



FACULTY OF LAW  
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# Abandon All Labour Rights, Ye Who Enter Here

- The Labour Rights of Prisoners

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# Summary

Prisoners are somewhat overlooked in international law. There is no binding global instrument regarding their treatment. Regulations are left to the national legislators, though there are a few regional instruments concerning prisoners. Prisoners are often required to work during their prison sentence, but the conditions of work are neglected in national law. The ILO, which is the UN agency responsible for the labour rights, is responsible for offering guidance on what labour rights and freedoms that prisoners can expect when in prison. For this thesis, only the fundamental principles and rights that are acknowledged in the ILO Declaration on Fundamental Principles and Rights at Work from 1998 will be used, even if some comparison will be made to other international human rights instruments.

The examination of these instruments shows that prisoners are seldom mentioned, and when they are mentioned, it is to exclude them. This does not make prisoners unprotected, however, since the fundamental principles and rights at work do not list the categories of workers that are covered, but rather lists which categories that are excluded from the protection provided. That prisoners are not mentioned can only be understood as that they are covered by the protection.

This conclusion entails that many states all over the world are in breach of the fundamental principles and rights at work, since it is very rare that any state allows prisoners to form trade unions, for example. The only known example of this is Germany. Finding that states are breaching the fundamental principles and rights at work is not enough, the ILO conventions also need to be enforced, which is the responsibility of the ILO. The only instance where the ILO has found breaches concerning prisoners is regarding forced labour in private prisons. There is therefore much work left to be done.

# Sammanfattning

Fångar är förbisedda i folkrätten. Det finns inget bindande instrument med global tillämpning som reglerar hur de ska behandlas. Ansvaret lämnas till den nationella lagstiftaren, även om det finns ett par regionala instrument som reglerar fångars situation. Fångar förväntas ofta arbeta under sitt fängelsestraff, men arbetsvillkoren är försummade i den nationella arbetsrättsliga lagstiftningen. Riktlinjer för hur fångars arbetsrättsliga rättigheter och friheter ska utformas finns hos den Internationella Arbetsorganisationen (International Labour Organisation, ILO), det FN-organ som ansvarar för arbetsrätt. Denna uppsats behandlar främst de fundamentala principer och rättigheter som återfinns i ILO:s deklaration om de fundamentala principerna och rättigheterna i arbete från 1998, men en del jämförelser görs med andra människorättsinstrument.

I utredningen av vad dessa instrument erbjuder fångar för arbetsrättsligt skydd, visas att fångar sällan är omnämnda, eller om de är det, så är det för att exkludera dem från instrumentets tillämpningsområde. Detta lämnar dock inte fångar helt utan skydd, eftersom ILO:s fundamentala principer och rättigheter inte undantar fångar från sitt tillämpningsområde. Eftersom fångar inte är undantagna kan det bara förstås som att även de är skyddade.

Denna slutsats innebär att stater världen över bryter mot de fundamentala principerna och rättigheterna i arbetet, eftersom det är ovanligt att fångar exempelvis tillåts bilda fackföreningar. Det enda kända exemplet där det tillåts är Tyskland. Det är dock inte tillräckligt att konstatera att stater bryter mot de fundamentala principerna och rättigheterna, även ILO:s konventioner måste upprätthållas, vilket är ILO:s ansvar. Den enda gången ILO har agerat för fångars rättigheter är gällande deras situation i privata fängelser, då ILO funnit att stater brutit mot konventioner gällande tvångsarbete. Det återstår därför mycket arbete på detta område.

# Acknowledgments

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# Abbreviations

|           |  |
|-----------|--|
| ABA       | American Bar Association   |
| ACA       | American Correctional Association  |
| ACHPR     | African Commission on Human and People's Rights  |
| ACHR      | American Convention on Human Rights  |
| CEDAW     | Convention on the Elimination of All Forms of Discrimination against Women               |
| CFA       | Committee on Freedom of Association  |
| CoE       | Council of Europe  |
| CPT       | Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| CRC       | Convention on the Rights of the Child  |
| ECHR      | European Convention on Human Rights  |
| ECtHR     | European Court of Human Rights   |
| EU        | European Union   |
| GG/BO     | <i>Gefangener Gewerkschaft-Bundesweite Organisation</i>                                  |
| ICERD     | International Convention on the Elimination of All Forms of Racial Discrimination        |
| ICCPR     | International Covenant on Civil and Political Rights                                     |
| ICESCR    | International Covenant on Economic, Social and Cultural Rights                           |
| ICJ       | International Court of Justice   |
| ILC       | International Labour Conference  |
| ILO       | International Labour Organization  |
| JDL Rules | United Nations Rules for the Protection of Juveniles Deprived of their Liberty           |



|        |  |
|--------|--|
| NGO    | Non-Governmental Organization  |
| OAS    | Organization of American States  |
| OAU    | Organization for African Unity   |
| UN     | United Nations   |
| UNODC  | United Nations Office on Drugs<br>and Crime  |
| UDHR   | Universal Declaration of Human<br>Rights   |
| VCLTIO | Vienna Convention on the Law of<br>Treaties between States and<br>International Organizations or<br>between International<br>Organizations |

# 1 Introduction

## 1.1 Background

During the fall of 2016, US prisons were shaken by a strike that took place in several facilities all over the country. The reason for the strike differed from prison to prison, but one of the demands that all the strikers had in common was that the 13<sup>th</sup> amendment should be changed so that servitude and slavery within the prison-system would end. Information about the strike has not been widely available, since the prisons do not disclose anything about the strike. Some prisons could be seen going into lockdown.<sup>1</sup>

There are similar problems around the world with regards to prisoners and their labour rights, since they are in many cases excluded from national legislation. Many international conventions exclude prisoners from protection against forced labour. In many states, prisoners can be forced to build roads as a punishment, locked up in chain gangs, with limited access to toilets and breaks, with insufficient food and water to sustain the hard labour that they are performing.<sup>2</sup>

The fact that prisoners lose their human rights has been pointed out by different NGO's for several decades, but the labour rights of prisoners are not covered to any great extent.<sup>3</sup> This thesis will therefore seek to investigate

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<sup>1</sup> Kanyakrit Vongkiatkajorn, *Why Prisoners Across the Country Have Gone on Strike*, 19 September, 2016, Mother Jones, available at <http://m.motherjones.com/politics/2016/09/prison-strike-inmate-labor-work>, last accessed 16 May 2017.

<sup>2</sup> Gerard de Jonge, *Still 'Slaves of the state': Prison Labour and International Law*, in Van Zyl Smit, Dirk & Dünkel, Frieder (eds.), *Prison labour: salvation or slavery?: international perspectives*, Ashgate, Aldershot, 1999 (de Jonge, *Still 'Slaves of the state'*), p 315.

<sup>3</sup> Both Amnesty International and Human Rights Watch have reported on prisoners' human rights issues, see for example: *Ghana urged to meet international prison standards*, 25 April 2012, Amnesty International, available at: [www.amnesty.org/en/latest/news/2012/04/ghana-improve-infrastructure-reduce-overcrowding-and-increase-prison-monitoring-meet-internatio/](http://www.amnesty.org/en/latest/news/2012/04/ghana-improve-infrastructure-reduce-overcrowding-and-increase-prison-monitoring-meet-internatio/), last accessed 21 May 2017.

which labour rights prisoners could expect to be granted while in prison, and what could be done to enforce them.

Today, over 10 million people are imprisoned worldwide,<sup>4</sup> with around 2.2 million in the USA alone.<sup>5</sup> Several states are excluded from this estimate, with North Korea being the biggest gap in the statistics, because no information is available from that state. With North Korea and some other states included, it is estimated that the actual prison population is closer to 11 million.<sup>6</sup> Most of the prisoners are forced to work in some way, as part of their prison sentence. The *50 for Freedom* campaign estimates that around 21 million men, women and children are engaged in forced labour in the world today.<sup>7</sup> This number does not include prisoners, since they are not considered to be forced labourers. Had they been included, the actual number would be closer to 32 million, which would be almost a 50% increase. A third of everyone involved in forced labour is therefore not considered.

## 1.2 Purpose and Aim

The area of focus of this thesis is the labour rights of prisoners, since that is an area that is not well studied. The purpose of this thesis is to investigate whether prisoners have any enforceable labour rights under international law, with a primary focus on the International Labour Organisation's (ILO) fundamental conventions.<sup>8</sup> There will also be a discussion on whether the conventions offer enough protection.

The overall aim of the thesis is to assess the protection that prisoners can expect in their role as workers, and to shed light on the situation of prisoners

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<sup>4</sup> Andrew Coyle, Helen Fair, Jessica Jacobson and Roy Walmsley, *Imprisonment Worldwide: the current situation and an alternative future*, 2016, Policy Press (Coyle et. al, *Imprisonment Worldwide*), pp 6 and 9.

<sup>5</sup> Ibid, figure 2.4 on p 15.

<sup>6</sup> Ibid, p 11.

<sup>7</sup> To see the statistics for the campaign, visit: <http://50forfreedom.org/modern-slavery/>, last accessed 17 May 2017.

<sup>8</sup> ILO Declaration on Fundamental Principles and Rights at Work, 1998, article 2.

working in prison. In the thesis, I seek to answer the question of to what extent do the ILO's fundamental principles and rights apply to prisoners?

## **1.3 Method and Structure**

The aim of this thesis is to apply the protection that labourers are provided in the ILO's four conventions on fundamental principles and rights at work to prisoners. That will be done mainly through an analysis of the eight conventions that make up the Fundamental Principles and Rights at Work, and by comparing them to the situation in different countries, with a focus on Sweden, but with analogies from other states depending on the available information.

In this thesis, both hard and soft law will be used. The hard law instruments will be used to describe the situation as it is today, and the soft law instruments will be used to interpret the hard law, but also to show any indications of progress in the area of prison labour. The goal is to see what protection the laws provides for prisoners' labour rights. To describe and interpret law with the help of authoritative legal sources, such as law, case law and doctrine, is known as the legal dogmatic method. This is then applied with the help of statistical sources.

Chapter 2 will provide background information on the ILO, as well as prisoners' labour conditions. It will also include a short discussion about penal theories and the status of prisoners, with focus on what happens when a person is sentenced to prison. Definitions of some of the main concepts for the thesis will also be provided in this chapter, for further use throughout the thesis.

Chapter 3 investigates what provisions exist in international law regarding prisoners and work. In chapter 4 there will be a discussion about what rights the ILO four fundamental principles and rights at work provide for the prisoners, and how then can be applied.

Chapter 5 will contain a discussion on what rights the prisoners could expect and what the result would be if they made a complaint to the ILO. In the final chapter, chapter 6, some short examples will be provided on what changes could be expected in the future.

## **1.4 Limitation and Scope**

It is hard to write about the human rights of prisoners, since violations are constantly ongoing, and there is little information disclosed on the subject.

This thesis will not cover any other aspects of the prison system than labour rights, unless when called for to explain these. The use of community sentencing and community service is widespread, but will not be part of this thesis, since it goes beyond work within prisons.

There is widespread discrimination and prisoner abuse worldwide: often minorities make up the majority of prisoners, and the conditions within prisons are regularly very poor. However, these subjects are substantially covered in other publications, which will be relied upon but not elaborated on in this thesis.

Regarding the selection of which states should be referred to in this thesis, a big limitation is the language. The main focus will be on Swedish conditions, but other countries will be referred to when appropriate to show different legal practices.

## 2 Background

This chapter will provide a background for the different terms used throughout the thesis, but also a more general history of the use of prisons and prison labour. The structure and work of the ILO will also be presented.

### 2.1 About the International Labour Organisation

Since the main part of this thesis will cover the four fundamental principles and rights at work, which stems from a declaration from the ILO, it is important to provide some background information on the structure and functioning of the ILO.

The ILO is a UN agency with 187 member states which has been in existence since 1919.<sup>9</sup> The ILO is the only UN agency with a tripartite structure.<sup>10</sup> The three parts of the ILO tripartism are the member states' governments, the workers' organizations and the employers' organizations.<sup>11</sup>

Within the ILO there are several bodies, with the main ones being the International Labour Conference (ILC), the Governing Body and the International Labour Office. The ILC is the meeting that is held each year in Geneva, Switzerland, attended by all member states. The delegation from each state is made up of two government representatives and one representative each from the main labour and employers' organizations of the state.<sup>12</sup> The ILC is also the body that adopts the conventions and

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<sup>9</sup> Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (Rodgers et. al, *ILO and the Quest for Social Justice*), p 2. For the member states, see: [www.ilo.org/public/english/standards/relm/country.htm](http://www.ilo.org/public/english/standards/relm/country.htm), last accessed on 17 May 2017.

<sup>10</sup> See: [www.ilo.org/global/about-the-ilo/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/lang--en/index.htm), last accessed 17 May 2017.

<sup>11</sup> Rodgers et. al, *ILO and the Quest for Social Justice*, p 12.

<sup>12</sup> International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, (ILO Constitution) article 3(1).

recommendations of the ILO, and supervises the implementation of the conventions.<sup>13</sup>

The General Body is the executive body of the ILO which sets the policy for the ILC, and suggests a budget and agenda for approval by the ILC.<sup>14</sup> The General Body meets three times a year.<sup>15</sup> Lastly, the International Labour Office is the permanent secretariat of the ILO.<sup>16</sup> It is under the leadership of the Director General, which is selected by the General Body.<sup>17</sup>

After the adoption of conventions by the ILC, there is an obligation on the member states to report to the General Body on the situation regarding that area in their country.<sup>18</sup> This obligation exists even in situations when the state has not ratified the convention in question.<sup>19</sup> When a state has submitted their report, the workers' and employers' organizations of that state have the possibility to leave comments on the report, which makes it harder for the states to conceal any non-conformities with the conventions.<sup>20</sup> The reports are then examined by the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts), a committee consisting of 20 jurists appointed by the General Body, which then either make an observation or a direct request.<sup>21</sup> The latter is a question aimed directly to the government for smaller issues, such as a request for clarification or for more information. Observations, on the other hand, are published in the Report of the Committee of Experts each year, which is sent to the ILC. At the ILC, the report is picked up by the Conference Committee on the Application of Standards (the Conference Committee), which is a

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<sup>13</sup> About the ILC, see: [www.ilo.org/ilc/AbouttheILC/lang--en/index.htm](http://www.ilo.org/ilc/AbouttheILC/lang--en/index.htm), last accessed 16 May 2017.

<sup>14</sup> About the Governing body at: [www.ilo.org/gb/about-governing-body/lang--en/index.htm](http://www.ilo.org/gb/about-governing-body/lang--en/index.htm), last accessed at 16 May 2017.

<sup>15</sup> Ibid.

<sup>16</sup> About the International Labour Office, see: [www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/lang--en/index.htm), last accessed 16 May 2017.

<sup>17</sup> Rodgers et. al, *ILO and the Quest for Social Justice*, p 11. See also: [www.ilo.org/gb/about-governing-body/lang--en/index.htm](http://www.ilo.org/gb/about-governing-body/lang--en/index.htm), last accessed 16 May 2017.

<sup>18</sup> Rodgers et. al, *ILO and the Quest for Social Justice*, p 20.

<sup>19</sup> ILO Constitution, article 19(6)(d).

<sup>20</sup> Rodgers et. al, *ILO and the Quest for Social Justice*, p 20.

<sup>21</sup> International Training Centre of the ILO, *Guide to International Labour Standards*, second edition, 2014 (ILO, *Guide to International Labour Standards*), p 270.

permanent committee of the ILC.<sup>22</sup> The Conference Committee then selects certain areas for closer discussion with the states. Afterwards, the Conference Committee makes recommendations in its final report.<sup>23</sup>

There is also another mechanism in place for the supervision of conventions, which is the representation and complaints mechanism, provided for by the ILO Constitution.<sup>24</sup> Representation means that a workers' or employers' organization can make a complaint claiming that a state does not fulfil its obligations under a ratified convention.<sup>25</sup> If the General Body deems the representation receivable, it sets up a tripartite committee to examine it. The tripartite committee then examines the subject and provides a conclusion to the General Body, which can choose to either publish the representation and eventual replies from government reply to it, or to refer the issue to the Committee of Experts, which will in that case commence operations in accordance with the ordinary procedure, as presented above.<sup>26</sup>

Complaints are made by states against other states, which are parties to the same conventions.<sup>27</sup> The complaints can also come from the General Body itself, or from a delegate to the ILC.<sup>28</sup> The General Body then has the possibility to appoint a Commission of Inquiry, which makes a thorough investigation of the issue, which could involve visits to the state. When the investigation is completed, the Commission submits a report to the General Body and to the state with its findings and recommendations on a way forward. If the state accepts the recommendations the case ends and the Committee of Experts will follow up on implementation. If not, the state can turn to the International Court of Justice (ICJ) for a final decision on the matter.<sup>29</sup>

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<sup>22</sup> About the Conference Committee, see: [www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm](http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm), last accessed on 19 May 2017.

