

# Globalisation and human rights: a case study of prisoners' labour

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What I hope to do today in the brief time available is to give you a flavour of some of the work that I have done on and off over the last few years on how international human rights law regulates the use of prisoners' labour, and in particular how it operates in cases where prisoners' labour is used by non-state actors.<sup>1</sup> To do this, I want to talk about four things that, like 'prisons' and 'privatisation' start with the letter 'p': they are a proposition, prison practices, provisions and paradoxes.

## A Proposition

The proposition is relatively straightforward, and probably familiar to us all. It goes like this: globalisation is harmful to human rights. But first, what do I mean by 'globalisation'? I am referring to those economic policy choices associated with economic liberalization. These include greater reliance on the free market, reduction in the size and the role of the state, deregulation of markets (for example, telecommunications) and privatization of functions hitherto performed by the state directly.<sup>2</sup>

Before going on, it is important to interrogate the initial proposition because, as my colleague at Melbourne Law School, John Tobin, managed to get me to see, globalisation, at least as I am using the term here, cannot change the international legal obligations that are binding upon states, whether in relation to human rights or any other sphere of activity. So in what way is globalisation harmful to human rights if it doesn't alter how they are protected by international (or domestic) law?

The answer seems to be that the changes wrought by globalisation in the role and power of the state are likely to have an adverse effect on its *capacity* to fulfil its obligations under human rights law. On the one hand, the devolution of state functions to private actors could limit the ability of the state to protect the human rights of the people affected by that devolution of function. On the other hand, in pursuing the policies associated with globalisation, a state may be pursuing a program promoted (or imposed) by an international financial institution. Such programs are often not especially concerned with compliance with international human rights law, and indeed many of them have adverse consequences for human rights, particularly economic, social and cultural rights. So what we have in the impact of globalisation

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<sup>1</sup> C Fenwick, 'Private use of prisoners' labor: paradoxes of international human rights law' FORTHCOMING in *Human Rights Quarterly*.

<sup>2</sup> I have derived this definition from the statement by the United Nations Committee on Economic, Social and Cultural Rights on Globalisation and its impact on the enjoyment of economic, social and cultural rights, at: Report of the 18<sup>th</sup> and 19<sup>th</sup> Sessions of the Committee on Economic, Social and Cultural Rights, UN Doc. E/1999/22 para. 515, at para. 2 of the statement.

on the state can be seen as a transfer of state power to ‘bureaucrats and special interest groups [as a result of which] the ability of government to protect human rights, even if guaranteed by a constitution and enforced by an independent judiciary, becomes more restricted.’<sup>3</sup>

Philip Alston offers a different analysis of how globalisation may have an adverse impact on the protection of human rights. For Alston, there are at least two ways in which globalisation is, at best, not neutral towards human rights. First, he sees the elevation of the *means* of globalisation – privatisation, deregulation, reliance on the free market and so – to values or ends *in themselves*. Thus the processes have stopped being what they ought to be: means of pursuing other ends or values, including the promotion of human rights. The other problem that concerns Alston is the possibility that human rights norms are now only validated insofar as they fit into some broader, ‘market-based “vision” of the good society.’<sup>4</sup>

Alston therefore calls on international lawyers to examine closely the implications for international norms, processes and institutions that follow from the changed internal role of the state brought about by globalisation.<sup>5</sup> In this he has something in common with Jeffrey Dunoff who, seeing multiple dominant narratives about globalisation and its likely impact on human rights, argues that there cannot be any determination *in the abstract* of the relationship between markets, globalisation and human rights.<sup>6</sup>

So what I have been trying to do is to put into practice the suggestion that we must look closely at particular phenomena associated with globalisation, before assuming that their impact is harmful to human rights. This brings me to the phenomena on which I have focused: the way that the state uses prisoners’ labour, and how that interacts with the trend in recent years to private operation of correctional facilities, including secure prisons.

### **Prison Practices**

Where prison practices are concerned, for present purposes I need to outline two things. One is the rise in the involvement of the private sector in running correctional facilities, including secure prisons, and how that is related to (or a part of) globalisation. The other is the way in which prisoners are (and for many years have been) deployed as a workforce.

Privately operated prisons (in their current incarnation)<sup>7</sup> first began to emerge in the mid 1980s, when the state of Tennessee considered a proposal that its entire prison system be run by the Corrections Corporation of America. Then in 1988 Texas

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<sup>3</sup> R McCorquodale and R Fairbrother, ‘Globalisation and Human Rights’ (1999) 21 *Human Rights Quarterly*, 735, 746.

