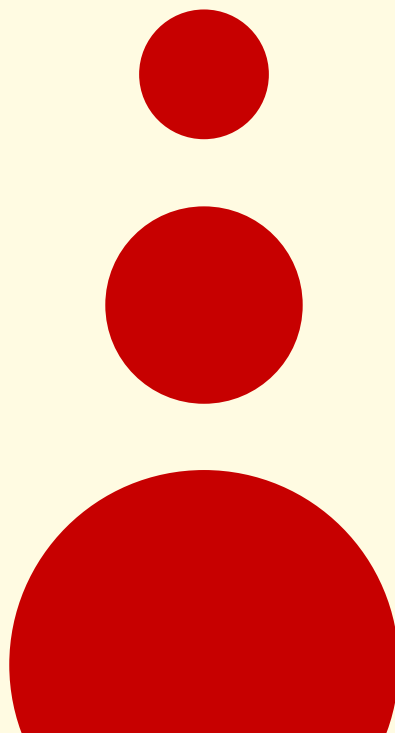
This section has argued that the most important binding international law on prison work, which derives from the ILO Forced Labour Conventions, relies on a false binary, and regulates prison work as though risks of exploitation are present only if businesses and other non-state entities are involved in providing it.

Moreover, the concept of 'voluntariness' in the ILO framework is vague. Most prisoners will accept unpaid or low-paid work even when they know it will carry no long-term benefits (such as training and skills) if the alternative is to be confined all day in a cell. Thus, the standard that prisoners who work for private entities should do so 'voluntarily' is not a strong protection against exploitation.

By focusing on disputes between member states and the ILO, this section has also demonstrated a further problem with existing international law: that states which perceive it as a hindrance to their partnerships with external organisations have tended to ignore it, or interpret it in line with their policies. This undermines the credibility of the Conventions themselves.

Soft law provisions, meanwhile, provide more detailed guidance on the resocialising aims of prison work, and on how different interests can be balanced. But because the provisions create no enforceable rights, governments and policy-makers are free to assert generically that prisoners obtain myriad benefits from working. These assertions fail to account for the present or future needs of different prisoner groups, which are not generic.

The result is that working prisoners lack meaningful protection from exploitation, and have no enforceable right to fairly remunerated, fairly allocated work opportunities designed to improve their employment prospects on release.



## 6. Towards a more coherent framework for governing prison work

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This situation represents an opportunity. A more detailed and coherent set of standards for prison work, addressing the gaps and weaknesses we have identified, could better protect prisoners against exploitative labour conditions, could better regulate public and private sector actors, and could foster more partnerships with non-public entities which could provide better work opportunities for prisoners and prison-leavers. Among the questions a revision of the international framework would need to address include the following:

- What kinds of work opportunities are appropriate for prisoners serving different kinds of sentence? In particular:
  - Under what circumstances can work done early in the sentence (when ‘real work conditions’ in the outside world may be distant) legitimately be claimed to prepare prisoners for release?
  - Is prison work done for profit-making enterprises and for a ‘real world’ wage more appropriate for prisoners at some sentence stages or in some situations?
  - Why should work done for the state be assumed to be non-exploitative, whereas work done for a non-public entity is assumed to be potentially exploitative regardless of its aims, objectives, and governance?
  - What does (or can) ‘working voluntarily’ mean, when used to describe working relationships in the inherently coercive prison setting?
- What would a fair and equitable division of the gains of prison labour look like, between governments, private sector employers or buyers (where relevant), NGOs and other not-for-profit entities (where relevant), prisons, and prisoners?
  - How much should prisoners be paid or otherwise rewarded for working in prison, and what kinds of deduction from prisoners’ wages are appropriate?
  - Should prisoners’ wages reflect rates of pay for similar work outside prison? If so, how, and with what qualifications?
- How should the law reflect the increasingly hybrid nature of work provision in many prison systems, and particularly the fact that the financial relationship between prisons and their partner organisations may not always be of a kind to generate obvious potential for exploitation?
  - What kinds of relationship are particularly liable to become exploitative, and what additional safeguards are required?
  - What kinds of relationship contain less risk for exploitation, and how can barriers to this kind of provision be removed?
- How should prisoners be selected/approved for work?
- What incentives should states be permitted to offer businesses and local public authorities, to encourage them to engage prisoner labour?
- How best can the rehabilitative or resocialising aims of prison work be realised in practice? Is more involvement – and investment – from non-state actors needed, if prison work is to achieve its potential benefits?
- What tools would be required for a reform process which would better protect prisoners from exploitation, improve the amount and quality of partnerships with the private sector and improve the work opportunities available to prisoners?

# Notes

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<sup>1</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), r. 103, [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>2</sup> The reasons for this are discussed further in section 5.1.

<sup>3</sup> The most important are compulsory military service, work or service by prisoners, and compulsory work extracted to respond to civil emergencies. What the exemptions have in common is that they all involve compulsory work justified by some wider public (and not private) benefit.

<sup>4</sup> It is important to note that the ILO Conventions, in setting out the conditions which must apply where prisoners work for 'private individuals, companies, or associations', make no distinction between those which operate under the profit motive and those which do not. The same requirements apply to all work that is not directly for a public body, regardless: whether prisoners work under contract to a private company which is using their labour to produce goods for sale on the open market (and thus profiting from their cheap labour); or whether the non-public body is a charity, using philanthropic funding to offer vocational training. The 1930 Convention itself requires only that all such work be supervised and controlled by a public authority. Subsequent ILO guidance materials have made clear that the ILO interprets this to mean, further, that the work should be done 'in the public interest', although what this means in practice is unclear.

<sup>5</sup> The dispute between the ILO and various members states is analysed in depth in an article in the ILO's academic journal: Faina Milman-Sivan and Yair Sagy, 'On the International Labour Organization and Prison Labour: An Invitation to Recalibrate', *International Labour Review* 159, no. 4 (2020): 505–24, <https://doi.org/10.2139/ssrn.3695490>.

<sup>6</sup> Senate hearings quoted in 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, 1517.