<sup>23</sup> Ibid.

<sup>24</sup> ILO Constitution, articles 24 and 26.

<sup>25</sup> Ibid, article 24.

<sup>26</sup> ILO, *Guide to International Labour Standards*, p 274.

<sup>27</sup> ILO Constitution, article 26.

<sup>28</sup> Ibid, article 26(4).

<sup>29</sup> ILO, *Guide to International Labour Standards*, p 277.



There is also the Committee on Freedom of Association (CFA), which is a General Body committee. The CFA was established in 1951 to examine complaints from workers' or employers' organizations on violations of freedom of association. This is regardless of the concerned state's ratification of the relevant convention, since the CFA gets its mandate from the ILO Constitution and not from the conventions. The reason behind this is the great importance that is put into freedom of association by the ILO.<sup>30</sup> The CFA is therefore given extraordinary powers, since it is usually not possible to investigate whether a state follows a convention which it has not ratified.<sup>31</sup> If the CFA accepts the case, it starts a dialogue with the state concerned. Should it find violations, the CFA issues a report to the General Body and makes recommendations on how to resolve the issue.<sup>32</sup>

There is also, besides the supervision-systems, the issuance of General Surveys. They build on information from the reports submitted by the states, but also from the workers' and employers' organizations, and are put together by the Committee of Experts once a year. The General Surveys cover different subjects each year, chosen by the General Body. They give the ILO a possibility to see the development in labour-related issues in the world, but also the obstacles that can surface.<sup>33</sup>

## 2.2 Definitions

In the following subchapters, some definitions will be provided, to lay a foundation for the subsequent reading.

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<sup>30</sup> See chapter 5.2.1.

<sup>31</sup> About the CFA, see: [www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm](http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm), last accessed 16 May 2017.

<sup>32</sup> ILO, *Guide to International Labour Standards*, pp 281-282.

<sup>33</sup> About General Surveys, see: [www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/general-surveys/lang--en/index.htm](http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/general-surveys/lang--en/index.htm), last accessed 16 May 2017.

## 2.2.1 Prisoner

For the purpose of this thesis, the term “prisoner” is defined as someone that has been sentenced to prison by a court of law. This limitation is used since it is the same as in the Forced Labour Convention,<sup>34</sup> and because the obligation to work under some legal instruments, which will be accounted for in chapter 3, only applies to prisoners with a sentence. Pre-trial detainees and remand prisoners do not have any obligation to work under international law.

## 2.2.2 Worker

The term “worker” is discussed in several ways within international law. Of essence to this thesis is how it is defined in the ILO conventions. Since the focus of this thesis are the four fundamental principles and rights that were decided upon by the ILO in the 1998 declaration,<sup>35</sup> the definition of “worker” is derived from the eight conventions that make up the four fundamental principles and rights.<sup>36</sup>

None of the conventions contain a definition of “worker”, which means that guidance needs to be sought in sources outside of the conventions. Regarding the conventions governing freedom of association and collective bargaining, the CFA and the Committee of Experts have, on several occasions, discussed the use of the word worker, since they have a supervisory responsibility of the conventions. With that said, the wording of the Freedom of Association and Protection of the Right to Organise Convention (Freedom of Association Convention),<sup>37</sup> states in its article 2 that “Workers and employers, *without*

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<sup>34</sup> Forced Labour Convention, 1930 (No. 29) (Forced Labour Convention), article 2(2)(c).

<sup>35</sup> ILO Declaration on Fundamental Principles and Rights at Work, 1998, article 2.

<sup>36</sup> The eight conventions are, in numerical order: Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138), and; Worst forms of Child Labour Convention, 1973 (No. 182).

<sup>37</sup> Freedom of Association and Protection of the Rights to Organise Convention, 1948 (No. 87) (Freedom of Association Convention).

*distinction whatsoever...*”.<sup>38</sup> This has been interpreted to have the widest meaning possible.<sup>39</sup> In fact, to use the phrase “[w]orkers [...] without distinction whatsoever”, gives it a much wider use than it would have had if it simply listed all the prohibited forms of distinction. This means that the convention covers all forms of workers, with the only exception being the police and the armed forces, who are not covered by the convention unless they already are protected by national legislation.<sup>40</sup> The wide definition also allows for new forms of work to be covered, without a need to amend the convention.<sup>41</sup> The opinion of the Committee of Experts in this case is that the right to organize should therefore be the general principle, and that exceptions from this then must be expressly made.<sup>42</sup>

The all-covering scope of the convention was confirmed in a General Survey, of 2012.<sup>43</sup> There the Committee of Experts noted that a number of worker categories were excluded from freedom of association in some countries, which was not the intention of the convention and was therefore not allowed.<sup>44</sup> Of extra interest for this thesis is the fact that also workers without contracts are covered, since prisoners very seldom receives contracts.<sup>45</sup>

The same exceptions applies to the Right to Organise and Collective Bargaining Convention,<sup>46</sup> which also has an expressed exception for the public servants involved in the administration of the state.<sup>47</sup> The CFA has expressed that the widest possible definition of worker should be used in any

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<sup>38</sup> Freedom of Association Convention, article 2 (my emphasis).

<sup>39</sup> ILO, *Giving Globalization a Human Face; General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III, Part 1B, 2012 (General Survey 2012), para 53.

<sup>40</sup> Ibid article 9.

<sup>41</sup> ILO, *Freedom of Association and Collective Bargaining; General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949*, ILC, Report III, Part 4B, 81<sup>st</sup> session 1994 (General Survey 1994), para 45.

<sup>42</sup> Ibid.

<sup>43</sup> General Survey 2012.

<sup>44</sup> Ibid, para 71.

<sup>45</sup> Ibid.

<sup>46</sup> Right to Organise and Collective Bargaining Convention, 1949 (No 98) (Right to Organise and Collective Bargaining Convention).

<sup>47</sup> Ibid article 6.

case, including when there does not exist an employment relationship.<sup>48</sup> The mere fact that someone is working within the armed forces, the police or, in the case of the Right to Organise and Collective Bargaining Convention, as a public servant in the administration of the state, does not revoke the status of worker, only that they do not have a right under the conventions to freedom of association and collective bargaining. It is also stated by the CFA that the exceptions should be used extremely restrictively, so not to limit the rights of workers who should be granted them.<sup>49</sup>

Regarding the other fundamental conventions, they differ a lot in the wording. It is only the Equal Remuneration Convention<sup>50</sup> that refers to the word “workers” which is to be understood in its widest possible interpretation.<sup>51</sup> Neither is it possible to limit the scope of application under the Discrimination (Employment and Occupation) Convention.<sup>52</sup>

In the two conventions regarding forced labour,<sup>53</sup> the definition of forced labour is: “...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>54</sup> The conventions therefore do not provide a definition of the term “work”, but the Committee of Experts has noted that the Forced Labour Convention contains no provisions that would limit the application.<sup>55</sup> Likewise, the two conventions regarding child labour refer to “child labour”<sup>56</sup>

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<sup>48</sup> ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006 (Digest 2006), para 254.

<sup>49</sup> Digest 2006, para 223.

<sup>50</sup> Equal Remuneration Convention, 1951 (No. 100) (Equal Remuneration Convention).

<sup>51</sup> General Survey 2012, para 658.

<sup>52</sup> Discrimination (Employment and Occupation) Convention, 1958 (No 111) (Discrimination (Employment and Occupation) Convention), and General Survey 2012, para 733.

<sup>53</sup> The Forced Labour Convention, and the Abolition of Forced Labour Convention, where the later does not contain a definition on its own, but relies on the definition in the Forced Labour Convention.

<sup>54</sup> Forced Labour Convention, article 2(1).

<sup>55</sup> ILO, *Eradication of forced labour: General Survey concerning the Force Labour Convention, 1930 (no. 29), and the Abolition of Forced Labour Convention, 1957 (no. 105)*, Report III, Part 1B, 2007 (General Survey 2007) para 143.

<sup>56</sup> Minimum Age Convention, 1973 (No 138) (Minimum Age Convention), article 1, and Worst Forms of Child Labour Convention, 1999 (No 182) (Worst Forms of Child Labour Convention), article 1 and 3.

and “employment and work”<sup>57</sup>, which rather focuses on the action than the person.

Besides the ILO, the Economic and Social Council has also expressed that the widest possible interpretation of the word worker should be used when interpreting the International Covenant on Economic, Social and Cultural Rights, (ICESCR).<sup>58</sup>

With this taken into consideration, it can be stated with confidence that the fundamental conventions apply to all workers, even the ones in prison or otherwise imprisoned.

## 2.3 The Idea Behind Prison

There are four main functions of prisons: punishment, deterrence, rehabilitation and isolation of prisoners from society.<sup>59</sup> Different legal systems focus on different aspects of the four options, and some states might put emphasis on one of the functions, while other states use more than one and in some cases, all of them. The way that the legal system in the states works could often affect how the prisons are constructed and used, ranging from simple “storage-buildings”<sup>60</sup> where the focus is on isolation and punishment, to massive complexes where the rehabilitative aim is of greater importance.<sup>61</sup> Which function a state chooses to focus on depends on what

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<sup>57</sup> Minimum Age Convention, article 2(1) and 3.

<sup>58</sup> Economic and Social Council, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 27 April 2016, E/C.12/GC/23, paras 5 and 6, and International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>59</sup> *European prison rules*, Council of Europe, Strasbourg, 2006, p 106.

<sup>60</sup> See, for example, Turkey, with constant overcrowding in their prisons leading to people having to sleep on the floor of their cells: Mahmut Bozarslan, *What's Going on in Turkey's Prisons?*, 3 April 2017, Al-Monitor, [www.al-monitor.com/pulse/originals/2017/04/turkey-outcry-grows-ill-treatment-in-prisons.html](http://www.al-monitor.com/pulse/originals/2017/04/turkey-outcry-grows-ill-treatment-in-prisons.html), last accessed 17 May 2017.

<sup>61</sup> Norway: Erwin James, *The Norwegian Prison Where Inmates are Treated Like People*, 25 February 2013, The Guardian, available at: [www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people](http://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people), last accessed 17 May 2017.

aims it has. If it seeks to show an offender that their crime is not acceptable, it could focus on the punishment, if it seeks more to hinder the individual from committing crimes a deterring method should be used, and if the aim is to help the individual to refrain from criminal activities and from reoffending in the future, a bigger focus would be placed on the rehabilitative trainings and actions. In the following, a short description of the functions of the system will be provided.

### **2.3.1 Punishment**

When an individual receives a sentence after committing a crime, it is usually up to the court to evaluate how serious the offence is and what punishment the criminal act deserves.<sup>62</sup> In states that no longer allow for corporal punishment or death sentences, prison is the most severe punishment that can be used.<sup>63</sup> Sentencing to prison is mainly used as a mode of retaliation for the crime that the individual committed, a form of punishment.<sup>64</sup> This mode of retaliation is known as retribution, to simply punish someone for what he or she has done.

The result of imprisonment, or the effect thereof, is that the individual loses rights he or she would have had if not in prison, such as the freedom of movement or freedom of information. In contrast to this, it has been stated by the highest court in the UK that “a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication” in the Wilberforce Judgement from 1982.<sup>65</sup> That means that the prisoners still have the right to be protected by the prison administration from other rights infringements.

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<sup>62</sup> There are exceptions to this, such as the “three-strike-rule” in some states in the USA, where the third crime leads to life imprisonment.

<sup>63</sup> Coyle et. al, *Imprisonment Worldwide*, p 124.

<sup>64</sup> There are of course exemptions from this, as several states use detention to prevent crime, see Patrick Keyzer, *Preventive detention: asking the fundamental questions*, Intersentia, Cambridge, 2013.

<sup>65</sup> Raymond v. Honey, 1983, 1 AC 1.

## 2.3.2 Deterrence

Prisons could be used to punish someone for the offence they have committed, but also as a deterrent measure, to prevent other people from committing crimes.<sup>66</sup> Sentencing someone to prison for a criminal act is often also meant as a signal for other people, to show what will happen if he or she commits a crime.<sup>67</sup> Deterrence therefore is the opposite from punishment or retribution, since deterrence has a forward-looking approach, while punishment and retribution look backward.

A state imposing severe punishment on criminals is more likely seeking to deter people from committing crimes rather than to punish for the committed deed. The efficiency of this is, however, questioned and some studies also show that the harshness of the punishment have a very small effect on whether people commit crimes or not.<sup>68</sup> If the certainty that one will get punished is increased, however, it is possible to see an effect in the behaviour of individuals.<sup>69</sup> In fact, some of the critique against increasing the severity of the punishment in an attempt to raise the deterring effect is that it assumes that every person is a reasonable individual that weighs the pros and cons before committing a crime. Statistics show that this is very often not the case.<sup>70</sup> This is regarded as an “economist approach”, the assumption that an individual always considers the possible gains from committing a crime and the potential losses that could result from it (in the form of a prison sentence).<sup>71</sup>

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<sup>66</sup> Lucken, *Rethinking Punishment*, p 13.

<sup>67</sup> Ibid, p 16.

<sup>68</sup> Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, 2010, p 2f.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid, p 3.

<sup>71</sup> Ibid.

Despite scant evidence of its effect, deterrence is the area that several crime-prevention policies are aimed at, since most people think that harder punishment is the best way to avoid crimes being committed.<sup>72</sup>

### 2.3.3 Rehabilitation

Once a person is sentenced to prison, a responsibility for the prison-system to care for that person is activated. At this point, there are different ideologies regarding how to treat the prisoner. If the state's prison system aims to ensure that the person does not reoffend, the main focus of the prison should be to rehabilitate the prisoner. This view of the prison system is mirrored in the International Covenant on Civil and Political Rights (ICCPR), which states that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."<sup>73</sup>

This aims at helping the individual to readapt to the society, in the shape of treating drug abuse or providing education or training which helps the person to get and maintain a job upon release. In Scandinavian countries, the aim is to release prisoners that are less likely to re-offend.<sup>74</sup> Norway is one of the most successful countries in the world when it comes to low recidivism,<sup>75</sup> with re-offence rates under 30% during a two-year period after their release.<sup>76</sup>

Recidivism occurs for many reasons, but since the biggest group of re-offenders in the USA are people suffering from drug or alcohol addictions, it is fair to assume that the treatment of these addictions would lead to a decrease in the number of individuals that re-offend to be able to uphold said addictions.<sup>77</sup> A problem with the rehabilitative aim of prisons is that most prisoners only serve a short period in prison, less than 12 months, and most

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<sup>72</sup> Several political initiatives aim to this end, see for instance; TT, *Regeringen vill ha Hårdare Straff*, 21 December 2016, Dagens Industri, at [www.di.se/nyheter/regeringen-vill-ha-hardare-straft/](http://www.di.se/nyheter/regeringen-vill-ha-hardare-straft/), last accessed 17 May 2017.

<sup>73</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (ICCPR), article 10(3).

<sup>74</sup> Carolyn W. Deady, *Incarceration and Recidivism: Lessons from Abroad*, 2014, p 3.

<sup>75</sup> Recidivism is the act of re-offending.

<sup>76</sup> Carolyn W. Deady, *Incarceration and Recidivism: Lessons from Abroad*, 2014, p 3.

<sup>77</sup> The National Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Population*, p 19.



of the programs that try to help addicts require a long time-span to be effective.<sup>78</sup> Rehabilitation is not popular with people who believe in the deterring effect of prisons, since it can be seen as a soft treatment of prisoners.

### **2.3.4 Isolation of the Offender from Society**

An effect of the prison system is that imprisoned offenders are isolated from society during a period of time and cannot commit additional crimes while he or she is being punished for earlier crimes. This is also as a way to separate the offender from the victim or victims that could get affected by the offender's presence. This view of the prison system shifts focus to the need of separating the prisoner from society rather than the aim of helping the prisoner to refrain from committing further crimes.

To isolate the prisoner from the rest of society is the fundamental idea behind prisons. The "time-out" from society that prisons provide plays a role in all the three earlier mentioned focus-areas with prisons (Punishment, Deterrence and Rehabilitation). The treatment of the prisoner once he or she reaches prison is what distinguishes the different focus areas. Many states' prison systems provide little more than just a place to sleep at night, and not much activities aside from that. This way of "storing prisoners" can be seen in some of the US states, for example Texas,<sup>79</sup> where prisoners are kept in cells without activities for the bigger part of the day, often in overcrowded prisons.<sup>80</sup>

The practice of isolating the offenders from society is part of the Incapacitation Theory, which aims to prevent the person from reoffending by separating the person from society. This is part of an utilitarian approach, in the sense that the discomfort of one (the prisoner) is outweighed by the gain

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<sup>78</sup> Brå, *Arbete, Utbildning och behandling i svenska anstalter: en studie om intagnas sysselsättning*, (No. 2015:20) 2015 (Brå 2015), p 10.

