The Nexus of Business and Human Rights: Challenging Corporate Profiteers in the United States Immigration Detention Industry

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Abbreviations

BOP	Bureau of Prisons
CSR	Corporate Social Responsibility
CBP	Customs and Border Patrol
DHS	United States Department of Homeland Security
DOJ	Department of Justice
FY	Fiscal Year
GDP	Gross Domestic Product
HHS	United States Department of Health and Human Services
HRC	United Nations Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICE	Immigration and Customs Enforcement
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	Intergovernmental Organization
NGO	Non-governmental Organization
OFPP	Office of Federal Procurement Policy
OIG	Office of the Inspector General
OMB	Office of Management and Budget
ORR	Office of Refugee Resettlement
SDG	Sustainable Development Goals
SRSG	Special Representative of the United Nations Secretary General
UDHR	Universal Declaration on Human Rights
UN	United Nations
US	United States

Federal Statutes, Regulations and Memoranda

The Zero Tolerance Policy	8 U.S.C. § 1325(a) (2018)
DHS Appropriations Act of 2010	H.R. 2892, P.L. No. 111-83, 111th Congress (2009)
DHS Appropriations Act of 2011	S. 3607, 111th Congress at 14 (2010)
The Federal Activities Inventory Act	5 U.S.C. § 101, 102, 103, 104, 2105 and 7103 (1998) 10 U.S.C. § 2460 (1998)
Federal Procurement Policy Act	41 U.S.C. 401 (1979)
OMB-OFPP Policy Letter 11-01	77 F.R. 7609 (2011)
OMB-OFPP Policy Letter 92-1	57 F.R. 45096 (1992)
OMB-OFPP Circular No. A-76	68 F.R. 12388 (2003)

Other Authorities

Domestic

Halchin, E. (2007). *The Federal Activities Inventory Reform Act and Circular A-76* (CSR Report No. RL31024). https://www.everycrsreport.com/reports/RL31024.html

Manuel, K. (2014). *Definitions of "Inherently Governmental Function" in Federal Procurement Law and Guidance* (CSR Report No. R42325). https://fas.org/sgp/crs/misc/R42325.pdf

Schriro, D. (2009). *Immigration Detention Overview and Recommendations.* Immigration and Customs Enforcement Report. https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf

International

Charter of the United Nations. 59 Stat. 1031; T.S. No. 993; 3 Bevans 1153. (ratified on June 26, 1945, entered into force on October 24, 1945).

Universal Declaration of Human Rights. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (adopted December 10, 1948).

International Covenant on Civil and Political Rights, December 16, 1966. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

International Covenant on Economic Social and Cultural Rights, December 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967)

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UN Sub-Commission on the Promotion and Protection of Human Rights. *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations.* E/CN.4/Sub.2/ RES/1998/8 (1998).

Part One: Building the Foundation

Section I – Introduction

The growing power of corporations[1] has prompted dialogue around the need to formalize regulatory and enforcement mechanisms capable of addressing corporate impact on human rights. Throughout the past three decades, advocates have urged States and authoritative international bodies – particularly the United Nations – to undertake issues pertaining to the nexus of business and human rights. While many agree that this nexus needs to be addressed, there has been very little consensus on which entity is responsible undertaking which stratagem. The dialogue has discerned in three tenets – voluntary, guided and enforceable approaches. The foundational international initiatives have primarily employed voluntary and guided approaches – which have inadequately addressed the growing issues of governance gaps, legal gaps, and power imbalances. These initiatives have left corporations without explicit obligations, external oversight and virtually no enforcement mechanisms. Therefore, when corporations violate human rights, they do so with de facto impunity – leaving those affected without proper means to demand accountability and/or remediation[2].

While authoritative figures and advocates argue about the most effective approach, the troubling governance and legal gaps continue to threaten the livelihood of vulnerable communities. In the past three decades, the failure of voluntary and guided initiatives to protect human rights has been continuously demonstrated at the expense of vulnerable communities. The dire impact of this failure is exemplified in the private immigration detention industry in the United States – where a lack of state leadership has allowed corporations to profit from exploitation and human rights violations. As we transition into the fourth decade of these initiatives, it is imperative that authoritative figures work diligently to establish regulatory and enforcement mechanisms, focused on deterrence and accountability for corporations.