<sup>4</sup> P Alston, ‘The Myopia of the Handmaidens: International Law and Globalisation’ (1997) 3 *European Journal of International Law* 435, 442.

<sup>5</sup> *Ibid.*

<sup>6</sup> J Dunoff, ‘Does Globalisation Advance Human Rights?’ (1999) 25 *Brooklyn Journal of International Law* 125, 139.

<sup>7</sup> In the longer historical run, private involvement in the running of prisons has been the rule, rather than the exception: it is really only since the 1930s that the state has sought to exercise ‘public monopoly of criminal justice functions’: A White, ‘Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective’ (2001) 38 *American Criminal Law Review* 111, 122-3.

became the first jurisdiction in recent times to contract out the operation of a prison. From there, the practice has spread, with a total of 181 privately operated prisons worldwide as at September 2001. Of these, 151 were in the United States. With 14 privately run prison facilities, Australia has the next largest number, and Victoria has the highest proportion of prisoners held in privately run facilities of any jurisdiction in the world. Until recently it was more than 50 per cent of all prisoners in the state.

The relationship between privately run prisons and globalisation is relatively easy to see. Governments around the world have had to respond to increases in prison populations (often brought about by their own 'tough on crime' policies, particularly with respect to drugs), but to do so in ways that have had relatively little impact on state budgets. One of the consequences of rising prison populations has been further deterioration in prison conditions which, despite what some may say, are generally way less than luxurious. These circumstances have come about during the period in which the forces and ideologies of globalisation have emerged, so it is no surprise that the private sector has found an opportunity to profit from the devolution of aspects of this state function. In other words, the increase in the incidence of privately operated prison facilities is a stereotypical example of how globalisation has caused changes in the role of the state. Contracting out, privatisation, and public/private partnerships are all emblematic of that economic restructuring, and the increased role of the private sector in correctional functions is a part of that spectrum.

What then of prisoners and their labour? The state has long exercised the right to extract labour from prisoners, with a variety of rationales relied upon for this over the years. Going back several centuries, prisoners in Europe were commonly deployed for public works, in particular the construction of military fortifications. In a related phenomenon, during the 15<sup>th</sup> and 16<sup>th</sup> century, some European naval powers revived the practice of galley slavery in order to pursue their wars around the Mediterranean. In both cases prisoners were seen to be a cheap, disposable labour force that could be compelled to do work that was difficult to have performed by free labour. (Of course in this period generally the concept of 'free labour' was less well developed in any event). By the early 19<sup>th</sup> century, and perhaps earlier, prison facilities had come to resemble industrial production facilities.<sup>8</sup> At the same time, the idea had taken hold that prisoners, who were plainly in need of moral correction, could be *reformed* through a program of labour. This did not mean that prisoners were not still seen as an economic asset that might be exploited to good effect: prisoners in Western Europe, were commonly made available to local entrepreneurs for a fee. By this means, the state sought to defray the costs of imprisonment. In the United States, particularly in the post-civil war south, whole prisons and prison systems were leased out to private operators, leading to terrible abuses of prisoners.<sup>9</sup>

For the most part the idea that prisoners are an economic asset to be deployed as best suits their gaoler has passed, although not so the idea that from prisoners' labour might be generated some revenue to contribute to the cost of running prisons. We do however still cling to the notion that work for prisoners can and will have a positive,

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<sup>8</sup> The correlation between the organisation of systems of production and types of punishment, including prisons, is pursued at length in G Rusche and O Kirchheimer, *Punishment and Social Structure*, Russell and Russell, New York, 1968 (original edition 1939).

<sup>9</sup> See in particular A Lichtenstein, *Twice the Work of Free Labor – The Political Economy of Convict Labour in the New South*, Verso, London and New York, 1996.

reformative impact on them. In general, therefore, prisoners are compelled to work during the term of their captivity.<sup>10</sup>

It is the combination of these two phenomena that give rise to the specific focus of my inquiry: the international legal regulation of the use of prisoners' labour by the private sector. One obvious way in which this comes about is that prisoners who are confined in jurisdictions that compel them to work may be held in a privately operated prison – as in many Australian jurisdictions. Here there is an obvious possibility that the private prison operator may obtain some benefit from the forced labour of a prisoner. There are two other ways in which it might happen. One is that the private sector may be the operator of a workshop or other correctional industry program within a prison. The other is that prisoners on work release or day release in anticipation of the end of their sentence may be assigned to work for private sector entities.