<sup>79</sup> Several newspapers report on the conditions in prisons, with Texas being one of the worst states. See, among others; Chase Hoffberger, *Texas Inmates Strike for Better Conditions*, 6 April 2016, The Austin Chronicle (available at [www.austinchronicle.com/daily/news/2016-04-06/texas-inmates-strike-for-better-conditions/](http://www.austinchronicle.com/daily/news/2016-04-06/texas-inmates-strike-for-better-conditions/), last accessed 17 May 2017).

<sup>80</sup> Coyle et. al, *Imprisonment Worldwide*, pp 92 ff.

for the rest of the population (in that they do not have to carry the weight of the person's criminal activities, either as private individuals or collectively in society).<sup>81</sup> Prisons are the most common way to separate people from society, even if other options such as capital punishment and dismemberment are also part of this practice.<sup>82</sup> The latter two are essentially a form of punishment for the crimes that the individual is expected to commit in the future.

### 2.3.5 Summary

The use of prison and its main focus is widely debated across the world. The efficiency of the prison system is also subject to debate, since it depends on what focus the state has in its prison system. If a state aims to merely punish the individual for his or her crime, then the sentencing to prison does just that, and the rest is simply to store the prisoners until the date when they are to be released. However, if the focus is to make the prisoner a functioning member of society, then rehabilitation would be the better option, as seen in the example of Norway above.

## 2.4 The Idea Behind Prison Labour

When an individual is sentenced to and arrives in prison, the responsibility to take care of the prisoner falls on the prison administration.<sup>83</sup> The prison administration has three objectives: security, good order and helping the prisoner to prepare for the time after release.<sup>84</sup> The security aspect aims to prevent prisoners from escaping, the good order to make certain that prisoners, guards and visitors are not in danger of physical harm or violence,

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<sup>81</sup> Alana Barton, *Incapacitation Theory*, In Bosworth, Mary (ed.), *Encyclopedia of prisons & correctional facilities*, Sage Publications, Thousand Oaks, Calif., 2007 (Barton, *Incapacitation Theory*), p 1.

<sup>82</sup> Examples of dismemberment are sterilization of sex-offenders (physical dismemberment) and the revocation of someone's driving license or placing them in curfew (legal dismemberment), see; Barton, *Incapacitation Theory*, 2010, p 1.

<sup>83</sup> Coyle et. al, *Imprisonment Worldwide*, pp 124f.

<sup>84</sup> Coyle et. al, *Imprisonment Worldwide*, pp 88 and 125.

and, finally, the preparation objective provides prisoners with opportunities to have a good life after release. This third part is the focus of this thesis, since it includes the idea of prison labour.<sup>85</sup>

Prison labour has multiple functions, it is for example argued that it is a good way to reduce boredom for the prisoners.<sup>86</sup> The possibility to work is often a welcomed distraction, since prisoners otherwise would have few opportunities to leave their prison cell. It is also a good measure, since prisoners who can fill their time with meaningful activities are less likely to become unruly.<sup>87</sup>

There are two reasons behind states offering work possibilities to prisoners. One is as a punitive measure, to force the prisoners to work hard and often with meaningless tasks as a form of punishment. This form of prison labour is often what is called “hard labour”, and is part of the sentence. The other form is to let the prisoners learn to perform meaningful tasks which educates them and lets them pay for their own living. In some states prisoners get paid for their work, mainly in European countries.<sup>88</sup> This payment differs substantially between states, and different ideologies guide the amount that prisoners are paid. In Germany, it is considered that too low a wage would be useless since it does not show the prisoners the benefits of work.<sup>89</sup> In an amendment to the German Prison Act, prisoners can be paid with other means than simply monetary, such as decreased prison-time.<sup>90</sup>

The idea behind letting prisoners work has been existent since the early use of prisons. Some argue that the main idea behind prisons was to use criminals as cheap labour-force.<sup>91</sup> In the early days of the prison system, the focus was

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<sup>85</sup> Coyle et. al, *Imprisonment Worldwide*, p 88.

<sup>86</sup> Brå 2015, p 32.

<sup>87</sup> Ibid.

<sup>88</sup> Richard L. Lippke, *Rethinking Imprisonment*, 2007, p 151.

<sup>89</sup> Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England*, Oxford University Press, Oxford, 2004, p 109.

<sup>90</sup> Ibid, pp 109-110.

<sup>91</sup> See, for example, Joycelyn M Pollock, *The Rationale for Imprisonment*, in Blackburn, Ashley G, Fowler, Shannon K, and Pollock, Joycelyn M, *Prisons: Today and Tomorrow*, 3<sup>rd</sup> edition, James and Bartlett Publishers, Burlington, 2014 (Pollock, *The Rationale for Imprisonment*), p 11-12 and Gardner, Gil, *The Emergence of the New York State Prison*

to engage the “idle poor” in some sort of activity. They fulfilled this task together with so-called workhouses, which people could turn to be allowed to get a small amount of money in exchange for hard work. The conditions inside the prisons and workhouses were poor, the ideology behind that being that people would prefer to work at a regular job rather than to use these communal options.<sup>92</sup>

Over time, the purpose of prison labour evolved into two distinct ideas, one that saw prison labour as a necessary occupation for prisoners, while the other viewed prison labour as a punishment, and put more focus on the punitive elements of the work.<sup>93</sup> As has been showed previously in this chapter, this division still remains today, depending on what focus the states have with their prison systems. There is not much evidence today that the use of prisoners as a cheap labour force is be the main purpose of any states’ prison system, but there are private companies which profit from high incarceration rates.<sup>94</sup> To safeguard that private companies do not have influence over the sentencing by courts is not covered by this thesis, but there is reason for concern in this area.

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*System: A Critique of The Rusche-Kirchheimer Model*, in *Crime and Social Justice*, no. 29, 1987, p 105-106.

<sup>92</sup> Pollock, *The Rationale for Imprisonment*, p 12.

<sup>93</sup> *Ibid*, p 12.

<sup>94</sup> *Banking on Bondage: Private Prisons and Mass Incarceration*, 2 November 2011, American Civil Liberties Union, p 5.

# 3 International Standards on Prison Labour

Prison labour is often included when discussing prison conditions. These are the standards in prison which allow prisoners to have a decent life within the system. It is considered important that prisoners have access to work, which will provide them with a meaningful activity during the day, but also with education to help them after their release.<sup>95</sup> There are only a few global and regional conventions on the treatment of prisoners, so guidance can also be found within other rights-based instruments, mainly in the provisions relating to people deprived of their liberty and forced labour.

The regulations come in form of human rights instruments, which do not specifically regulate the treatment of prisoners, and sometimes expressly exclude prisoners in some provisions. In the following, there will first be a short evaluation of some global instruments that are applicable, and then some regional instruments.

## 3.1 International Human Rights

With the creation of the United Nations after the second world war, human rights became an increasingly discussed topic. It was the belief of the original UN member states that no individual state should have an indisputable right to determine for themselves how to treat their citizens. This led to the creation of several international human rights declarations and instruments, aimed at the protection of every single human within the territory of the signatory states.<sup>96</sup> These human rights were designed as rights that are inherent in being

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<sup>95</sup> Penal Reform International, *Global Prison Trends 2016*, p 7, goal 8.

<sup>96</sup> Coyle et. al, *Imprisonment Worldwide*, p 71.

human, and not something that can be earned, lost or given away.<sup>97</sup> Not even in the case of when a person commits a crime should anyone lose their human rights, since that would imply that people who are sentenced to prison are deprived of their humanity.<sup>98</sup> A prisoner is, by the very act of being sentenced to prison, deprived of some rights, freedom of movement being the most apparent, but should not be deprived of others.<sup>99</sup>

As was presented in the earlier chapter, prisoners will still maintain their right to life and health, to mention a few things.<sup>100</sup> Some instruments offer guidance on which human rights a prisoner can expect to enjoy.

Within international human rights law, one of the most important sets of instruments is the international bill of human rights, which consists of the Universal Declaration of Human Rights (UDHR),<sup>101</sup> the ICESCR,<sup>102</sup> and the ICCPR,<sup>103</sup> with its two optional protocols.<sup>104</sup> These instruments set out a standard of human rights that are to be followed, with certain provisions that are today considered to be applicable to everyone everywhere, such as the prohibition of torture and the prohibition of slavery.

Most provisions of these instruments dealing with labour are found in the ICESCR, but also the UDHR and the ICCPR contain articles regarding labour.<sup>105</sup> UDHR recognises a right to work but forbids slavery or servitude, while ICCPR forbids any form of slavery or forced labour, except in cases of

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<sup>97</sup> Ibid, p 71.

<sup>98</sup> Ibid, p 72.

<sup>99</sup> See, for example: [www.penalreform.org/priorities/prison-conditions/issue/](http://www.penalreform.org/priorities/prison-conditions/issue/), last accessed 17 May 2017.

<sup>100</sup> See chapter 2.3.

<sup>101</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III), (UDHR).

<sup>102</sup> International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>103</sup> International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>104</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171, which gives private individuals the right to file complaints to the Human Rights Committee, and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) A/RES/44/128, which provides for the abolition of the death penalty.

<sup>105</sup> UDHR, article 23, and ICCPR, article 8.

a court sentence with that implication.<sup>106</sup> In the ICESCR, there is a right to work (and to freely choose one's occupation),<sup>107</sup> a right to fair and favourable conditions,<sup>108</sup> and protection for children from harmful work.<sup>109</sup> There is also a right to form and join trade unions, without restrictions except for the rules of the trade union one seeks to join.<sup>110</sup> The UDHR also provides for freedom of association,<sup>111</sup> and the right to protect one's interests through a trade union.<sup>112</sup> The same right is incorporated in the ICCPR, where there is also a reference to the ILO convention regarding freedom of Association and Protection of the Right to Organise.<sup>113</sup>

There are several other conventions that could be applicable to prisoners, that cover a narrower group of individuals, such as minorities, women and children. These conventions are, to select a few, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>114</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>115</sup> and the Convention on the Rights of the Child (CRC).<sup>116</sup> In the ICERD, there is an equal right to work and equal remuneration, and also a right to freely join trade unions.<sup>117</sup> The CEDAW also protects the right to work and equal remuneration,<sup>118</sup> while the CRC provides a somewhat bigger protection for children. Children have the right to be protected from economic exploitation,<sup>119</sup> capital punishment or life

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<sup>106</sup> UDHR, article 23 and 4.; ICCPR, article 8.

<sup>107</sup> ICESCR, article 6.

<sup>108</sup> Ibid, article 7.

<sup>109</sup> Ibid, article 10(3).

<sup>110</sup> Ibid, article 8.

<sup>111</sup> UDHR, article 20(1).

<sup>112</sup> Ibid, article 23(4).

<sup>113</sup> ICCPR, article 22. The reference to the ILO convention is in article 22(3), which references the Freedom of Association Convention.

<sup>114</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered 4 January 1969) (ICERD).

<sup>115</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW).

<sup>116</sup> UN General Assembly, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

<sup>117</sup> ICERD, article 5(e)(i) and (ii).

<sup>118</sup> CEDAW, article 11(a-e).

<sup>119</sup> CRC, article 32 (1).

imprisonment,<sup>120</sup> and the right to be ensured separation from adults in prison.<sup>121</sup> It is noteworthy that the last provision is not included in the CEDAW, that women should be separated from men in prison. This is actually one of the few times that prison is even mentioned in international human rights law.

States are also required to set a minimum age for when children are allowed to work.<sup>122</sup> Children are supposed to be protected from certain kinds of work, such as drug trafficking and pornographic performances.<sup>123</sup> There is also a need for the protection of children from sexual abuse, which could very well be the case within prisons.<sup>124</sup>

Separation of men and women is however included in the Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules).<sup>125</sup> These rules were adopted by the UN as guidelines for states on how to build their prisons and prison management systems in a way that acknowledges the rights of prisoners, or as stated:

The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.<sup>126</sup>

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<sup>120</sup> Ibid, article 37 (a).

<sup>121</sup> Ibid, article 37 (c).

<sup>122</sup> Ibid, article 32(2)(a).

<sup>123</sup> Ibid, articles 33 and 34.

<sup>124</sup> Ibid, article 34. For examples, see: Campaign for Youth Justice, *Key facts: Youth in the justice system*, April 2012, p 3, and Jens Modvig, *Violence, Sexual Abuse and Torture in Prisons*, in Stefan Enggist, Lars Møller, Gauden Galea and Caroline Udesen (eds.), *Prisons and Health*, World Health Organization, 2014, p 21.

<sup>125</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955 (the Mandela Rules), see rule 11. The rules were renamed the Mandela Rules after the 2015 revision, in honor of Nelson Mandela. See; [www.unodc.org/ropan/en/PrisonReform/the-nelson-mandela-rules--an-updated-guide-for-prison-management-in-line-with-human-rights.html](http://www.unodc.org/ropan/en/PrisonReform/the-nelson-mandela-rules--an-updated-guide-for-prison-management-in-line-with-human-rights.html), last accessed 19 May 2017.

<sup>126</sup> The Mandela Rules, Preliminary observation 1.



The Mandela rules are therefore not binding, but are being used as a minimum standard by international organizations which works for better treatment of prisoners.<sup>127</sup>

The Mandela Rules contain a few provisions regarding the work of prisoners.<sup>128</sup> The Mandela Rules state that all prisoners shall have an opportunity to perform work, and that they shall have the right to, as far as possible, be able to choose their occupation.<sup>129</sup> This opportunity to work also stretches to pre-trial detainees.<sup>130</sup> The earlier Standard Minimum Rules, before the 2015 revision, contained a requirement for all prisoners to work, a requirement that now is no longer included in the Mandela Rules.<sup>131</sup> In the version that applies today, the emphasis is on the voluntary possibility to work, rather than the requirement to do so.<sup>132</sup> The work with developing the new edition of the rules were implemented so to bring the rules into the modern way of thinking, with more emphasis on the human rights of the prisoners.<sup>133</sup> The Mandela Rules also call for treatment of prisoners which makes it easier for them to reintegrate within the society, and puts the emphasis of the treatment of prisoners on social rehabilitation.<sup>134</sup> The Mandela Rules place the rationale behind prison labour not on its afflictive nature,<sup>135</sup> but rather on its usefulness for the prisoner and the maintenance or increase of the prisoner's abilities.<sup>136</sup> Regarding the working conditions, the safety and health of the prisoners always need to be protected, to ensure that no prisoner suffers from industrial injuries,<sup>137</sup> and the Mandela Rules call for a good working environment.<sup>138</sup> The Mandela Rules also provide that

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<sup>127</sup> See, for example, Penal Reform International or World Prison Brief.

<sup>128</sup> The main rules regarding work is in the Mandela Rules, rules 96-103.

<sup>129</sup> The Mandela Rules, rule 98 (3).

<sup>130</sup> *Ibid*, rule 116.

<sup>131</sup> In the earlier version, the provision could be found in rule 71(2). The provision is not present in today's rules.

<sup>132</sup> The Mandela Rules, rule 96(1).

<sup>133</sup> Joint NGO briefing on the revision process, pp 6-7, available at: <https://cdn.penalreform.org/wp-content/uploads/2013/07/Joint-NGO-Briefing-SMR-Review-updated-January-2016.pdf>, last accessed 17 May 2017.

<sup>134</sup> The Mandela Rules, rule 88.

<sup>135</sup> *Ibid*, rule 97(1).

<sup>136</sup> *Ibid*, rules 96(2) and 98(1).

<sup>137</sup> *Ibid*, rule 101.

<sup>138</sup> *Ibid*, rule 14.

prisoners shall never be held in slavery or work for the private profit of prison staff,<sup>139</sup> shall never be forced to work longer hours than what would be required of a free worker,<sup>140</sup> and shall also be remunerated for their work.<sup>141</sup> The Mandela Rules state that there shall be no discrimination, and that special measures for the needs of vulnerable categories of prisoners shall not be deemed to be discriminatory.<sup>142</sup>

Several NGO's has noted that The Mandela Rules are being used as guidance for many prison systems all over the world, so the importance of the rules, even if they only have the status of guidelines, is to be reckoned.<sup>143</sup>

Regarding juveniles, the Mandela Rules contain provisions regarding their treatment,<sup>144</sup> but most guidance is found in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules).<sup>145</sup> The JDL Rules define anyone under the age of 18 as a juvenile.<sup>146</sup> Their rights are mostly a right to continue to be treated as children, in that they shall have access to education outside of the detention facility and eventual diplomas and certificates shall not mention in any way that the juvenile has been in prison.<sup>147</sup> Juveniles shall also receive vocational training that is most likely to provide them with employment opportunities upon release, and while working they should never be treated worse than juvenile workers that are not in prison. They should also be remunerated for the work they perform.<sup>148</sup> Besides the JDL rules, there are also the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which

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<sup>139</sup> Ibid, rule 96(2) and (3).