[1] Hereafter, all forms of corporations and business entities will be referred to as “corporations”.
[2] Ibid.

Part Two: The Framework of Business and Human Rights

The Expansion of Corporate Power Through Globalization

Globalization, trade liberalization and economic growth have restructured the landscape of business operations and corporate activity[3]. Through the global market, States and corporations have greatly benefited from financial and developmental gains. States have been empowered to engage in economic activity with a variety of actors through a single, centralized supersystem[4]. As States engage in this international apparatus, they benefit from economic growth; greater competition and innovation; increased purchasing power; and more efficient allocation of resources[5]. However, corporations have arguably benefited more from market globalization.

Globalization allows corporations to reach previously inaccessible markets. They've been able to strategically outsource their supply-chains – resulting in improved efficiency and economies of scale in production, distribution, and management[6]. As the financial power of corporations expanded, they began to amass power and influence in their domestic and global arena at large.

Corporations have expanded this power and influence through the following manners:

- Possession of great economic power – which is often greater than that of developing States;
- Capacity to engage in foreign affairs (i.e. diplomacy and negotiations);
- Influence on institutional decision on the order of law and policy (i.e. lobbying for more favorable international trade deals);
- Ability to execute traditional State operations (i.e. overseeing detention facilities); and
- Substantial impact on public welfare (i.e. investing in community development initiatives)[7].

[3] Heasman. *The Corporate Responsibility to Protect Human Rights.* University of Helsinki (2018). Web. https://helda.helsinki.fi/bitstream/handle/10138/234463/THECORPO.pdf?sequence=1&isAllowed=y
[4] Mander. *Economic Globalization: The Era of Corporate Rule.* Center for New Economic. Web. https://centerforneweconomics.org/publications/economic-globalization-the-era-of-corporate-rule/
[5] Harvard Business Review. *The Globalization of Markets.* May 1983. Web. https://hbr.org/1983/05/the-globalization-of-markets
[6] Ibid.
[7] Garrett. *The Corporation as Sovereign.* Maine Law Review: Volume 60 (2008). Web. https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?article=1296&context=mlr

The Horizontal Power of States and Corporations

When considering the proxy of corporate power, the need to reconceptualize and restructure the international apparatus becomes increasingly apparent.

While corporations are commonly viewed as subordinates to States in the international arena, corporations have begun to operate as quasi-States. Similar to States, corporations have begun performing traditional State functions, developing greater political roles and substantially impacting international affairs[8]. Comparable to foreign policy initiatives of developed States, corporations also possess great direct and indirect influence over States – to ensure national laws, policies, and institutions are favorable to their bottom line[9].

For instance, as corporations strategically consider where to outsource, they are more likely to prefer establishing business operations in a State with lax business-related regulatory frameworks – including lower corporate tax, less government oversight and subpar rights enforcement[10]. As a result, corporations are able to benefit from decreased operational costs, greater profitability and de facto impunity[11]. In return, States are provided with incentives including economic stimulation and stability; increased employment; and improved infrastructure[12]. Due to immense financial incentives, [developing] States are more likely to work diligently to meet corporate demands.

As the power imbalance between States and corporations' narrows, it is critical that international discourse retire State-primacy discourse in order to recognize corporations as horizontal actors comparable to States[13]. If States fail to recognize this immense power shift, they will continuously fail to impose appropriate legal obligations – thus reinforcing the reign of the corporate veil.

