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## **Abolishing Private Prisons in the United State: a Human Rights Assessment**

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### **ABSTRACT**

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This article addresses the question of private prisons from the perspective of human rights and comes to the conclusion that private prisons should be abolished under the current circumstances.<sup>1</sup> This human rights approach is not based on religious and theological arguments (which, however, are powerful for those who share the corresponding religious and theological views<sup>1</sup>). Rather, it is of ethical-philosophical nature and grounded in the International Bill of Rights, which includes the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Economic, Social and Cultural Rights (1976), the International Covenant on Civil and Political Rights (1976) and eight core conventions of the International Labor Organization. This International Bill of Rights constitutes the normative foundation of the UN Framework (2008) and UN Guiding Principles on Business and Human Rights (2011) (cf. Enderle 2021). They contain 30 internationally recognized human rights and apply to all – public and private – business enterprises around the world. States have the duty to “protect” and “remedy” human rights while business enterprises are responsible to “respect” (independently from states) and “remedy” human rights (in collaboration with states). Most recently, the U.S. Department of State published the Report of the Commission on Unalienable Rights (Report 2020), which reinforces the human rights incorporated in the Universal Declaration of Human Rights.

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## **1. Introduction**

*We* argue from the ethical perspective that the UN Framework and Guiding Principles are relevant for assessing the legitimacy of private prison. (Of course, they are relevant for public prisons as well.) Human rights are minimal ethical requirements, which express human dignity in concrete ways. It goes without saying that incarceration entails the restriction of the *exercise* of

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*certain* human rights. However, human rights as inherent or inalienable rights cannot be taken away from any human being, including prisoners.

The three most important corporations managing and operating private prisons in the United States are The GEO Group, CoreCivic and Management & Training Corporation, the first two being publicly traded on the New York Stock Exchange (NYSE: GEO, CXW). Exposed to the pressures of the stock markets and the common economic rationale, they have *strong incentive systems to give first priority to profit and shareholder value* and shape their management and operations of private prisons (and – though not discussed here – their detention facilities).

## **2. Human rights as standards for assessing private prison**

In fact, to a large extent, prisoners are deprived of their personal freedoms and highly restricted in their contacts with other people. They are not allowed to enjoy, for example, the following rights incorporated in the UDHR: freedom of movement (#13), freedom of assembly (#20), political participation (#21), free choice of employment (#23) and participation in cultural life (#27). Prisoners are very vulnerable and cannot control their lives.

On the other hand, even incarcerated, prisoners should be able to exercise their human rights such as not being treated as slaves (#4), being free from torture or cruel, inhuman or degrading treatment (#5), having equal recognition and protection under the law (#6, 7), the right to privacy (#12), to an adequate standard of living [including food, clothing, and housing] (#25), to physical and mental health [especially access to medical services] (#25), and to education [for their reintegration into society after incarceration] (#26). If inmates are working in prison, they should be able to enjoy the right to equal pay for equal work, to equality at work, to just and favorable remuneration, to a safe work environment (#23) and, to some extent, the right to rest and leisure (#24).

In order to assess private prisons in terms of human rights, we ask whether private prisons “respect” the exercise of the second group of the inmates’ human rights. Thereby, “respecting human rights” – according to the UN Guiding Principles – means that none of these rights are adversely impacted,

neither directly nor indirectly nor through complicity (that is, by having a direct linkage with a third party without contributing directly or indirectly to the violation).

### **3. Strong incentive systems of private prisons to give first priority to profit and shareholder value**

The three most important corporations managing and operating private prisons in the United States are The GEO Group, CoreCivic and Management & Training Corporation, the first two being publicly traded on the New York Stock Exchange (NYSE: GEO, CXW). Exposed to the pressures of the stock markets and the common economic rationale, they have *strong incentive systems to give first priority to profit and shareholder value* and shape their management and operations of private prisons (and – though not discussed here – their detention facilities). The monotonic purpose of maximizing shareholder value is still the predominant view of the purpose of the corporation in the United States (cf. Bower & Paine 2017). This view endures despite the recent Business Roundtable Statement (Business Roundtable 2019) that moves away from shareholder primacy and includes commitment to all stakeholders.