<sup>140</sup> Ibid, rule 102. A free worker is a worker that is not a prisoner.

<sup>141</sup> Ibid, rules 100(2) and rule 103.

<sup>142</sup> Ibid, rule 2.

<sup>143</sup> Joint NGO briefing on the revision process, pp 6-7, available at: <https://cdn.penalreform.org/wp-content/uploads/2013/07/Joint-NGO-Briefing-SMR-Review-updated-January-2016.pdf>, last accessed 17 May 2017.

<sup>144</sup> Mostly that they shall be kept separate from adults, see the Mandela Rules, rules 11(d) and 112(2), but also their right to training and education, in rules 98(2) and 104(1).

<sup>145</sup> United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution/ adopted by the General Assembly, 2 April 1991, A/RES/45/113, (JDL Rules).

<sup>146</sup> Ibid, rule 11(a).

<sup>147</sup> Ibid, rules 38 – 41.

<sup>148</sup> Ibid, rules 42 – 46.

are more focused on the fair trial part of the detention procedure, but still contain provisions for the reintegration of the juvenile prisoners.<sup>149</sup>

Regarding women, the Mandela Rules also have provisions regulating their treatment. They shall, just as juveniles, be kept separate from men in prisons.<sup>150</sup> They shall also have their own female guards, and no male staff member shall ever enter the women's part of the prison unless accompanied by a female staff member.<sup>151</sup> But just as juvenile prisoners, women have a separate instrument regarding their treatment in prison, called the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules).<sup>152</sup> These rules do not contain any specific regulations regarding work or working conditions, but they do stress the reintegration of women into society upon release.<sup>153</sup> Both the JDL Rules and The Bangkok Rules are guidelines for prison administrations.

## 3.2 Regional

Different regional instruments regarding human rights exist, with varying degrees of importance and supervision. In the following, there will be a short description of some of these instruments and the bodies that oversee their implementation.

### 3.2.1 Europe

In Europe, the main organ for implementation of human rights is the Council of Europe (CoE) through the European Court of Human Rights (ECtHR),

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<sup>149</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules): resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33, rule 29.

<sup>150</sup> The Mandela Rules, rule 11(a).

<sup>151</sup> Ibid, rule 81(1-3).

<sup>152</sup> United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), 6 October 2010, A/C.3/65/L.5.

<sup>153</sup> The Bangkok Rules, rule 46.

which oversees the implementation of the European Convention on Human Rights (ECHR).<sup>154</sup> Besides these institutions, there is also the European Union (EU), which has some regulations regarding prisoners. However, the EU regulations only cover the transportation of prisoners and enforcement of judgements in other member states, and provide no standards on treatment of prisoners.<sup>155</sup> The EU does have a framework decision where it states that the focus is the rehabilitation of the prisoner, which can only be achieved in the home state.<sup>156</sup> Apart from this framework, the EU has the Charter of Fundamental Rights of the European Union, which contains the right to work and to freely chose one's occupation.<sup>157</sup>

The ECHR contains some provisions regarding the treatment of prisoners and their right to work, mainly article 4 on slavery and forced labour, where prisoners are excluded from the protection as long as they are detained in accordance with article 5.<sup>158</sup> Interestingly, this layout allows for people to be forced to work in cases of pre-trial detention, while waiting for extradition or while in detention awaiting an asylum process, and minors being detained to ensure their educational supervision in addition to individuals sentenced to a prison sentence.<sup>159</sup> The ECHR does not contain any right to work, which can be found in other regional human rights instruments.<sup>160</sup> This is a conscious exclusion by the CoE, since it wanted to focus only on certain rights from the UDHR in the ECHR.<sup>161</sup> The economic, social and cultural rights are instead covered by the European Social Charter of 1961, but this instrument is not supervised by the ECtHR or any other court, but rather a mechanism of self-

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<sup>154</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR).

<sup>155</sup> For more information, see: [http://ec.europa.eu/justice/criminal/recognition-decision/prisoners/index\\_en.htm](http://ec.europa.eu/justice/criminal/recognition-decision/prisoners/index_en.htm).

<sup>156</sup> Council Framework Decision 2008/909/JHA of 27 November 2008, article 4 (Full).

<sup>157</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, article 15.

<sup>158</sup> ECHR, article 4 and 5.

<sup>159</sup> *Ibid*, article 5.

<sup>160</sup> See the following subchapters 3.2.2 and 3.2.3.

<sup>161</sup> Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4<sup>th</sup> edition, Intersentia Publishers, 2006, p 5.

reporting by the states on the application of the charter, to be followed up on by the Committee of Ministers, which can issue recommendations.<sup>162</sup>

The CoE issued its own prison rules in 1973,<sup>163</sup> in response to the Standard Minimum Rules from 1955.<sup>164</sup> These rules, later renamed the European Prison Rules, have since been amended, the last time through recommendation Rec(2006)2.<sup>165</sup> During the period between the first implementation to the last amendment, there has been a great expansion of the Council of Europe with more member states, with different traditions regarding prison. In the 15 states that were members in 1973, the legal tradition was that prison were reserved only for the most severe crimes, and it was considered that the loss of freedom was the main sentence, and prisons did not provide any additional punishment.<sup>166</sup>

In the states that became members after 1973, the situation was very different from that in the first member states. The new member states came mostly from central or eastern Europe, with different traditions regarding prisoners. The rates of imprisonment were up to six times higher than in the original member states, and the conditions within the prisons were often very poor.<sup>167</sup>

Regarding work, the European Prison Rules call for fair working conditions,<sup>168</sup> that enough work of a useful nature be provided,<sup>169</sup> and that the work provided shall be on a sufficient level so that prisoners maintain or increases their ability to work upon release.<sup>170</sup> Work shall never be used as punishment.<sup>171</sup> Prisoners shall also be remunerated for the work they

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<sup>162</sup> About the charter, at: [www.coe.int/en/web/turin-european-social-charter/about-the-charter](http://www.coe.int/en/web/turin-european-social-charter/about-the-charter), last accessed 16 May 2017.

<sup>163</sup> European Standard Minimum Rules for the Treatment of Prisoners, Resolution (73) 5.

<sup>164</sup> Later renamed The Mandela Rules, see chapter 3.1.

<sup>165</sup> Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January 2006, Rec(2006)2. The previous name was the European Standard Minimum Rules for the Treatment of Prisoners.

<sup>166</sup> *European prison rules*, Council of Europe, Strasbourg, 2006, pp 101f.

<sup>167</sup> *Ibid*, p 102.

<sup>168</sup> European Prison Rules, rule 18.2.

<sup>169</sup> *Ibid*, rule 26.2.

<sup>170</sup> *Ibid*, rule 26.3 and 26.7.

<sup>171</sup> *Ibid*, rule 26.1.

perform.<sup>172</sup> The European Prison Rules also provide for proper protection from injuries, and that the equipment used in prisons should not be put to less severe tests than what is used for free workers.<sup>173</sup> The ECtHR has applied the European Prison Rules in some cases, but only as guidance. An example is the case of *Meier v Switzerland*, where it was held that the notion that only prisoners under retirement age should be offered work was only meant as guidelines, and to force a prisoner to work after retirement age can be regarded as “work required to be done in the ordinary course of detention”, and would therefore not be forced labour. This is since there is no consensus among the CoE member states regarding the requirement to force prisoners to work after retirement age.<sup>174</sup>

Since 1990, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has visited every member state several times to inspect the conditions in prisons and remand prisons. Each visit results in a report that the states may choose to publish.<sup>175</sup> The CPT work under the guidance of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,<sup>176</sup> which provides instructions on how to ensure the protection from torture and inhuman or degrading treatment in the ECHR.<sup>177</sup>

### 3.2.2 The Americas

The states of both south and north America have joined the Organization of American States (OAS), which works to ensure democracy, human rights, security and development.<sup>178</sup> The OAS works with human rights through the Inter-American Human Rights System, which consists of the Inter-American

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<sup>172</sup> Ibid, rule 26.6.

<sup>173</sup> Ibid, rule, 26.13 and 26.14.

<sup>174</sup> *Meier v Switzerland*, App no 10109/14 (ECtHR 9 February 2016), paras 78-79.

<sup>175</sup> The published reports of every state are available at: [www.coe.int/en/web/cpt/states](http://www.coe.int/en/web/cpt/states), last accessed 16 May 2017.

<sup>176</sup> Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 26 November 1987.

<sup>177</sup> ECHR, article 3.

<sup>178</sup> See OAS, *What we do*, at: [www.oas.org/en/about/what\\_we\\_do.asp](http://www.oas.org/en/about/what_we_do.asp), last accessed 17 May 2017.

Commission on Human Rights and the Inter-American Court of Human Rights.<sup>179</sup> The main human rights instruments in the Americas are the American Declaration on the Rights and Duties of Man,<sup>180</sup> and the American Convention on Human Rights.<sup>181</sup> Another instrument that includes protection for prisoners is the Inter-American Convention to Prevent and Punish Torture, which requires that torture shall not be used as a penalty.<sup>182</sup> The American Declaration on the Rights and Duties of Man was the first international document on human rights, predating the Universal Declaration on Human Rights with less than a year.<sup>183</sup>

Concerning the right to work, the American Declaration on the Rights and Duties of Man establishes that everyone has the right to a work of their own choosing,<sup>184</sup> but also that everyone has an obligation to care for their family, and to provide their children with support.<sup>185</sup> The declaration is not a binding instrument, but has been used to promote human rights within the member states of the OAS by the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights. The American Declaration on the Rights and Duties of Man also contains, as the name implies, both rights and duties for the individuals covered. The rights and duties exist independent of each other, so a breach of any duty would not automatically lead to the loss of the rights in the declaration.<sup>186</sup>

The American Convention on Human Rights (ACHR), however, sets down binding rules for the ratifying states. The convention has been ratified by 25

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<sup>179</sup> The Inter-American Commission on Human Rights has been active since 1960, and the Inter-American Court of Human Rights since 1979.

<sup>180</sup> American Declaration on the Rights and duties of Man, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

<sup>181</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, (adopted 22 November 1969, entered into force 18 July 1978) (ACHR).

<sup>182</sup> Inter-American Convention to Prevent and Punish Torture (adopted on 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No. 67, article 2. This convention will not be cited for in this thesis.

<sup>183</sup> *American Declaration on the Rights and Duties of Man* was adopted in April 1948, while the UDHR was adopted in December 1948.

<sup>184</sup> *American Declaration on the Rights and Duties of Man*, article XIV.

<sup>185</sup> *Ibid*, article XXX.

<sup>186</sup> *American Declaration on the Rights and Duties of Man* is divided into two chapters, the first providing the individuals rights, the other providing the duties.

of the 35 member states in the OAS, out of which two states, Trinidad and Tobago and Venezuela, have denounced the convention,<sup>187</sup> leaving it with 23 still state signatories.<sup>188</sup> Even though the convention contains provisions prohibiting slavery and forced labour, it does contain an exemption regarding forced labour for people who have been sentenced to prison.<sup>189</sup> The only regulation is that forced labour for prisoners is not to have a harmful effect, neither physical or psychological. Economic, social and cultural rights (under which labour rights normally sort) are not mentioned in the convention directly, but are rather mentioned under a reference to the Charter of the Organization of American States, and its protocol, the protocol of Buenos Aires.<sup>190</sup>

### 3.2.3 Africa

In Africa, the Organization for African Unity (OAU) was the organization that took a continental responsibility for human rights protection, and produced its own human rights instrument. The Organization for African Unity was later disbanded and replaced by the African Union in 2002.<sup>191</sup> The African Charter on Human and People's Rights (the Banjul Charter)<sup>192</sup> offers the main guidance regarding human rights, apart from the global instruments mentioned in chapter 3.1, in Africa. The Banjul Charter has been ratified by almost all African states, which gives it almost continental coverage.<sup>193</sup> It contains the same obligations for the states as many of the other regional

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<sup>187</sup> Trinidad and Tobago in 1998, Venezuela in 2012.

<sup>188</sup> Information received from Organization of American States website, accessed at 16 May 2017, at: [www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>189</sup> ACHR, article 6(2) and (3).

<sup>190</sup> Ibid, article 26, with reference to both the Charter of the Organization of American States and to its protocol of Buenos Aires.

<sup>191</sup> Launched in South Africa in July 2002, see [www.au.int/web/en/history/oau-and-au](http://www.au.int/web/en/history/oau-and-au), last accessed 16 May 2017.

<sup>192</sup> The African Charter on Human and People's Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 (Banjul Charter).

<sup>193</sup> The only state left to sign and ratify is South Sudan.



instruments, with provisions covering arbitrary arrest and the right to a fair trial.<sup>194</sup>

Regarding the protection for work, the Banjul Charter states that all individuals “shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”<sup>195</sup> There is also a prohibition regarding slavery.<sup>196</sup> The Banjul Charter further contains a right to education, without limitations of any sort.<sup>197</sup>

The Banjul Charter has, in addition to the articles regulating the work of the states, also articles regarding the duties of the individuals, towards their families and society, but also to regard the rights of others.<sup>198</sup> These articles provide the individuals with an obligation to foster the relationships with other in a respectful way, which would include not to commit crimes and in that way, destabilise the society. There is also a duty to help one’s family to a harmonious development, with all that it requires.<sup>199</sup>

The Banjul Charter is supervised by the African Commission on Human and People’s Rights (ACHPR), which oversees the implementation of the charter.<sup>200</sup> Since 2006, there is also a court that complements the functions of the ACHPR in monitoring the Banjul Charter, the African Court on Human and People’s Rights.<sup>201</sup> So far there has been no cases regarding prison work.

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<sup>194</sup> Banjul Charter, article 6 and 7 respectively.

<sup>195</sup> Ibid, article 15.

<sup>196</sup> Ibid, article 5.

<sup>197</sup> Ibid, article 17.

<sup>198</sup> Ibid, article 27.

<sup>199</sup> Banjul Charter, article 27.

<sup>200</sup> About the African Commission on Humans and Peoples’ Rights, see: [www.achpr.org/about/](http://www.achpr.org/about/), last accessed 16 May 2017.

<sup>201</sup> History of the African Court on Human and Peoples Rights can be found at <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court>, last accessed 16 May 2017.

# 4 The Four Fundamental Principles and Rights at Work

In 1998, the ILO established the four fundamental principles and rights at work as being: “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation” in its Declaration on Fundamental Principles and Rights at Work.<sup>202</sup> Through this declaration, the ILO made it compulsory for member states to “respect, promote and to realize” these principles and rights, even if the state had not ratified the corresponding convention.<sup>203</sup> In the following, the principles and freedoms will be presented and then assessed in relation to prisoners.

## 4.1 Forced Labour

In the opinion of the Committee of Experts, freedom from forced labour is a cornerstone in the ILO’s work for decent work and one of the most basic human rights issues it engages in.<sup>204</sup> The instruments that regulate the ILO’s work regarding forced labour are the Forced Labour Convention,<sup>205</sup> and the Abolition of Forced Labour Convention.<sup>206</sup> The definition of forced labour in the Forced Labour Convention is “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>207</sup> However, even if this definition would

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<sup>202</sup> International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1998, article 2 (a-d), my emphasis.

<sup>203</sup> Ibid, article 2.

<sup>204</sup> General Survey 2012, para 252.

<sup>205</sup> Forced Labour Convention, 1930 (No. 29).

<sup>206</sup> Abolition of Forced Labour Convention, 1957 (No 105).

<sup>207</sup> Forced Labour Convention, article 2(1).

seem to include prisoners as well, they are excluded from the convention by article 2(2)(c).<sup>208</sup> There is therefore no need to discuss whether prison labour is forced labour or not, since it is still excluded from the protection provided by the convention.

For the exception in article 2(2)(c) to come into effect, the work needs to be forced or compulsory, since a voluntary component would have the effect of work not being forced.<sup>209</sup> This does not deprive prisoners of all protection, however, since it is still required that the work is “carried out under the supervision and control of a public authority and that the [prisoner] is not hired to or placed at the disposal of private individuals, companies or associations”.<sup>210</sup> In cases where there is lacking public supervision, there would therefore be a breach of the convention, just as it would if the prisoner was placed to work for a private company without public supervision being required. Another situation that would be a breach of the Forced Labour Convention is when private companies set up workshops within prisons. To be noted is that the two rules are applied independently, meaning that it is enough that one of them is breached in order for there to be a breach of the convention.<sup>211</sup> The reason why prison labour is excepted is because the historical use of compulsory labour within prisons as a punishment and on a retributive basis, which in modern times has switched to a clearer focus on rehabilitative effects.<sup>212</sup>

However, the Committee of Experts has found that there can be exceptions to the prohibition on placing prisoners to work for private entities when a prisoner offers him- or herself voluntarily to work for a private company.<sup>213</sup> The problem is how to evaluate the voluntariness of the work. The consent from a prisoner to work for a private company should be in written form, at

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<sup>208</sup> The idea behind prison labour has been elaborated in chapter 2.4.