[8] Ruggie. *Multinationals as Global Institutions.* Wiley Online Library: Regulation and Governance (2017). Web. https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12154
[9] Grear et al. *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability.* Oxford: Human Rights Law Review (2015). Web. https://watermark.silverchair.com/ngu044.pdf
[10] Duruigbo. *Corporate Accountability and Liability for International Human Rights Abuses.* Northwestern Journal of International Human Rights: Volume 6 (2008). Web. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1073&context=njihr
[11] Pati. *Global Regulation of Corporate Conduct.* American University Law Review: Volume 68 (2019). Web. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2105&context=aulr
[12] Ibid.
[13] Babic. *States versus Corporations: Rethinking the Power of Business in International Politics.* Italian Journal of International Affairs: Volume 52 (2017). Web. https://www.tandfonline.com/doi/full/10.1080/03932729.2017.1389151

Imbalance in the International Apparatus

States and corporations financially benefit from the international legal apparatus, as trade and commerce instruments have exacerbated profitability[14]. Despite the comparable conduct between these two entities, their conduct is governed by distinct obligations including: what they are responsible for; who they are responsible to; and how they are held accountable.

The primary responsibility of the State is to conduct national affairs – including health, education, industry relations – in the interest of protecting citizens and its sovereignty[15]. State conduct is formally regulated through international law. The corresponding treaty mechanisms tasked with regulation and punitive measures focus on the scope of State activity[16].

On the contrary, corporations are only responsible to their shareholders – as articulated by their fiduciary duty[17]. The mechanisms tasked with ensuring corporate conduct aligns with shareholder interests is multi-layered:

At the corporate-level, corporate actors are held accountable for violations of their codes of conduct, by their organizational superiors – ranging from mid-level managers to the board of directors[18]. These punitive measures may range from withholding privileges of bonuses to termination of employment. Unless the actions of the officer directly violate their legal obligations, it is unlikely liability will be imposed by an external entity. In the instance that legal violations occur, States are responsible for adjudicating the respective issue(s) through administrative, judicial or legislative means. However, corporate liability is often interpreted through civil litigation, which has limited capacity to influence deterrence[19]. At the international level, corporations do not bear explicit legal obligations[20]. This arena has relied on soft law

[14] Slye. *Corporations, Veils and International Criminal Liability.* Brooklyn Journal of International Law (2008). Web. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1205&context=bjil
[15] Thynne et al. *Government "Responsibility" and Responsible Government.* The Journal of Politics: Volume 16, Issue 2 (1981). Web. https://doi.org/10.1080/00323268108401800
[16] United Nations. Universal Declaration of Human Rights. Res. 217(A). Adopted December 10, 1948.
[17] Slye. *Corporations, Veils and International Criminal Liability.* Brooklyn Journal of International Law (2008). Web. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1205&context=bjil
[18] Ibid.
[19] Through the Alien Tort Claims Act, U.S. courts are able pursue civil liability if corporate actions are identified as international crimes under the Act (Ruggie, 2007). Notably, this draw upon the internationally accepted principle of individual responsibility.
[20] It must be noted that the distinct legal entities – parent companies and subsidiaries – are subjected to the laws of the host-State. However, the corporate entity at large is not directly governed by international law (Ruggie, 2007).

instruments, which indirectly impose responsibilities on corporations through international legal instruments – provided that States have executed their obligations into domestic law[21].

While international law can indirectly impose legal obligations onto corporations, it fails to ensure universal regulation of business activities. Subjected to host-State domestic laws, corporations are able to strategically target States with weak governance for their supply chain operations. This legal grey-zone has serious consequences for the protection and realization of human rights.

Defining the Nexus of Business and Human Rights

Through global supply/value chains, corporations are able to outsource the production, distribution and servicing throughout the globe. Irrespective of where the business activities occur, the bottom line is consistent – profit maximization. As corporations work to cut costs, they often look towards locations with relaxed regulation and lower legal standards – often possessing significantly lower wages and fewer protections for workers[22]. Inevitably, corporate activities directly or indirectly impact the realization of human rights in their home-State and host-State(s).

Corporations may have positive human rights impacts – especially through the financial incentives provided to host-State(s) – including creating employment opportunities, building local infrastructure and contributing to regional development. However, their activities sustain a wider range of negative impacts, including exploitation of child labor, increased pollution rates and displacing local communities. However, there is no international codification of this responsibility, nor is there a legal mechanism tasked to enforce obligations and regulate corporate conduct with regard to human rights[23]. Consequently, when human rights abuses

[21] International human rights instruments call upon the State to "ensure respect for" and "ensure the enjoyment" of rights. In order to fulfill this obligation, States must ensure they possess the institutional capacity to regulate the conduct of all actors within its borders – including corporations. While the international apparatus does not possess direct legal authority to impose obligations onto corporations, it can be conducted through domestic law (Ruggie, 2007).