## Provisions

I want to turn now to the issue of how international law might seek to regulate the use of prisoners' labour, whether by the state or otherwise. Because of the short time available, I am going to focus on the most important of the relevant provisions, which is article 2(2)(c) of the International Labour Organisation's *Forced Labour Convention*, 1930 (No. 29).<sup>11</sup> This is the most widely ratified of the ILO's eight core labour standards, which the ILO takes to be fundamental human rights standards.<sup>12</sup> Since the adoption by the ILO in 1998 of its Declaration on Fundamental Principles and Rights at Work, all ILO members also have an obligation to comply with the spirit of Convention 29 (and the other core labour standards), whether or not they have ratified the instrument.

Before looking at that provision and how it has been interpreted and applied, it is useful to mention the origin, purpose and structure of Convention 29. It is the last of the international instruments adopted that formed part of the international campaign to eradicate slavery. In 1926, the Slavery Convention was adopted under the auspices of the League of Nations. Article 5 of that convention provides that forced labour, whilst permitted, should not deteriorate into conditions analogous to slavery. The task of addressing the then still common practice of forced labour (for the most part by colonial powers in their non-metropolitan territories) fell to the ILO, which at the invitation of the League, formed a Committee on Native Labour to examine the issue.

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<sup>10</sup> In Australia, most prison systems require prisoners to work for six hours a day, or to engage in educational programs for a similar period of time: C Fenwick, 'Regulating Prisoners' Labour in Australia: A Preliminary View' (2003) 16 *Australian Journal of Labour Law* 284-320.

<sup>11</sup> The other international provisions are: the Slavery Convention (Art 5: forced labour should not become slavery); the Universal Declaration of Human Rights (the *travaux préparatoires* show that forced labour was contemplated by the prohibition on slavery in Art 4); the International Covenant on Civil and Political Rights (Art 8 prohibits forced labour, but excludes prisoners' labour pursuant to lawful court order); the European Convention on Human Rights (Art 4 prohibits forced labour, but excludes prisoners' labour where detained under proper legal procedures), the American Convention on Human Rights (Art 6 is much like art 2(2)(c) of ILO Convention 29); the United Nations Standard Minimum Rules on the Treatment of Prisoners (Arts 71-76 on prisoners' work directly address the private benefit issue, but these are soft law), and the European Prison Rules (Arts 71-76 are similar to be less stringent than the UN rules). See generally Fenwick, above n 1.

<sup>12</sup> Conventions 29 and 105 (forced labour), Conventions 87 and 98 (freedom of association, trade union rights and collective bargaining), Conventions 100 and 111 (non-discrimination and equality in employment) and Conventions 138 and 182 (freedom from harmful child labour).

The work of that committee and of the ILO Conference ultimately produced Convention 29.

The principal obligation in Convention 29 is to totally suppress the use of forced labour within the shortest possible period. The convention does, however, contemplate the continued use of forced labour for a ‘transitional period’, and much of the instrument is detailed regulation of the terms under which forced labour might continue to be exacted.<sup>13</sup> There are, however, five exemptions from the prohibition contained in article 1. These cover compulsory military service, normal civic obligations, work exacted in case of emergency that endangers the whole or part of the population, and minor communal service that can be considered a normal civic obligation.<sup>14</sup> The fifth exemption is the relevant one for present purposes, and I will therefore set it out in full:

‘any work or service exacted from a person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.’

So what this means, in effect, is that states are free to continue to compel their prisoners to work, provided that they meet three interrelated and equally important conditions. The first is the requirement that prisoners must have been convicted in a court of law. This means that prisoners who are held on bail, or people who are held in any sort of administrative detention (for example, while awaiting the outcome of an application for determination of refugee status) may not be compelled to work, although they may be offered work and they may agree to do it. Secondly, there is the requirement of public supervision and control of prisoners at work. Related to that is the third requirement, that prisoners not be ‘placed at the disposal’ of the private sector.

In the short time available it is impossible to set out in detail how this provision has been interpreted and applied. There are, however, several important points to note. The first is that the interpretation and application of this provision by the ILO’s Committee of Experts on the Application of Conventions and Recommendations has been quite contentious in recent years. Governments that have ratified the instrument and which have privately operated prisons, in particular the United Kingdom and Australia (but not the United States, which has not ratified Convention 29) have been relatively combative with the ILO. In general terms the employers have supported the governments on the issue, while the workers have insisted on the strict application of the conventions’ requirements, both for the protection of prisoners, and in order to ensure that cheap prisoners’ labour does not become a threat to jobs in the free labour market where trade union members are employed.