<sup>209</sup> ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), ILC, 89th Session, 2001, Part I: General Report, (General Report, 2001) para 107.

<sup>210</sup> Forced Labour Convention, article 2(2)(c).

<sup>211</sup> Forced Labour Convention, article 1(1).

<sup>212</sup> General Report, 2001, para 109.

<sup>213</sup> General Survey 2012, para 279.

the least,<sup>214</sup> but also all other elements of the employment need to be evaluated, to determine that full consent is at hand. These elements are that the prison labour should be as close to a free relationship as possible, including wages, social security and health.<sup>215</sup> There should also be no risks of being worse off from refusing the work, in terms of penalties or isolation of the prisoner.<sup>216</sup> However, these conditions are just indicators of voluntariness, and are not explicitly required by the Forced Labour Convention. The examination regarding if the prisoner voluntarily offers him- or herself is supposed to be carried out under the supervision of the public authority.<sup>217</sup>

The supervision and control of a public authority also proves to be problematic for privately owned prisons, since they are, by pure definition, not public. So, all work carried out during a prison sentence in a privately-owned prison would then have trouble meeting this standard. The Committee of Experts has discussed the problems with private prisons at depth in their 2001 report.<sup>218</sup> In situations when work is carried out for the public authority, and under its supervision, there is never a problem with interpretation of the convention, and prisoners can be forced to perform any work without their consent or even without being paid.<sup>219</sup> The possibility for a prisoner to be put to work for a private entity is dependent on, as mentioned above, that it is voluntary on behalf of the prisoner. But this voluntariness is not easily measured, since there must not only be a non-existence of punishment for refusal, but there can also not be any negative effects, such as being confined to one's prison-cell for the majority of the day, forced idleness, or to be deemed a "trouble-prisoner" and, in that way, miss opportunities for early release.<sup>220</sup> There have been cases where a refusal to take on assigned work was being part of the assessment regarding the behavior of the prisoner,

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<sup>214</sup> Ibid, para 279.

<sup>215</sup> Ibid, para 291.

<sup>216</sup> Ibid, para 291.

<sup>217</sup> Ibid, para 119.

<sup>218</sup> General Report, 2001, paras 82-146.

<sup>219</sup> Ibid, para 113.

<sup>220</sup> Ibid, para 129.

leading ultimately to a worse position when it comes to early release due to good behavior.<sup>221</sup> As stated by the Committee of Experts:

If the system under which private prisons are run offers prisoners true options so that they can consent to perform work or reject it without penalty as described; if there are assurances that there is no penalty as described for refusal to work at all levels, such as by the public authority, the private entity, any parole board and also within the prison itself; and if the prisoners formally consent to the performance of labour, then one vital aspect of the indicia of voluntariness would be satisfied.<sup>222</sup>

To further examine if the work for a private company is freely chosen, one could look to the work conditions of the work performed. If it is close to what a free worker would be offered, in terms of work hours, pay and social security, then this is another indication that the employment would not be forced labour in the view of the convention.<sup>223</sup> Conditions of work are only indicators of voluntariness, not proof.

All these safeguards are to ensure that private companies cannot set up prisons to get access to compelled cheap or free labour. This is important both for the sake of the prisoner, but also to protect the free workers market, and, if the prison produces goods for sale on the open market, there is a problem with unfair competition.<sup>224</sup> Businesses that comply with fair conditions and standards at work cannot compete with prisons which do not pay for their prisoners' work.

In 1957, the Abolition of Forced Labour Convention<sup>225</sup> was adopted as a supplement to the Forced Labour Convention.<sup>226</sup> It calls for each member of ILO to not use forced labour in five situations:

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<sup>221</sup> Ibid, para 130.

<sup>222</sup> Ibid, para 131.

<sup>223</sup> Forced Labour Convention, article 2(1). General Report, 2001, paras 133–134.

<sup>224</sup> General Report, 2001, para 145.

<sup>225</sup> Abolition of Forced Labour Convention.

<sup>226</sup> General Survey 2012, paras 253 and 300.

- a. as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- b. as a method of mobilising and using labour for purposes of economic development;
- c. as a means of labour discipline;
- d. as a punishment for having participated in strikes;
- e. as a means of racial, social, national or religious discrimination.<sup>227</sup>

Unlike the Forced Labour Convention, this convention does not contain any exceptions. Therefore, the exceptions in the Forced Labour Convention do not apply to prisoners under the Abolition of Forced Labour Convention.<sup>228</sup> Consequently, if prisoners are used for the economic development of the state, then that is in breach of the Abolition of Forced Labour Convention's article 1(b).<sup>229</sup> Economic development has historically been seen as work in communication and infrastructure (road building etc.), and some cases of mining and farming.<sup>230</sup> What is commonly known as "chain gangs" were prisoners chained together in order to perform manual labour, often to build roads, breaking rocks or cleaning ditches.<sup>231</sup> If the work is of the magnitude that it can be considered to be for the economic development of the state, then it is against the convention. However, work of public utility performed by prisoners would still be allowed.

In relation to (a) and (d), the convention prohibits the use of sentencing someone to forced labour because they have expressed political opinions or participated in strikes.<sup>232</sup> These exemptions from allowed prison labour comes from the belief by the ILC that prison labour could be used to punish someone for their political or other beliefs, something that the Abolition of Forced Labour Convention aims to prohibit and stop.<sup>233</sup>

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<sup>227</sup> Abolition of Forced Labour Convention, article 1.

<sup>228</sup> Forced Labour Convention, article 2(2)(c).

<sup>229</sup> General Survey 2012, para 300.

<sup>230</sup> General Survey 2007, para 7.

<sup>231</sup> de Jonge, *Still 'Slaves of the state'*, p 315.

<sup>232</sup> General Survey 2012, para 300.

<sup>233</sup> General Survey 2007, para 146.

To use forced labour as a punishment for breaching labour discipline is also not allowed by the convention under (c) above.<sup>234</sup> However, the most usual form of labour discipline would be deductions in pay rather than to force someone to work, but it is still present in the convention since it is part of some legal systems.<sup>235</sup> This conduct relates to public officials who are not conducting their work properly or are not allowed to quit their jobs,<sup>236</sup> or regarding merchant shipping, where sailors employed can be dragged back on the ship if they desert or are disobedient.<sup>237</sup>

The last provision, (e), regarding forced labour as a means of racial, social, national or religious discrimination, is rarely used today and has no application on prison conditions.<sup>238</sup> It is also worth mentioning that the convention makes no difference between “hard labour” or ordinary prison labour. The reason behind this is that the people affected by these provisions have done nothing wrong in the opinion of the ILC, and should therefore not be punished by any form of labour.<sup>239</sup>

## 4.2 Freedom of Association and Collective Bargaining

The right to freedom of association is considered by the ILO to be one of the fundamental principles for the organization and essential to the organization’s sustained progress.<sup>240</sup> Freedom of association is vital for the fulfillment of all other labour rights, especially the other fundamental principles and rights at

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<sup>234</sup> Abolition of Forced Labour Convention, article 1(c).

<sup>235</sup> General Survey 2012, para 309.

<sup>236</sup> Ibid, para 311. States that has previously been using this form of punishment is the Syrian Arab Republic and Guatemala.

<sup>237</sup> Ibid, para 312. Examples of states where this occurs are Ghana, Kuwait and Nigeria, among others, see footnote of the same paragraph.

<sup>238</sup> Ibid, para 300 *e contrario*, and General Survey 2007, paras 190-191.

<sup>239</sup> General Survey 2007, paras 146-147 and its corresponding footnotes, and General Survey 2012, para 300 and corresponding footnote.

<sup>240</sup> Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia), 1944, at I.

work established by the ILO.<sup>241</sup> In the preamble to the ILO constitution, freedom of association is even mentioned as one of the ways to ensure peace.<sup>242</sup> The importance of freedom of association cannot be stressed enough, according to the ILO.

Freedom of association is set out as a fundamental principle and right together with the right to collective bargaining.<sup>243</sup> These rights are regulated as fundamental principles and rights by the ILO in the two conventions Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention.<sup>244</sup> There are other instruments and conventions from ILO on this matter, but they are only elaborations on the principles laid down in these two conventions.<sup>245</sup> The two conventions on freedom of association and collective bargaining are also two of the most ratified conventions.<sup>246</sup>

The specific body for the supervision of these conventions that supplements the ordinary supervision of standards set out in the ILO constitution, the CFA. It was created in 1951, with the mandate to investigate complaints brought before it and make recommendations to the Governing body on how to proceed, even if the state concerned had not ratified the conventions.<sup>247</sup> To date, the CFA has examined more than 3200 cases.<sup>248</sup>

The Freedom of Association Convention provides the possibility for everyone to join a trade union of their choice, restricted only by the rules that said union may require for membership.<sup>249</sup> The wide application of the convention, as discussed in chapter 2,<sup>250</sup> gives it almost universal coverage for workers

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<sup>241</sup> General Survey 2012, para 49.

<sup>242</sup> ILO Constitution, 1919, preamble.

<sup>243</sup> ILO Declaration on Fundamental Principles and Rights at Work, June 1998, article 2(a).

<sup>244</sup> Freedom of Association Convention, and Right to Organise and Collective Bargaining Convention.

<sup>245</sup> Rodgers et. al, *ILO and the Quest for Social Justice*, p 49.

<sup>246</sup> General Survey 2012, para 52. The Freedom of Association Convention has been ratified by 154 states, while the Right to Organise and Collective Bargaining Convention has been ratified by 164.

<sup>247</sup> Rodgers et. al, *ILO and the Quest for Social Justice*, p 2.

<sup>248</sup> All reports can be found here:

[www.ilo.org/dyn/normlex/en/f?p=1000:20060:0::NO:20060::](http://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0::NO:20060::), last accessed 16 May 2017.

<sup>249</sup> The Freedom of Association Convention, article 2.

<sup>250</sup> Chapter 2.2.2. above.



within the state. The wording of article 2, “Workers and employers, without distinction whatsoever...” gives the effect that no one is excluded no matter what area he or she is involved in.<sup>251</sup> In the opinion of the Committee of Experts,<sup>252</sup> the coverage involves both formal and informal sectors, as well as private and public sectors, and no distinction regarding workers can be made.<sup>253</sup> This includes the grounds for discrimination.<sup>254</sup> The only exception to this provided for by the convention is the police and the armed forces.<sup>255</sup> However, several states do allow for the police to form and join trade unions.<sup>256</sup> This exception is also supposed to be used in a restrictive manner, since it does not include civilian employees within the military. The Committee of Experts has emphasized that certain important functions in the society, such as prison guards, fire fighters and customs staff are not excluded from the convention.<sup>257</sup> The reason behind why the convention sets down very limited possibilities for when someone could be excluded from the protection that they are entitled to is not that categories not mentioned are not covered, but rather that exceptions not mentioned are not allowed.<sup>258</sup>

It is also important to mention that freedom of association is guaranteed for both workers and employers, which means that there is freedom of association for trade union purposes, since it gives both parts the possibility to join in associations.<sup>259</sup> This leads on to the Right to Organize and Collective Bargaining Convention,<sup>260</sup> which provides the right for collective bargaining, and that no person or organization shall interfere with that right.<sup>261</sup> The objectives in this convention consist of three parts; that no interference is allowed by the employers either when hiring or during the time of

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<sup>251</sup> The Freedom of Association Convention, article 2.

<sup>252</sup> Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts).

<sup>253</sup> General Survey 2012, para 53.

<sup>254</sup> Ibid, para 53.

<sup>255</sup> Freedom of Association Convention, article 9(1).

<sup>256</sup> General Survey 2012, para 54.

<sup>257</sup> Ibid, para 67.

<sup>258</sup> Ibid, paras 69-81.

<sup>259</sup> General Survey 1994, para 46.

<sup>260</sup> Right to Organise and Collective Bargaining Convention.

<sup>261</sup> Ibid, articles 1,2 and 4.

employment,<sup>262</sup> no interference is allowed in the internal affairs of either workers or employers unions,<sup>263</sup> and the insurance of collective bargaining.<sup>264</sup> The idea behind the protection of collective bargaining is to ensure that dialogue can be upheld between workers and employers, and in that way ensure social peace.<sup>265</sup> The limitations within the Right to Organise and Collective Bargaining Convention are the same as in the Freedom of Association Convention, they exclude members of the armed forces and the police,<sup>266</sup> with the addition that “public servants engaged in the administration of the state” are also not covered by the convention.<sup>267</sup> The limitations are supposed to be as few as possible, and the Committee of Experts has expressed that since many states have different definitions on what makes out a public servant, the important aspect is the administration of the state.<sup>268</sup> To be excluded from the protection, they need to have a de facto direct part in the administration, and not only by title.<sup>269</sup> It is also important to remember that the convention only allows for the exclusion of the military, police and public servants. If they are provided protection by the state by national law, the convention cannot be used to exclude them later.<sup>270</sup>

Nothing in the conventions provides that prisoners should be excluded. When prisoners work, there is nothing excluding them from the scope of the conventions, either when they freely choose to work or if they are forced to perform said work. There should therefore not be any hindrance for prisoners to join trade unions for the purpose of negotiating the work conditions in prisons.

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<sup>262</sup> Ibid, article 1.

<sup>263</sup> Ibid, article 2.

<sup>264</sup> Ibid, article 4.

<sup>265</sup> General Survey 2012, para 167.

<sup>266</sup> Right to Organise and Collective Bargaining Convention, article 5(1).

<sup>267</sup> Ibid, article 6.

<sup>268</sup> General Survey 2012, para 171.

<sup>269</sup> General Survey 1994, paras 199-201.

<sup>270</sup> Right to Organise and Collective Bargaining Convention, articles 5(2) and 6.

## 4.3 Child Labour

The main conventions that cover child labour are the Minimum Age Convention and the Worst Forms of Child Labour Convention.<sup>271</sup>

The Minimum Age Convention prohibits individuals under the age of 18 from performing any work that is likely to jeopardize health, safety or morals,<sup>272</sup> and demands that states set a minimum age for when a child can be employed in any other matter.<sup>273</sup> This age limit shall be set so that the child can finish their primary education, and no lower than 15 years.<sup>274</sup> The Committee of Experts emphasizes the importance for children to receive an education, since it helps the child to receive better work in the future, which in turn leads to the reduction of poverty in society.<sup>275</sup>

Within the Minimum Age Convention, there are no exceptions from the minimum age requirement regarding prisons or prisoners. It is possible to exclude certain areas if “special and substantial problems of application arise”.<sup>276</sup> It does, however, never exclude the kinds of work that could be harmful to the health, safety and morals of the youth.<sup>277</sup> It should also be difficult for the states to argue that they have difficulties in implementing the convention for children in prisons since the prisons should be under state supervision.<sup>278</sup> The states should therefore have full control of the situation and be able to moderate the work done by prisoners.

The Minimum Age Convention does not provide a total ban on child labour however, since work that is necessary for the education of a child or as vocational training is always allowed as long as the work is “carried out in

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<sup>271</sup> Minimum Age Convention, and Worst Forms of Child Labour Convention.

<sup>272</sup> Minimum Age Convention, article 3(1).

<sup>273</sup> Ibid, article 2(1)

<sup>274</sup> Ibid, article 2(3). It is allowed to set 14 as a minimum age in cases when the state lacks educational facilities, but only temporary, and the state needs to continuously motivate the decision, see Minimum Age Convention, article 2(4-5).

<sup>275</sup> General Survey 2012, par 367.

<sup>276</sup> Minimum Age Convention, article 4(1).

<sup>277</sup> Ibid, article 4(3) in conjunction with article 3.

<sup>278</sup> See, for example, Forced Labour Convention article 2(2)(c) and chapter 4.1 above.

accordance with conditions prescribed by the competent authority” and is important for the training or education at hand.<sup>279</sup> A big part of the work for abolishing child labour is to guarantee that children receive the necessary education that they have a right to and that they should be able to finish compulsory schooling.<sup>280</sup>

When it comes to the Worst Forms of Child Labour Convention, it defines children as anyone under the age of 18.<sup>281</sup> The convention aims at protecting children from the worst forms of child labour.<sup>282</sup> Among the listed worst forms of child labour, there is a provision protecting children from forced labour. In the case that children are sentenced to prison, the requirement to work comes inherently from the sentence. Children can also be sentenced to community service, which is a direct way to be forced to work in order to pay off your debt to society.<sup>283</sup> As seen previously in the forced labour chapter, all prison labour is seen as forced labour, except when it is voluntarily.<sup>284</sup>

Neither of the conventions have any definition on what kind of work it is that could be considered to harm “the health, safety or morals of children,”<sup>285</sup> but leaves it up to the domestic laws or competent authorities to determine, requiring states to make that determination.<sup>286</sup> However, there is a recommendation which provides some guidance to help the states determine which areas of work that should be considered hazardous, the Worst Forms of Child Labour Recommendation.<sup>287</sup> The recommendation lists, among other things, work that exposes the child to physical, psychological or sexual abuse,<sup>288</sup> dangerous machineries,<sup>289</sup> and workplaces that the child cannot

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<sup>279</sup> Minimum Age Convention, article 6.