[22] Duruigbo. *Corporate Accountability and Liability for International Human Rights Abuses.* Northwestern Journal of International Human Rights: Volume 6 (2008). Web. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1073&context=njihr

[23] Duruigbo et al. *Corporate Accountability and Liability for International Human Rights Abuses.* Northwestern Journal of International Human Rights (2008). Web. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1073&context=njihr

occur, there is no clear answer for who is responsible, what the consequences are, and what remedies will be provided to those affected.

The State-centric framework of international law has focused on imposing both negative and positive obligations onto the State – which are asserted through regulatory and punitive mechanisms[24]. However, these mechanisms fail to adequately address the growing power and impact of corporations. Without imposing explicit legal obligation onto corporations, corporate liability is contingent upon the willingness and ability of States to establish regulatory law.

If universal enjoyment is the human rights imperative, it is illogical to assume that it can be achieved by subjecting corporate liability to the discretion of States. There is a vast range of issues that impede the ability of States to ensure and protect human rights from abuses committed by non-State actors including: vast inconsistencies in domestic law; financial incentives that impede of State regulation; limited resource and institutional capacity to hold corporations liable; and lack of clarity regarding legal authority.

In order to ensure human rights are universally respected, the international apparatus – likely the United Nations – must focus on developing legal instruments capable of adjusting to the changing landscape of the international arena and addressing the indefinite expansion of human rights need.

Section II – The Foundation of Business and Human Rights Initiatives

Throughout the past three decades, the international community has begun to address the nexus of business and human rights – aimed at clarifying corporate duties and responsibilities, imposing liability, creating legal mechanisms for oversight and enforcement, and providing remedies. The primary attempts have sought to interpret corporate obligations through two approaches: (i) the capacity to interpret the legal obligations of corporations based on existing international legal instruments, and (ii) creating new legal instruments to articulate corporate legal obligations[25].

Interpreting International Legal Instruments

At a minimum, the responsibility of business enterprises to respect human rights has been referenced in international human rights treaties and legal instruments. The International Bill of

[24] Ibid.
[25] SHIFT Project. *UN Guiding Principles on Human Rights.* Web. https://www.shiftproject.org/un-guiding-principles/

Human Rights – which includes the Universal Declaration of Human Rights and its two corresponding covenants – sets out a benchmark to assess the human rights impact of States and other social actors, including business enterprises.

The most prominent legal instrument commonly applied to frame the human rights obligations of businesses is the Universal Declaration of Human Rights (1948). While the Universal Declaration primarily addresses State obligations, the preamble suggests it can be universally applied, stating:

> "A common standard of achievement for all peoples and nations, to the end that every individual and *every organ of society*, keeping with this Declaration constantly in mind, shall … promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance …"[26]

The mention of "every organ of society" has been understood to include all legally distinct entities, including businesses. Thus, while States are the primary duty-bearers, each individual and organ of society also carries a responsibility to observe human rights.

Stemming from the principles embedded in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights translated those normative principles into hard law.

In Article 2, the ICCPR (1996) identifies that State obligations are also tied to ensuring that "all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"[27]. This responsibility not only implies that States must undertake positive and negative obligations, but also must ensure that it creates an infrastructure to take preventative or remedial action if an individual and subject – such as a business enterprise – of its jurisdiction violates human rights[28]. Furthermore, Article 5(1) of the Covenant indirectly details the responsibilities of business enterprises in declaring:

[26] Universal Declaration of Human Rights, Dec. 8, 1948. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). https://www.un.org/en/universal-declaration-human-rights/
[27] International Covenant on Civil and Political Rights. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967). https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[28] Weissbrodt. *Corporate Human Rights Responsibilities.* University of Minnesota Law School: Scholarship Repository (2005). https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1246&context=faculty_articles

> "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein ... "[29]

The ICCPR addresses the shared responsibility of the observation and respect of human rights by all legal entities in society, including the State, individuals and groups – thus placing indirect responsibility onto business enterprises.