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<sup>13</sup> The transitional period was originally intended to be five years, after which there would be a further review by the ILO Conference. Although the review never took place, the ILO’ supervisory body, the Committee of Experts on the Application of Conventions and Recommendations, has since remarked that today it must be assumed that it is no longer open to states to implement forced labour practices on the basis that they are still in a transitional period: ILO, *Committee of Experts’ Annual Report 2001*, ILO, Geneva, 2001, [125].

<sup>14</sup> Convention 29, arts 2(2)(a), (b), (d) and (e).

The first important point to consider is the application of the requirement for public supervision and control of prisoners' work, where a prison is privately operated. Wherever a state has contracted out a prison function, it has introduced some type of regulatory mechanism to oversee contract compliance. In some cases those mechanisms derive from statute, in others from administrative regulations, and in still others from the terms of the contracts themselves.<sup>15</sup> Often it is a combination. The question that arises, however, is really one of the adequacy of the arrangements by which privately run prisons are supervised by the jurisdiction in question. Is the requirement of public supervision met by the presence of an independent prison monitor, or by periodic visits, or by amenability to the jurisdiction of an independent prison inspector (as in the UK and Western Australia)? Each situation has to be examined closely, but the various failures to oversee private prison operators adequately tend to suggest that the convention is not usually complied with in this respect.

The second important point emerging from the findings of the Committee of Experts is the interpretation of the requirement that prisoners not be placed at the disposal of private interests. Governments, particularly the Australian government, have not of late persuaded the committee that their practices comply. One thing that has been argued is that in the absence of an employment contract between the prisoner and any other person,<sup>16</sup> there is no 'hiring' within the meaning of article 2(2)(c) of the convention. The committee has rejected this argument. It has also been suggested that where (as in Victoria) the private prison operator is prevented from deriving any profit from industries in which prisoners work, the requirement that prisoners not be 'placed at the disposal' of private actors has been met. This argument has also been rejected, on the ground that the convention does not refer to the private operator making a balance-sheet profit from the use of prisoners' labour.<sup>17</sup>

The third important point to note is that article 2(2)(c) does not prohibit prisoners in privately run facilities, or otherwise, from voluntarily accepting work with a private actor. It only prevents them from being compelled to take up such work. The ILO's Committee of Experts has developed around this notion a comprehensive set of principles by which it determines whether or not prisoners have voluntarily given their labour. As the committee has noted, this is a difficult thing of which to be sure given the captive nature of the workforce in question. Among the things that the committee looks for as indicia that the work has been undertaken voluntarily are a signed agreement to work, and working conditions that approximate those applicable to that type of work in the free labour market. This includes provisions relating to accident compensation and social security. More recently the committee has acknowledged that it might be appropriate, provided these conditions are met, for states to make (compulsory) deductions from prisoners' wages, both to defray the cost of their imprisonment, and to provide for recompense to their victims.<sup>18</sup>

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<sup>15</sup> On mechanisms for public control of privately run prisons, see generally R Harding, *Private Prisons and Public Accountability*, Open University Press, Buckingham, 1997.

<sup>16</sup> It is generally the case that prisoners are not parties to contracts of employment in the work that they do: Fenwick, above n 10.

<sup>17</sup> ILO, above n 13, [126].

<sup>18</sup> *Ibid*, [143].

## Paradoxes

Looking at Convention 29 and comparing it with the rest of international human rights law that regulates the work done by prisoners, we arrive at a pair of quite striking paradoxes.

The first paradox is that the only place in international law that we find any binding rules about the control of prisoners' labour is in article 2(2)(c) of Convention 29 as it has been interpreted and applied by the ILO's Committee of Experts.<sup>19</sup> As we have seen, that law is concerned with how prisoners' labour is used by private actors, *not* by the state. Thus, the paradox is that the practice of globalisation, by the privatisation of prison facilities, *increases* the level of legal protection available for prisoners. Of course, that still leaves the question whether states are able to comply with their obligations.

The second paradox is that international law generally *allows* states to compel their prisoners to work. While it prohibits slavery and forced labour in all their forms, from these prohibitions it universally excludes the exaction of prisoners' labour. What it does not do, however, is to regulate prisoners' conditions of work.<sup>20</sup> In other words, international law, even in the level of protection that is offered by ILO Convention 29, *presumes* that the state has the power to compel its citizens to work. It preserves that power, and merely seeks to regulate it in limited circumstances. Here then we see that the protection offered is both tenuous and limited.

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<sup>19</sup> There is an equivalent provision in the American Convention on Human Rights, but it has not given rise to similar or similarly detailed interpretation.

<sup>20</sup> There is detailed elaboration of how to regulate prisoners work in both the United Nations Standard Minimum Rules on the Treatment of Prisoners, and in the European Prison Rules, however these are both soft law.