<sup>280</sup> See, for example, Minimum Age Convention articles 2(3), 6 and 7(1-2).

<sup>281</sup> Worst Forms of Child Labour Convention, article 2.

<sup>282</sup> Ibid, article 3(a-d).

<sup>283</sup> [www.nolo.com/legal-encyclopedia/sentencing-alternatives-prison-probation-fines-30294.html](http://www.nolo.com/legal-encyclopedia/sentencing-alternatives-prison-probation-fines-30294.html), under “Community Service”, last accessed 17 May 2017.

<sup>284</sup> See chapter 4.1.

<sup>285</sup> Minimum Age Convention, article 3(1), Worst Forms of Child Labour Convention, article 3(d).

<sup>286</sup> Minimum Age Convention, article 3(3), Worst Forms of Child Labour Convention, article 4(1).

<sup>287</sup> R190 – Worst Forms of Child Labour Recommendation, 1999, paragraph 3.

<sup>288</sup> Ibid, paragraph 3(a).

<sup>289</sup> Ibid, paragraph 3(c).

leave.<sup>290</sup> All of these are situations which could very well occur within prisons. Some states have lists of work which they deem to be too harmful for children to perform, some of which have been collected in the General Survey 2012, where work *at* prison was listed, but not work *in* prison.<sup>291</sup>

## 4.4 Discrimination

Discrimination is covered in two of the fundamental conventions, the Equal Remuneration Convention<sup>292</sup> and the Discrimination (Employment and Occupation) Convention.<sup>293</sup> The Equal Remuneration Convention covers equal remuneration for work of equal value for men and women.<sup>294</sup> The convention contains no provisions regarding prisoners, but instead provides that all workers are covered.<sup>295</sup> Additionally, the convention allows for no exclusion at all, no matter if the person is a national or not, it applies in both private and public sectors, and in both formal and informal economy.<sup>296</sup> Regarding the “equal value” of the work performed, it is not defined in the convention what this means, but the Committee of Experts has stated that it is not limited to the work performed by women and men being the same, or similar. There is no need for the work that is performed to be of the same nature to be seen as having “equal value”.<sup>297</sup> The biggest focus should be on the required skills, responsibilities and working conditions to determine the value of the work.<sup>298</sup> Remuneration includes a big variety of payments, both

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<sup>290</sup> Ibid, paragraph 3(e).

<sup>291</sup> General Survey 2012, para 545. My emphasis. To work at a prison is mentioned together with work at mental hospitals or to conducting treatment of psychiatric patients, among other things. The main idea seems to be that some categories of people are too dangerous to work with for children.

<sup>292</sup> Equal Remuneration Convention.

<sup>293</sup> Discrimination (Employment and Occupation) Convention.

<sup>294</sup> Equal Remuneration Convention, article 1(b).

<sup>295</sup> Ibid, article 2(1).

<sup>296</sup> General Survey 2012, para 658.

<sup>297</sup> Ibid, para 673.

<sup>298</sup> Ibid, para 675.

in cash and in kind.<sup>299</sup> This could include housing and food as well as only money.<sup>300</sup>

The Discrimination (Employment and Occupation) Convention covers discrimination in relation to employment and occupation. It also covers vocational training and terms and conditions of work, among other things.<sup>301</sup> The convention's purpose is to protect people from discrimination based on "race, colour, sex, religion, political opinion, national extraction or social origin",<sup>302</sup> and with the possibility to also protect against discrimination on other grounds.<sup>303</sup> The convention's use of "employment and occupation"<sup>304</sup> as protected areas gives it a wide scope of protection, and includes all workers regardless of nationality, in public and in private sectors, and in the formal and informal economy.<sup>305</sup>

The term "discrimination" covers both direct and indirect discrimination.<sup>306</sup> Indirect discrimination occurs when conditions are seemingly neutral in theory, but in practice have a discriminatory effect. This is regardless of the intention of the party who created the rule.<sup>307</sup>

In the Discrimination (Employment and Occupation) Convention, there are some situations that are not supposed to be considered discrimination. These are inherent requirements of the job,<sup>308</sup> measures for the protection of the state,<sup>309</sup> and special measures for protection and assistance.<sup>310</sup>

When looking at the inherent requirements of the job, this is to be interpreted narrowly, and only applied to a single job, and not a whole sector or occupation.<sup>311</sup> Accepted forms of requirement could be religion for certain

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<sup>299</sup> Equal Remuneration Convention, article 1(1)(a).

<sup>300</sup> General Survey 2012, para 691.

<sup>301</sup> Discrimination (Employment and Occupation) Convention, article 1(3).

<sup>302</sup> Ibid, article 1(1)(a).

<sup>303</sup> Ibid, article 1(1)(b), see also: General Survey 2012, para 733.

<sup>304</sup> Discrimination (Employment and Occupation) Convention, article 2.

<sup>305</sup> General Survey 2012, para 733.

<sup>306</sup> Ibid, para 743.

<sup>307</sup> Ibid, para 745.

<sup>308</sup> Discrimination (Employment and Occupation) Convention, article 1(2).

<sup>309</sup> Ibid, article 4.

<sup>310</sup> Ibid, article 5.

<sup>311</sup> General Survey 2012, para 828.

religious institutions or political opinion in political organizations.<sup>312</sup> The second exception, the protection of state security, is narrowly applied. The person must previously have been proved to have performed acts that are hazardous to the state and its security. Simply to disagree with politics or non-violent protesting is not covered by this.<sup>313</sup> The last exception, allowing discrimination in measures for protection and assistance, refers to the aims of other ILO conventions, providing protection for previously discriminated groups such as indigenous peoples and people with disabilities.<sup>314</sup>

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<sup>312</sup> Ibid, para 831.

<sup>313</sup> Ibid, paras 833–834.

<sup>314</sup> Ibid, paras 836–837.

# 5 The Legal Position of Prisoners

After having presented the international legal framework, it is important to evaluate what kind of protection can be provided for prisoners.

## 5.1 The Reasoning Behind Prisons and Rehabilitation

The world is divided on the purpose of imprisonment, to say the least. Some countries want prison sentences and prison labour to be part of the same punishment, so that a sentence to prison includes hard and menial labour. Meanwhile, several other countries see prison sentences and the isolation from society as the sole punishment. The prison's main function then is to store the prisoners and prepare them for a life upon release. This rehabilitative view is found in the ICCPR,<sup>315</sup> the CRC,<sup>316</sup> the Bangkok Rules,<sup>317</sup> the JDL Rules,<sup>318</sup> the Beijing Rules,<sup>319</sup> and in the Mandela Rules.<sup>320</sup> It is also the opinion of NGO's working in the area, with Penal Reform International (PRI) being a prime example.<sup>321</sup> The Committee of Experts has concluded that the rehabilitative purpose of the prisons has been in focus since the early 1930's, at least.<sup>322</sup> The United Nations torture prevention body has also expressed that

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<sup>315</sup> ICCPR, article 10(3) and 14(4).

<sup>316</sup> CRC, article 40.

<sup>317</sup> The Bangkok Rules, rules 4, 12 and 40.

<sup>318</sup> JDL Rules, rules 79-80.

<sup>319</sup> The Beijing Rules, rule 29.

<sup>320</sup> The Mandela Rules, rules 25, 59, 88(1), 89(2), 90, 93(1), 96, 102 and 107.

<sup>321</sup> See PRI issue statement: [www.penalreform.org/priorities/reintegration-and-rehabilitation/issue/](http://www.penalreform.org/priorities/reintegration-and-rehabilitation/issue/), last accessed 17 May 2017.

<sup>322</sup> General Report 2001, para 94.



more focus should be placed on rehabilitation,<sup>323</sup> as has the United Nations Office on Drugs and Crime (UNODC).<sup>324</sup>

Seeing how many of these instruments are being used daily in the work of the different organs and organizations monitoring prison conditions, it would not be to take it too far to claim that the rehabilitative aspects of prison are of great importance today. The UNODC promotes the rehabilitation in their Doha Declaration: Promoting a Future of Lawfulness (Doha Declaration).<sup>325</sup>

The problem with the assumption that the aim of prisons today is to rehabilitate is the way that prisoners are treated in several states today. Complaints have been made regarding Kazakhstan<sup>326</sup> and Brazil,<sup>327</sup> among others, that they are not considering rehabilitation as an aim for prisoners. However, the fact that the states are receiving critique for this practice from international organizations and the UN only adds to the thought that rehabilitation is widely considered to be the aim with prisons.

## 5.2 Prisoners Protection Today

The scope of the ILO conventions and the protection they provide gives an indication of what protection prisoners can expect. As seen in previous chapters, it is very rare that a convention mentions prisoners, except for the

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<sup>323</sup> See *UN Torture Prevention Body Urges Kazakhstan to Enhance Prisoner Rehabilitation*, 3 October 2016, UN News Centre [www.un.org/apps/news/story.asp?NewsID=55190#.WRWQReWLTIU](http://www.un.org/apps/news/story.asp?NewsID=55190#.WRWQReWLTIU), last accessed 19 May 2017.

<sup>324</sup> UNODC, meeting regarding rehabilitation in prison: [www.unodc.org/unodc/en/frontpage/2017/January/unodc-gathers-penal-reform-leaders-from-across-the-globe-to-promote-prison-rehabilitation--reintegration-and-tackle-re-offending.html](http://www.unodc.org/unodc/en/frontpage/2017/January/unodc-gathers-penal-reform-leaders-from-across-the-globe-to-promote-prison-rehabilitation--reintegration-and-tackle-re-offending.html), last accessed 17 May 2017.

<sup>325</sup> UNODC, *Draft Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation* (Doha Declaration), 2015. The Doha Declaration will be explained further in chapter 6.2.

<sup>326</sup> *UN Torture Prevention Body Urges Kazakhstan to Enhance Prisoner Rehabilitation*, 3 October 2016: [www.un.org/apps/news/story.asp?NewsID=55190#.WRXLROWLTIU](http://www.un.org/apps/news/story.asp?NewsID=55190#.WRXLROWLTIU), last accessed 19 May 2017.

<sup>327</sup> Wells, Miriam, *Top UN Rep Says Prisons Have Abandoned Rehabilitation*, 13 January 2014, InSight Crime: [www.insightcrime.org/news-briefs/un-highlights-failure-of-latam-prisons](http://www.insightcrime.org/news-briefs/un-highlights-failure-of-latam-prisons), last accessed 19 May 2017.

Forced Labour Convention.<sup>328</sup> Within the ILO there is intense discussions before the adoption of any convention, so their text should reflect the intention of the ILC.<sup>329</sup> Whether prisoners were mentioned or considered at all is hard to determine, but considering how prisoners are often not mentioned in the General Surveys that are produced by the Committee of Experts, one conclusion could be that prisoners are not considered. But just because they are not considered does not mean that they are not protected.

In treaty interpretation, the main guiding instrument is the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>330</sup> However, since the ILO is an international organization, the relevant convention is instead the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO).<sup>331</sup> The ILO has made a formal confirmation that it wishes to accede to the convention,<sup>332</sup> but the convention has not yet entered into force, since not enough states have ratified it.<sup>333</sup> However, the principles on interpretation from the Vienna Convention are used by the ILO when ILO conventions are discussed.<sup>334</sup> Since the provisions for treaty interpretation are identical in the Vienna Convention and the VCLTIO, they are used interchangeably in this thesis.<sup>335</sup> In the following, the provisions from the VCLTIO will be used, since it covers international organizations.<sup>336</sup>

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<sup>328</sup> Forced Labour Convention, article 2(2)(c).

<sup>329</sup> For ILO convention procedure, see chapter 2.1.

<sup>330</sup> United Nations, *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

<sup>331</sup> UN General Assembly, *Convention on the Law of Treaties between States and International Organizations or between International Organizations*, (adopted 16 December 1982, not yet into force) A/RES/37/112 (VCLTIO).

<sup>332</sup> See UN Treaty collection, VCLTIO:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXIII-3&chapter=23&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en), last accessed 19 May 2017.

<sup>333</sup> At least 35 states need to ratify the convention for it to enter into force, according to article 85 of said convention. Ratifications by international organizations does not count toward the total number of ratifications, see:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXIII-3&chapter=23&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en), last accessed 19 May 2017.

<sup>334</sup> See General Survey 2012, para 118.

<sup>335</sup> Vienna Convention, articles 30-33 and VCLTIO, articles 30-33. For the full text of the articles, see Annex 1.

<sup>336</sup> VCLTIO, article 1.

Besides the Vienna Convention, the ILO has its own rules for interpretation of ILO conventions in the ILO Constitution.<sup>337</sup> Article 37 of the ILO Constitution calls for all disputes regarding any of the conventions to be settled by the International Court of Justice (ICJ), but also that the Governing Body can set up a tribunal for solving questions or disputes regarding the conventions.<sup>338</sup> This tribunal has the power to make interpretations, but is obliged to adhere to the judgments from the ICJ.<sup>339</sup> These two bodies are the only ones that can give a final verdict on the interpretation of the conventions, however, there is always a need for the Committee of Experts to make interpretations since it supervises the implementation of the conventions and examines the reports sent in by governments and the comments made by the labour and employer organizations.<sup>340</sup>

## 5.2.1 Forced Labour

Prisoners are not excluded from most of the four fundamental principles and rights at work, with the sole exception of the Forced Labour Convention.<sup>341</sup> When convicted, prisoners are forced to work within prisons, which is per definition forced labour. However, prisoners are excluded by the Forced Labour Convention.<sup>342</sup> The exclusion is not total, however, since article 2(2)(c) provides that the work should be supervised by a public authority and not be placed at the disposal of a private company.<sup>343</sup> There is also the protection provided by the Abolition of Forced Labour Convention, which totally forbids the use of forced labour in regards to certain categories of people, and for certain purposes.<sup>344</sup> Regarding these conventions, there are already confirmed breaches by the member states, which has been addressed

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<sup>337</sup> ILO Constitution.

<sup>338</sup> ILO Constitution, article 37.

<sup>339</sup> ILO Constitution, article 37(2).

<sup>340</sup> See chapter 2.1.

<sup>341</sup> Forced Labour Convention, article 2(2)(c).

<sup>342</sup> Forced Labour Convention, article 2(2)(c).

<sup>343</sup> See chapter 4.1.

<sup>344</sup> Abolition of Forced Labour Convention, article 1, and chapter 4.1.

by the Committee of Experts in their observations.<sup>345</sup> Among other breaches there is the placing of prisoners at the disposal of private companies, and forced labour for political reasons.<sup>346</sup> There is therefore no need for much further investigation into if prisoners' rights are breached in the case of these two conventions, since that is confirmed by the Committee of Experts.

Sweden does not have any privately-owned prisons, nor is it allowed for private companies to set up shop within prisons. Prisoners therefore do not work for private companies within the prisons, other than as contract manufacturers.<sup>347</sup> Towards the end of their sentence, Swedish prisoners have the opportunity to work for off-site factories, with the requirement to return to prison after the shift has ended. It is a way to be eased into the labour market upon release.<sup>348</sup> During this time they are employed by the companies they work for in the same way as a free worker, and earn a salary and have social benefits like free workers.

Some argue that the labour protection provided for prisoners in private prisons would give them more rights than the prisoners in public prisons have.<sup>349</sup> However, the safeguards are necessary, since prisoners in private prisons have different protection and conditions than those in public prisons.<sup>350</sup> There is also nothing stopping the states from applying the same principles in public prisons.

Slavery and forced labour is prohibited in other international human rights instruments as well, but some conventions, such as the ICCPR, excludes

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<sup>345</sup> Regarding the placing of prisoners at hands of private companies, see Observation (CEACR)-adopted 2016, published 106<sup>th</sup> ILC session (2017) *Forced Labour Convention, 1930 (No. 29)* – United Kingdom (Ratification: 1931), and Direct Request (CEACR) - adopted 2016, published 106<sup>th</sup> ILC session (2017) *Forced Labour Convention, 1930 (No. 29)* - Russian Federation (Ratification: 1956).