These incentive systems tend to impact *prisoners' lives* in many ways: by extending their prison time (that is, the longer the prisoner is incarcerated, the higher corporate profit gets); by reducing the operational costs as much as possible (for example, by serving low-quality food or by breaking safety standards); by lobbying for harsher sentencing laws in order to increase the prison population.

These incentive systems also have negative impact on working conditions, wages and training of the *personnel* that is entrusted with the care of prisoners in private facilities. In order to save costs, employees have to work overtime, get poorly paid and are not adequately trained for decently caring for prisoners.

These incentive systems do not advance, but rather undermine the public interest to *prepare* prisoners for life after incarceration and to get them *reintegrated* into their communities and society.

Numerous historical, empirical and theoretical studies and personal experiences of prisoners testify these negative impacts of the strong incentive systems of private prisons. To name a few: Anita Mukherjee's study (2020) of Mississippi's private prisons found that inmates in private prisons serve up to 90 additional days, which equals 7 percent of the average time served. The delayed release is linked to the widespread use of conduct violations in private prisons. Yet, despite the additional days served, there is no evidence that private prison inmates recidivate less. – The 2016 Nobel prize-winner in Economics, Oliver Hart, and coauthors (1997) explained that prison contracts tend to induce the wrong incentives by focusing on specific tasks such as accreditation requirements and hours of staff training rather than outcomes, and noted the failure of most contracts to address excessive use of force and quality of personnel in particular.<sup>1</sup> – Megan Mumford, Diane Whitemore Schanzenbach and Ryan Nunn (2016) present an extensive economic analysis of private prisons, including a case study of prison quality in Mississippi, and conclude that private prisons do not currently offer a clear advantage over the public-sector counterparts in terms of cost or quality. – A thorough and extensive study is L.-B. Eisen's book *Inside Private Prisons: An American Dilemma in the Age of Mass Incarceration* (2017). See, particularly, Chapter 3: Prisoners as Commodities, Chapter 9: Public Prisons Versus Private Prisons and Chapter 11: The Future of Private Prisons. It concludes with ten recommendations emphasizing the necessity of contract monitors: "Contract monitors are essential to ensure compliance and to confirm that conditions of confinement are humane." – Moreover, the Human Rights Defense Center (2021) is "Dedicated to Protect Human Rights" in public and private prisons in the United States. It celebrated its 30<sup>th</sup> anniversary in 2020 and publishes annual reports including litigation projects and other activities since 2006.

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1. Hart et al. note, "The private contractor's incentive to engage in cost reduction is typically too strong because he ignores the adverse effect on noncontractible quality" (1127).

Looking at the facts on the ground and the embedded profit incentives, inmates in private prisons tend to be treated as mere commodities, which violates their human dignity and the exercise of several of their human rights according to the UN Guiding Principles on Business and Human Rights mentioned above, in particular their rights to privacy, to physical and mental health, to access to medical services, to rest and leisure, to a safe work environment, to just and favorable remuneration, and to freedom from torture and cruel, inhuman or degrading treatment.

Because of the intrinsic value of human dignity and human rights, the violation of the exercise of these rights must not be tolerated even if private prisons are managed and operated with higher efficiency and efficacy than public prisons (a claim that is questionable; cf. Eisen 2017, chapter 11).