<sup>346</sup> Observation (CEACR) - adopted 2016, published 106<sup>th</sup> ILC session (2017), *Abolition of Forced Labour Convention, 1957 (No. 105)* - Russian Federation (Ratification: 1998).

<sup>347</sup> See information on KrimProd, the part of the Swedish prison system responsible for the production part of prison labour, at their webpage: [www.krimprod.se/Om-krimprod/](http://www.krimprod.se/Om-krimprod/), last accessed 18 May 2017. Contract manufacturing is when a company hires another company to do part of their production, and then assembles the product itself.

<sup>348</sup> Kriminalvården: *Utslussning Minskar Risken för Återfall i Brott*, [www.kriminalvarden.se/om-kriminalvarden/nyheter/2016/december/utslussning-minskar-risk-for-aterfall-i-brott/](http://www.kriminalvarden.se/om-kriminalvarden/nyheter/2016/december/utslussning-minskar-risk-for-aterfall-i-brott/), last accessed 17 May 2017.

<sup>349</sup> That prison work in private prisons should be voluntary.

<sup>350</sup> General Survey 2007, para 121.

prisoners in the same way that the Forced Labour Convention does.<sup>351</sup> The same goes for both the ECHR<sup>352</sup> and the American Convention on Human rights.<sup>353</sup> This indicates a global agreement regarding prisoners and labour, and that prison labour is a part of the prison sentence.

## 5.2.2 Freedom of Association

As seen, regarding freedom of association and collective bargaining, both these conventions have strictly regulated situations when categories of workers are excluded from the protection offered.<sup>354</sup> Both conventions exclude the police and the armed forces, and the Right to Organise and Collective Bargaining Convention also excludes some public servants.<sup>355</sup> Therefore, it would be easy to conclude that prisoners are actually covered and they have the right to form trade unions. However, the interpretation of the wording is only one part of interpreting conventions.<sup>356</sup> Another important part is to see to what the parties have agreed between themselves, either in agreement or in practice.<sup>357</sup> When investigating the General Surveys made by the Committee of Experts, prison guards are mentioned several times, but not prisoners.<sup>358</sup> The reason for the frequent mentioning of prison guards is that some states exclude them from the protection of the conventions under the notion that they are public officials.<sup>359</sup> Prisoners would never be considered public officials, and are therefore not discussed under this issue.

To take an example from domestic legislation, Swedish law provides that prisoners have a right to form *förtroenderåd* (prisoners' councils), with the function to negotiate with the prison administrations for changes in the living conditions within the prisons, such as what kind of equipment should be

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<sup>351</sup> ICCPR, article 8(3)(c).

<sup>352</sup> ECHR, article 4(3).

<sup>353</sup> American Convention on Human Rights, article 6(3).

<sup>354</sup> See chapter 4.2.

<sup>355</sup> Freedom of Association Convention, article 9(1) and Right to Organise and Collective Bargaining Convention, article 5 and 6.

<sup>356</sup> VCLTIO, article 31(1).

<sup>357</sup> Ibid, article 31(3)(a) and (b).

<sup>358</sup> See chapter 4.2, and General Survey 2012, para 67.

<sup>359</sup> General Survey 2012, para 69 and 209.

bought to the common rooms or what should be sold in the kiosks.<sup>360</sup> However, they do not have the right to negotiate on work conditions since prisoners are not considered to be *arbetstagare*, the Swedish term corresponding to employee.<sup>361</sup> Being an employee is a requirement within Swedish law for protection by the regulations regarding the right to collective bargaining.<sup>362</sup> This does not seem to be in line with the provisions in neither the Freedom of Association Convention nor the Right to Organise and Collective Bargaining Convention, since they contain no limitations that would limit the scope in such a way. This has been enforced in the CFA case against Poland in 2011, among others.<sup>363</sup> It has also been emphasized by the Committee of Experts that the purpose of these conventions is to allow for freedom of association for trade union purposes.<sup>364</sup>

Prisoners do not have a right to join trade unions in the USA either, which was the ruling of a Supreme Court case in 1977.<sup>365</sup> The Supreme Court held that freedom of association was one of the freedoms that prisoner were not granted, but applied only to people “outside of prison walls”.<sup>366</sup>

In Germany, the situation is quite different. There exists one prisoners’ union, *Gefangener Gewerkschaft-Bundesweite Organisation (GG/BO)*. The GG/BO has existed since 2014 and is the first trade-union in the world for prisoners.<sup>367</sup> It currently works for the freedom of prisoners to freely join trade unions while in prison, raised salaries to match those of the free workers, and social protection, since many prisoners released from prison at old age are often without pension and forced into poverty.<sup>368</sup>

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<sup>360</sup> Fängeslag (2010:610), 4:5§. For reference, see official translation in Act on Imprisonment (Swedish Code of Statutes 2010:610), chapter 4 section 5.

<sup>361</sup> *Arbetsrättsliga utredningar: bakgrundsmaterial*, Fritze, Stockholm, 1994, p 220.

<sup>362</sup> Lag (1976:580) om Medbestämmande i Arbetslivet, 1 §.

<sup>363</sup> Freedom of Association Committee, Case No 2888 (Poland).

<sup>364</sup> General Survey 1994, para 46.

<sup>365</sup> *Jones v. North Carolina Prisoners' Labor Union, Inc.* 433 U.S. 119 (1977).

<sup>366</sup> *Ibid*, 1(a) of the findings.

<sup>367</sup> Philip Oltermann, *Inmates at Berlin Tegel jail set up world's first union for prisoners*, 30 May 2014, The Guardian, available at: [www.theguardian.com/world/2014/may/30/inmates-berlin-tegel-jail-set-up-union-for-prisoners](http://www.theguardian.com/world/2014/may/30/inmates-berlin-tegel-jail-set-up-union-for-prisoners).

<sup>368</sup> See their webpage: <https://ggbo.de/ziele/>.

None of the international human rights instruments examined earlier provides any exemption from freedom of association regarding prisoners.<sup>369</sup>

### 5.2.3 Child Labour

Children who are sentenced to prison are not excluded from the protection offered by the conventions regarding child labour. Neither the Minimum Age Convention or the Worst Forms of Child Labour Convention have any provisions regarding prison work. Instead, the Worst Forms of Child Labour Convention provides that no child should be engaged in forced labour. It could be argued that this convention overrules the exception in the Forced Labour Convention, which allows for states to force prisoners to work. Article 30 of the VCLTIO provides that if later conventions are adopted regulating the same topic, the later provision should prevail, unless otherwise stated.<sup>370</sup> As seen regarding the Abolition of Forced Labour Convention, the fact that no exception for prisoners are provided makes the convention applicable to them.<sup>371</sup> Therefore it comes naturally that, since there is no provision excluding children in prisons from the application of the Worst Forms of Child Labour Convention, children should at all times be saved from forced labour. The same applies to the provision stating that the most important thing for children is to receive an education.<sup>372</sup> Further on, VCLTIO also states that the conventions should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>373</sup> That would mean that any limitation to the conventions that are not mentioned in said convention are not applicable. If one sees to other international instruments, the CRC provides that children shall be protected from hazardous work, and that a minimum age for admission to work should be implemented by the states.<sup>374</sup> The most

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<sup>369</sup> See chapter 3.

<sup>370</sup> VCLTIO, article 30 (3) in conjunction with article 30(1) and (2).

<sup>371</sup> Chapter 4.1.

<sup>372</sup> See chapter 4.3, under Minimum Age Convention.

<sup>373</sup> VCLTIO 31(1).

<sup>374</sup> CRC, article 32.

important thing for children is to receive an education, since that helps with the development of society.<sup>375</sup>

In Sweden and several other states, it is not very common to put children in prison. Instead, children in Sweden get treatment and education so that they can return to society. Imprisonment of children does, however, occur in some states in the world, for example the USA, where as many as 4 200 children are held in adult jails and prisons every day,<sup>376</sup> with a total around 95 000 children for the whole of 2011.<sup>377</sup> This is a number that is on great decline however, since more and more states have amended their laws to allow for people under 18 to be sentenced as juveniles, not adults.<sup>378</sup> This would lead to more children being sent to juvenile institutions instead of prisons, where they at least would be separated from adults. There are, however, discussions in both Brazil and India to reduce the age for when some children could be sentenced as adults.<sup>379</sup>

Placing a child in an adult prison is dangerous for various reasons,<sup>380</sup> but when considering the labour rights of the child the same problem arises as it would for a child trapped in child labour anywhere else in society. The child would lose the possibility to valuable education and he or she is at bigger risk of injuries since equipment and protective gear for work is often made to be used by adults. Child labour is declining worldwide, but it still exists in great numbers.<sup>381</sup>

It is, however, problematic to assess how big problem child labour within prison is, since there is very little information regarding the prevalence of it

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<sup>375</sup> CRC, article 28.

<sup>376</sup> Campaign for Youth Justice, *Key facts: Youth in the justice system*, April 2012, p 3.

<sup>377</sup> Human Rights Watch, *Children Behind Bars: The Global Overuse of Detention of Children*, 2016, p 5.

<sup>378</sup> Campaign for Youth Justice, *New Year, More Possibilities*, found at <http://cfyj.org/news/blog/item/new-year-more-possibilities>, last accessed 16 May 2017.

<sup>379</sup> See: Human Rights Watch, *Children Behind Bars: The Global Overuse of Detention of Children*, p 6.

<sup>380</sup> It has been showed that children placed in adult prisons in the USA run a higher risk of committing suicide, of being exposed to sexual exploitation, and that the mental disorders that the youth could suffer from are enhanced, see Campaign for Youth Justice, *Key facts: Youth in the justice system*, April 2012, p 3.

<sup>381</sup> General Survey 2012, para 328.



and, in such cases, at what kind of work.<sup>382</sup> A bigger problem seems to be that children in prisons do not receive sufficient education or have access to meaningful activities.<sup>383</sup> Very few states disclose this kind of information.

## 5.2.4 Discrimination

The wide application of the Equal Remuneration Convention and of the Discrimination (Employment and Occupation) Convention is the very foundation of how they work.<sup>384</sup> The Committee of Experts has expressed that the rule should be that equal remuneration shall apply everywhere.<sup>385</sup> The same goes for discrimination, which should not exist anywhere. The International Labour Office has explained that to allow the state to make arbitrary limitations towards any group of workers would not be in line with the provisions in the Discrimination (Employment and Occupation) Convention.<sup>386</sup>

In Sweden, the payment that prisoners receive is always constant, since it is provided for by regulation. There is no information that the payment received in other states is discriminatory. It is therefore no evidence that there is any difference between what payment the prisoners receive based on sex, ethnicity or any other ground for discrimination.<sup>387</sup>

Regarding the different tasks that are offered to the prisoners, there is a difference between men and women in Swedish prisons, which is an effect of the fact that there are relatively few women prisoners.<sup>388</sup> This leads to fewer women prisons, which can offer a smaller variety of work tasks. Men have a bigger variety, but to be able to perform certain work tasks they might be

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<sup>382</sup> See chapter 5.3.2.

<sup>383</sup> Human Rights Watch, *Children Behind Bars: The Global Overuse of Detention of Children*, 2016, p 3

<sup>384</sup> General Survey 2012, para 658.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid, para 733.

<sup>387</sup> Kriminalvårdens Föfattningssamling 2011:1, 3:2.

<sup>388</sup> Around 6% of all prisoners are women in Sweden. That number has been relatively constant the last ten years, see Brå 2015, p 36. See also Brå, *Work, education and treatment in Swedish prison:s A study on occupational activities for inmates*, Summary of report No. 2015:20, p 6.

forced to be placed in another prison.<sup>389</sup> Every prisoner has the possibility to make requests regarding which prison they want to be placed in at the beginning of their sentence. The requests could be made regarding wanted occupation, but are most often based on the location of the prisoner's family.<sup>390</sup>

The small female prison population also has the effect that women with a higher variation of needs are gathered at one place,<sup>391</sup> due to the lack of prisons, and the occupation and education is modified to suit a more diverse group of prisoners. This does not only affect women however, but also other groups that it is not advisable to put together with other prisoners, such as prisoners that have committed sexual crimes, prisoners with disabilities, and juvenile prisoners.<sup>392</sup>

Swedish prisons offer different tasks to women and to men, where the tasks offered to women are often of a less advanced nature. The tasks that are offered to men that are of a more advanced nature are more fulfilling for the men and gives them a good training for when they are released. The prisoners that are released also find that they have gained more from the advanced tasks. Both men and women have to perform menial tasks, but only men are offered some tasks that require more effort.<sup>393</sup>

To reach the rehabilitative effect of prison work, the aim is to try and provide useful training that the prisoners can bring with them when returning to the outside. However, for the training to be meaningful and effective, it needs to span over a certain amount of time. Women are often sentenced to much shorter prison sentences, which makes it difficult for the prisons to provide

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<sup>389</sup> Brå 2015, p 36 and 46. See also Brå, *Work, education and treatment in Swedish prison:s A study on occupational activities for inmates*, Summary of report No. 2015:20, p 6

<sup>390</sup> Brå 2015, p 46.

<sup>391</sup> "Needs" are the different requirements that exist which would help the prisoner to reintegrate into society.

<sup>392</sup> Brå 2015, p 54. This also affects juvenile women harder, since they are often a very small group within prisons.

<sup>393</sup> *Ibid*, p 62.

meaningful work or education.<sup>394</sup> It is often required that the classes should be of a certain size before the education can start, but with short sentences for women, the number of people available to participate in the training are often too low.<sup>395</sup>

In Sweden, all prisons offer different kinds of training possibilities, but the variety is somewhat smaller for women due to the smaller size of the prisons. During the period between 2010-2014, women prisoners were only offered training in three out of five categories that the Swedish Prison and Probation Service provides.<sup>396</sup> These three categories were *Restaurant and Foodstuff*, *Agriculture and Garden*, and the *Construction and Manufacturing Industry*. The ones not offered to women are *Mechanical Manufacture* and *Cleaning*. Even out of the three that were offered, several subcategories were not available for women, such as carpentry and small-engine education.

Whit this, it would appear as if Sweden is in breach of the Discrimination (Employment and Occupation) Convention, since there are such differences in the work and education possibilities for men and women, but also for people with disabilities and juvenile prisoners. However, each individual prison must offer work and education equally to everyone, which they are doing. To tackle the issue with the small female prison population, the solution could be to offer off-site education, but it comes with the difficulties regarding security, since the prisoners need to be accompanied to the classes. This problem has been acknowledged by the German government as an issue regarding women in prison and education.<sup>397</sup>

The Discrimination (Employment and Occupation) Convention contains an exception in the form that it is allowed to use some forms of discriminatory measures without them being considered discriminatory if the security of the

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<sup>394</sup> Starr, Sonja B., *Estimating Gender Disparities in Federal Criminal Cases* (August 29, 2012), University of Michigan Law and Economics Research Paper, No. 12-018, p 17, and Brå 2015, p 43.

<sup>395</sup> Ibid.

<sup>396</sup> Ibid, p 43–44.

<sup>397</sup> The Quaker Council for European Affairs, *Women in Prison: A Review of the Conditions in Member States of the Council of Europe*, p 78.

state is at hand.<sup>398</sup> Since, in theory, prisoners are only sentenced to prison after having committed a crime, they could be considered to be a threat to the security of the state. This argument is not very plausible, however, since the measures are to be directed towards certain types of occupation, so to prevent any individual that could be a threat against the state from reaching those positions.<sup>399</sup> This means that prisoners should not be exempted from the protection that the convention offers, especially not since the different occupation and education that is offered to prisoners is especially chosen to provide prisoners with meaningful training and to adapt them to reintegration into society.<sup>400</sup>

Neither CEDAW or ICERD have any provisions regarding prisons, but they do have provisions requiring the equal access to work.<sup>401</sup> There is therefore nothing stopping the application of these instruments to prisoners.

## **5.3 Protection Through ILO Monitoring Mechanism**

The ILO has monitoring mechanisms in place for the effective supervision of the implementation of conventions. Most supervision of the conventions is done in the regular work of the Committee of Experts through state reports, but there are also special complaints mechanisms. When a complaint about non-conformity with a signed convention is being made by either another state, the General Body or a delegate to the ILC, it is also possible to start an investigation of the matter, just as when a representation from the workers' or employer's organizations is being made.<sup>402</sup> These complaints or representations are then evaluated by the competent body within the ILO.

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<sup>398</sup> Discrimination (Employment and Occupation) Convention, article 4.

<sup>399</sup> General Survey 2012, para 832.

<sup>400</sup> Brå 2015, p 55.

<sup>401</sup> CEDAW article 11, and ICERD article 5(e)(i).

<sup>402</sup> See Chapter 2.1.

### 5.3.1 The Committee on Freedom of Association

If the complaint that is made concerns freedom of association, the CFA has a mandate to investigate the complaint, even if the state has not ratified the corresponding conventions, since the CFA applies the constitutional principles of freedom of association, and not the conventions.<sup>403</sup> As discussed above, there is nothing in the ILO conventions that would mandate any state to exclude prisoners from the protection of the Freedom of Association Convention or the Right to Organise and Collective Bargaining Convention. Yet this is what is happening, at least in Sweden, but also in many other countries. This breach of the conventions would make it possible to use pressure against the states to change this.

The next step for the CFA would be to examine the complaints, and to start a dialogue with the state concerned. At the end of the examination, the CFA produces a report with recommendations to the General Body, which then has to act upon it.

In this case, it would be quite clear that Sweden, and most other countries, are in breach of both the Freedom of Association Convention and the Right to Organise and Collective Bargaining Convention, since prisoners' rights under the conventions are not being granted. The fact that Sweden allows for the prisoners' council to exist is not enough, since it does not have trade union status, which it should allow for.<sup>404</sup> This leaves the prisoners' council without the possibility to negotiate regarding work conditions, wages, and hours of work, among other things.

Sweden would not be the only state in breach of this, however, since there are not many states with trade unions for prisoners. The only exception to this is Germany, where the GG/BO has been working for three years, and has not

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<sup>403</sup> About CFA: <http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>, last accessed 16 May 2017.

<sup>404</sup> There is no information on if any prisoners' council ever sought this right, but the law does not allow for it, see chapters 4.2 and 5.2.2.

been deemed unlawful.<sup>405</sup> There are some countries which refuse to grant freedom of association to prisoners, as seen in the USA where freedom of association is only available to people outside of prison walls.<sup>406</sup> However, one of the reasons behind the lack of trade unions for prisoners could be a lack of interest from the prisoners themselves, or a lack of knowledge regarding their rights.

### **5.3.2 Other ILO Complaints Mechanisms**

In cases, besides the ones concerning freedom of association and collective bargaining, there are two ways that criticisms can be made: representation from the workers' and employers' organizations, and complaints by the General Body, delegates to the ILC or other states which have ratified the same convention.<sup>407</sup> The two different methods activate different mechanisms. In cases of representations, the General Body appoints a tripartite committee, which contacts the government for information on the situation. Afterwards, the tripartite committee presents a report, which will form the basis for either follow-ups by the Committee of Experts, or the General Body can choose to appoint a Commission of Inquiry, if it finds that the replies are not satisfactory from the investigated government.

In cases of complaints, the General Body might appoint a Commission of Inquiry immediately, if it deems the complaint receivable. The Commission of Inquiry then produces a report with the findings which the ILO publishes. The state can accept the report or appeal it.<sup>408</sup> No country has ever used the possibility to appeal.

Apart from prisoners' rights to freedom of association and collective bargaining, this thesis has also covered forced labour, child labour and discrimination.

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<sup>405</sup> See chapter 5.2.1.

<sup>406</sup> See chapter 5.2.1.

<sup>407</sup> See chapter 2.1.

<sup>408</sup> See chapter 2.1.

As seen in the previous chapters, forced labour is allowed when someone is sentenced to prison. The only conditions required is that it is supervised by a public authority and that the prisoner is not involuntarily placed to work for a private company. This does still occur, however, and several states receive criticism for it, such as Russia and the UK.<sup>409</sup>

When it comes to discrimination and child labour, there is no exclusion for prisons in the relevant conventions. This means that the rights afforded in them are applicable also to prisoners. It is, however, difficult to assess whether there are any breaches of the conventions in prison settings, since there is so little information on the subjects. There is information available regarding discrimination when it comes to sentencing and treatment, but it is scarce regarding work inside of prisons.<sup>410</sup> The same goes for children, where some states admit that they let their imprisoned children work inside prisons, but no information is given on what safeguards they use to ensure that the work conditions are fair.<sup>411</sup> As seen above, the USA sends very young individuals to prison, but there is no information regarding if they work or what kind of work they are performing.<sup>412</sup>

With the information available today, it is hard to determine to what extent any breaches are occurring regarding prisoners, when it comes to discrimination and children at work. To determine if a Tripartite Committee or a Commission of Inquiry would find any breaches is therefore not possible to answer.

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<sup>409</sup> See chapter 5.2.2.

<sup>410</sup> There are indicia regarding discrimination when assigning jobs to prisoners, but it is not well enough investigated. See, for example: Kimmet Edgar and Khatuna Tsintsadze, *Tackling Discrimination in Prison: still not a fair response*, Prison Reform Trust and Zahid Mubarek Trust, 2017, p 6.

<sup>411</sup> HM Inspectorate of Prisons, *Children in Custody 2015–16: An analysis of 12–18-year-olds' perceptions of their experiences in secure training centres and young offender institutions*, 2016, p 41.

<sup>412</sup> See chapter 5.2.3.

## 6 A Way Forward

Today, more and more focus is put on the situation of prisoners, from several different organizations. The revised Mandela Rules provide one of the improvements that has been made for prisoners, since the previous version of the rules was starting to become outdated. There is also an initiative from the UNODC under the Doha Declaration, where the treatment of prisoners is considered in detail. Still, problems exist in all aspects of prisons, and there is considerable work to be done to reverse this.

### 6.1 ILO Reports

One of the most important first steps to change the situation for prisoners regarding the work situation is to gather information. The difficulties that arise when trying to assess if there are any breaches of the ILO conventions are caused by the minimal amount of information that is available. No state reports on the labour conditions within prisons, and the ILO does not ask for that information either, with the sole exception being under the forced labour convention, where private prisons are scrutinized.<sup>413</sup> Without information regarding what types of work that is provided to prisoners, how it is divided and how it is paid, it is hard to monitor the situations in the countries. Since the ILO conventions that have been discussed earlier are fundamental conventions, it should be important for the ILO to monitor also the case of prisoners. The first step towards improvement should therefore be to find out what breaches, if any, that exist inside of prisons.

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<sup>413</sup> General Survey 2012, paras 278-279 and 291.



## 6.2 Mandela Rules

The most interesting aspect of the Mandela Rules is that the rules, since 2015, no longer contain any provisions stating that prisoners should be forced to work. They have a right to work, however.<sup>414</sup> In the earlier versions of these rules, the Standard Minimum Rules for the Treatment of Prisoners, prisoners were required to work in accordance with their physical and mental fitness.<sup>415</sup> This does reflect a change of attitude towards prison labour, but it is still a very small change. According to Amnesty International, Penal Reform International, and many other NGO's, many states use the Mandela Rules as their only guide on prison conditions.<sup>416</sup> The Mandela Rules cover all aspects of life in prison, and not only the work conditions. The rules call for improved file management so that prisoners situation and needs can be effectively monitored, improved living conditions, with good access to daylight, and regular health evaluations, to name a few of the conditions provided.

When it comes to the form of work, the Mandela Rules provides that there shall be sufficient light in the work areas, work shall not be afflictive, prisoners shall not be held in slavery, limitations on maximum working hours and equitable remuneration. These rules are in place for prisoners to be treated more humanly. There is, however, no supervisory mechanism to assess whether these things are actually in place.

### 6.2.1 European Prison Rules

The Council of Europe's latest edition of the European Prison Rules includes many of the provisions found in the Mandela Rules, with regard to proper lightning of the workplace,<sup>417</sup> a right for the prisoners to choose their

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<sup>414</sup> The Mandela Rules, rule 96(1).

<sup>415</sup> The Standard Minimum Rules, rule 71(2).

<sup>416</sup> Joint NGO briefing on the revision process, pp 6-7, available at: <https://cdn.penalreform.org/wp-content/uploads/2013/07/Joint-NGO-Briefing-SMR-Review-updated-January-2016.pdf>, last visited 18 May 2017.

<sup>417</sup> European Prison Rules, rule 18.2.

occupation (within reasonable limits),<sup>418</sup> remuneration of prisoners,<sup>419</sup> that the work conditions shall, as far as possible, resemble the ones outside of prison,<sup>420</sup> and that they should be included in the national social security systems, among other things.<sup>421</sup> This last rule is interesting, as it shows an emerging trend among the member states of the Council of Europe, but as shown in the case of *Stummer v Austria* by the ECtHR, this is not yet developed enough so to show consensus among member states.<sup>422</sup> However, the fact that it is now included shows a clear progress towards the inclusion of prisoners into the social security systems. It is also important to note that the question at hand in the case regarded pension systems, which somewhat narrows the application.<sup>423</sup> But the emerging trend still exist, and the rights of prisoners should evolve, given time.

## 6.2.2 Selected Countries' Contributions

Unlike Europe, the Americas do not have a common guidelines system regarding the treatment of prisoners, but there are some national regulations. In the USA, the American Correctional Association (ACA), an organization aimed at gathering people engaged in the correctional industries in the country, has produced its own guidelines regarding the treatment of prisoners. The ACA has produced 22 different standards on varying subjects, such as women, juvenile and community corrections.<sup>424</sup> It has also made a Declaration of Principles, with the main focus being the reformation of prisoners.<sup>425</sup>

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<sup>418</sup> Ibid, rule 26.6.

<sup>419</sup> Ibid, rule 26.10.

<sup>420</sup> Ibid, rule 105.3.

<sup>421</sup> Ibid, rule 26.17.

<sup>422</sup> *Stummer v. Austria*, App no 37452/02 (ECtHR July 2011), para 105, with references to the European Prison Rules, rule 105.

<sup>423</sup> Ibid.

<sup>424</sup> These standards can be found at:

[www.aca.org/aca\\_prod\\_imis/aca\\_member/ACA\\_Member/Standards\\_and\\_Accreditation/StandardsInfo\\_Home.aspx](http://www.aca.org/aca_prod_imis/aca_member/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx), last accessed 19 May 2017.

<sup>425</sup> Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association.

Besides the ACA, the American Bar Association (ABA) also has standards on the treatment of prisoners.<sup>426</sup> These standards contain regulations on work for prisoners, and also how prisoners should be remunerated for their work.<sup>427</sup> The remuneration aims at giving prisoners incentives to get a healthy work-habit upon release.<sup>428</sup> The ABA standards also allow for prisoners to be recruited by private owned firms, but states that if the firm is a for-profit enterprise, the prisoners should receive at least minimum wages.<sup>429</sup> However, neither the ACA principles or the ABA standards are binding in any way. These two rules are the only national standards instruments regarding prisoners that I have been able to locate internationally.

### 6.3 Doha Declaration

The UNODC launched a Global Programme in 2013, with the aim to realize the Doha Declaration. The Doha Declaration aims at integrating crime prevention and criminal justice into the UN agenda. UNODC seeks to do this through four aspects: Resilient, reliable and transparent institutions,<sup>430</sup> Fair, humane and effective criminal justice systems,<sup>431</sup> Youth crime prevention,<sup>432</sup> and Education for Justice.<sup>433</sup>

The Fair, humane and effective criminal justice system is the part that is of interest for this thesis, since it aims to promote prisoner rehabilitation so that everyone can get a second chance and can reintegrate into the community. This will be realized in three steps: the first step is to provide technical

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<sup>426</sup> ABA Criminal Justice Standards on Treatment of Prisoners, 2010.

<sup>427</sup> Ibid, Standard 23-8.4(d).

<sup>428</sup> Ibid, Standard 23-8.4(d).

<sup>429</sup> Ibid, 2010, Standard 23-8.4(e).

<sup>430</sup> Seeking judicial integrity and to prevent corruption, see:

[www.unodc.org/dohadeclaration/en/index/about.html](http://www.unodc.org/dohadeclaration/en/index/about.html), last accessed 16 May 2017.

<sup>431</sup> Focusing on rehabilitation of the criminals, see:

[www.unodc.org/dohadeclaration/en/index/about.html](http://www.unodc.org/dohadeclaration/en/index/about.html), last accessed 16 May 2017.

<sup>432</sup> Stopping children from committing crimes through sport and skills training, see:

[www.unodc.org/dohadeclaration/en/index/about.html](http://www.unodc.org/dohadeclaration/en/index/about.html), last accessed 16 May 2017.

<sup>433</sup> Seeks to integrate crime prevention and the rule of law into education of all levels, see:

[www.unodc.org/dohadeclaration/en/index/about.html](http://www.unodc.org/dohadeclaration/en/index/about.html), last accessed 16 May 2017.

guidance to prison administrations on how to implement rehabilitation programmes, with guidance from the Mandela Rules. The second step is technical assistance for rehabilitation programmes to selected states, based on the state's proposed programmes. The UNODC will also help prisons develop a file management system, which will help the prison administration understand the needs of every prisoner. The third and last step will be the implementation of a global brand of prison made products. This is to help the prisoners raise an income and build their self-esteem. It is also supposed to make the public aware that prisoners are still a part of the society.<sup>434</sup>

As a way forward, these steps are promising, since they promote the inclusion of prisoners into the society. When the public becomes aware of the people behind the products, more focus will be placed on the work conditions within prisons. Just as there today is a lot of focus on the work conditions in off-shore factories, focus could also be geared towards prisoners' work conditions. It would also be hard for the UNODC to promote the products unless fair conditions are available through the whole operation.

## 6.4 Concluding Remarks

The four fundamental principles and rights at work is a very important aspect of the work of ILO. They are to be applied to every worker around the world and ensure that they have the basic protection in their employment or work.

What has been seen in this paper is that there is nothing stopping prisoners from being afforded the protection which should be rightfully provided to all workers in international law, yet there are very few states that recognize these rights in their domestic legal system. The only state which has an active trade union for prisoners today is Germany, which has not lead to more problem

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<sup>434</sup> All three steps can be found on: [www.unodc.org/dohadecclaration/en/topics/prisoner-rehabilitation.html](http://www.unodc.org/dohadecclaration/en/topics/prisoner-rehabilitation.html), last accessed 16 May 2017.

within their prison system. Rather, it provides a reliable channel for prisoners to voice their concerns.

Regarding discrimination and child labour, it is a real problem that there is so little information regarding the situation within prisons. In the research for this thesis, I have come across evidence that both discrimination and child labour in prisons occur, but it has never been officially investigated. Considering that prisons should be the easiest part of the state to regulate, since all prisons are supposed to be under state supervision, directly or indirectly, it should not be so difficult to completely eradicate discrimination and child labour. Nowhere else in society does the state have such control over the ones they should be trying to protect.

As mentioned before, there is not much information to be found regarding the work conditions inside of prisons, something that the ILO could and should monitor. The worldwide prison population makes out more than 10 million people, which all should be awarded the protection that the fundamental principles and rights at work offer. No numbers exist on how many of these 10 million are forced to work, but they make out a substantial part of the working population. There is no justification for leaving prisoners out of the reporting obligation that all member states have under the ILO constitution.

To claim that prisoners, since they have committed crimes, have forfeited their rights would be to oversimplify. Then one does not take into consideration the socioeconomic background of the person, but it also ignores the fact that people from ethnic minorities are over-represented within prisons, often receiving prison sentences for crimes that others might only get fined for.

Even if it has not been covered in this thesis, prisoners' rights are only a small part of the problems that they face every day. Other parts are the right to social protection, since no instance has been located, in which the work that prisoners perform inside prisons is counted towards their pension, which forces released prisoners to live poor in their old age, or commit crimes to sustain themselves.

It is a very popular opinion that prisoners brought their situation upon themselves and should therefore carry the punishment for their actions, but that is not socioeconomically viable since crimes are a burden on society, so helping prisoners readapt to society should be a more economical method, since recidivism is a great expense for the society.

To afford prisoners a fair wage for their work also helps them readapt to society, since it helps them pay off possible debts that they could have collected before or while in prison, or restitution to their victims. This is also in line with the American Declaration of the Rights and Duties of Man, where it is a duty to, among other things, support your family.<sup>435</sup> This is hard when you are in prison without receiving pay. To provide for one's family is also part of the Banjul Charter.<sup>436</sup>

This thought is not popular, with counterarguments being that it is wrong to provide prisoners with this possibility when there are homeless people outside who are not provided this help since they have chosen not to commit any crimes, and it would therefore pay off to commit crimes just to receive this opportunity to pay off one's debts. This is not a fair comparison, however, since both are being excluded from the protection that the states could have offered them. A homeless person should also be offered help in getting an apartment, employment and treatment for any mental health issues or drug addictions. It is, as always, important not to balance people against each other.

I finish this thesis with the hope that change can be made to ensure the protection of prisoners' rights.

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<sup>435</sup> American Declaration of the Rights and Duties of Man, article XXX.

<sup>436</sup> Banjul Charter, article 29.

# Annex 1

## **Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, articles 30-33.**

### **Article 30**

Application of successive treaties relating to the same subject matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

- (a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;
- (b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an organization under another treaty.

6. The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.

## **SECTION 3. INTERPRETATION OF TREATIES**

### **Article 31**

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

### **Article 32**

#### Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

### **Article 33**

#### Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.



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