#### **4. No guarantee to respect the dignity and human rights of inmates in private prisons**

In recent years The GEO Group published its *Human Rights and ESG Reports* (2018 and 2019), in which it makes a number of claims:

- To be committed to its mission and four core values: respecting human dignity and rights; providing leading, evidence-based rehabilitation programs; imparting a safe and secure environment; and maintaining quality facilities.
- To base their policy on the GRI Standards (Global Reporting Initiative) and the UN Guiding Principles on Business and Human Rights.
- To have a robust training program for staff at all levels of the organization.
- To assess regularly its human rights performance with regard to safe and humane environment, access to healthcare, access to legal services, access to family/friends communications, access to religious opportunities, access to safe and nutritious meals, access to recreational amenities, and access to rehabilitation programs for state inmates.
- To have an independent Corporate Contract Compliance Division that provides the overall direction and oversight of compliance for the entire company's domestic operations and performs audits of GEO facilities and of the key metrics related to GEO's commitment to human rights.

- To execute independent verification of GEO performance by all of GEO's government agency partners, which take an active role in the oversight and auditing of GEO's physical plants and service provisions.

Admittedly, GEO's Human Rights and ESG Reports present a laudable attempt to combine the respect of human rights and ESG standards with the pursuit of profit. Such win-win strategy can be considered feasible, although it requires immense and persistent efforts. It should also include – what the two reports do not do – a clear statement that GEO be accountable for violations and willing to accept penalties or contact termination in cases of human rights and ESG standards violations.

However, GEO does not make this commitment unequivocally. It qualifies its reports as “forward-looking information” with words “expect,” “may,” “could,” “hope,” “believe,” “would,” “might,” “estimate,” “anticipate,” “plan,” “aspire” or similar words. These are only aspirational – not ethically and legally binding – statements and enjoy the protection of the safe harbor for forward-looking statements provided by the Private Securities Litigation Reform Act of 1995, as amended.

CoreCivic also published ESG Reports with Human Rights Risks Assessment (2016, 2019). It recommends a number of actions to live up to those standards. But no evidence was found for their independent auditing and certification, let alone for securing human rights persistently in their prisons.

Moreover, the industry of private prisons has no policy to secure human dignity and human rights in their facilities.

Given the current situation in private prisons that is unlikely to improve substantially in the near future, there is *no guarantee* that private prisons will respect the dignity and the human rights of their inmates. As long as such human rights policy is *not clearly stated, effectively implemented and controlled by the supervisory power of the state* (that can impose sanctions; cf. Eisen 2017, “contract monitors are essential”), the risks of violating human dignity and human rights in private prisons continue to be *too high*, given the strong incentive systems to give first priority to profit and shareholder value.

This view was confirmed by the recent report “A Broken Prison and Detention Facility Accreditation System That Puts Profit Over People” that

investigated the American Correctional Association (ACA), the nation's largest accreditor of prisons and immigration detention facilities, and its relationship with the three largest private prison companies that received ACA accreditation: GEO Group, CoreCivic and Management & Training Corporation. It revealed – against the private prison companies' claims – that “the ACA's private prison accreditation system is riddled with conflicts of interest, lacks transparency, and is subject to zero accountability even though millions in taxpayer dollars flow to the ACA and private prisons companies. These problems put the health and wellbeing of incarcerated and detained individuals, the staff and employees who work in those facilities, and our communities at risk.” (Office of Sen. Warren 2020, p. 1). To address these problems, “the federal government, and state and local authorities, should end their reliance on ACA accreditation and stop outsourcing oversight of its prisons and detention facilities to for-profit organizations” (p. 16).

## **5. Conclusion**

As religious communities across the United States continue to demand an end to private prisons on the grounds of inhumane treatment that fails to protect the dignity of prisoners, from a human rights perspective, we agree with these religious communities and conclude that private prisons should be abolished under the current circumstances. Despite laudable efforts of individual corporations, there are insufficient arguments that the prisoners' dignity and human rights are secured and not violated in private prisons, given the strong incentive systems of corporations to give first priority to profit and shareholder value. The state must not delegate its power of punishment to private actors, because the high human rights risks cannot be compensated with higher efficiency and efficacy in private prisons. Like private prisons, public prisons have to respect human dignity and human rights of their inmates. But they do not have to be concerned with fiduciary obligations to generate profit and still can and should improve efficiency and efficacy, particularly if there are poorly managed and operated.

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