The ICESCR has addressed explicit obligations of the State to ensure the realization of rights aforementioned in the Covenant. However, the ICESCR Committee's General Comment No. 24 has been identified as an exceptional authoritative interpretation of the ICESCR – providing guidance to States to ensure compliance of human rights with regard to business activities[30].

Specifically, General Comment No. 24 defines State obligations "to respect, protect and fulfil the Covenant rights of all persons under their jurisdiction in the context of corporate activities undertaken by State-owned or private enterprises"[31]. The Committee clarifies that this obligation requires that States impose appropriate negative and/or positive duties onto business enterprises to ensure fulfilment of human rights. Importantly, the Committee also clarifies States' extraterritorial obligations to ensure respect for the Covenant rights.

A State would be found in violation of their duty to protect Covenant rights, if they fail "to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused…". Thus, States are required to take the necessary steps "to facilitate and promote the enjoyment of Covenant rights" – which includes developing a competent and capable legislative framework and judicial system[32].

While these legal instruments have been foundational in the interpretation of the role of business activities on human rights, they fail to impose explicit legal obligations onto corporations, nor do they provide the necessary mechanisms to ensure the realization of human rights[33]. Instead, it has

[29] International Covenant on Civil and Political Rights. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967). https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[30] Desierto et al. *The ICESCR as a Legal Constraint on State Regulation of Business, Trade, and Investment: Notes from CESCR General Comment No. 24.* EJIL Talk (2017). Web. https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation
[31] UN Committee on Economic, Social and Cultural Rights. *General Comment No. 24: The State Obligations under the ICESCR in the Context of Business Activities*. E/C.12/GC/24 (2017).
[32] Ibid.
[33] Hohenveldern. *Corporations In and Under International Law.* Cambridge: University of Cambridge (1987). Print.

relied on States to develop national law within their respective jurisdictions, to regulate business enterprises[34].

Section III – The International Struggle Towards Normative Change

Throughout the past three decades, the international authorities have attempted to address the corporate accountability gap by creating new instruments. These initiates have engaged in the following three normative approaches: voluntary, guided and enforceable approaches[35].

Voluntary approaches refer to initiatives produced and implemented by corporations themselves. At their own discretion, corporations may choose to address their wider social responsibility by creating value for stakeholders. These principles can be conducted through a range of stakeholder-focused initiatives including corporate social responsibility[36]. Voluntary initiatives, like the UN Global Compact, approaches are likely to have the most buy-in from corporations, because it does not impose obligations, nor does it require regulation[37]. Instead, corporations are able to capitalize on their normative endorsement without having to track or prove the effectiveness of their initiatives[38]. While this approach provides the most limited assurance of that corporations will respect human rights, authoritative entities believe it plays a crucial role in norm-setting. Through voluntary initiatives, corporations acknowledge that they have a responsibility to improve their wider impact. However, this acknowledgement must be a means to an end (i.e. imposition of legal obligations), not the end itself.

Guided approaches refer to the international recommendations for corporations to demonstrate their respect for human rights. These initiatives – most notably the UN Guiding Principles –plays a normative role in encouraging States and corporations to acknowledge and comply with their

[34] In the Barcelona Traction, Light and Power Company Ltd (1970), the ICJ articulated that while "corporations, formed under municipal law, enjoy[ed] contemporary" and have presented a need to develop new and expanding requirements in the international legal realm – the ICJ was unwilling to lift the corporate veil. While the ICJ may consider lifting the corporate veil under exceptional circumstances, they opted to leave jurisdictional authority to States (Hohenveldren, 1987). This comment reinforced the traditional interpretation of international law – where States are primarily responsible for protecting human rights abuses committed by non-State actors.
[35] Rights and Accountability in Development. *Principles Without Justice: The Corporate Takeover of Human Rights.* March 2016. Web. http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf
[36] Crane et al. *Corporate Social Responsibility: In the Global Context.* Corporate Social Responsibility: Readings and Cases: Routledge (2008). Web. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1667081
[37] Ibid.
[38] Ibid.

responsibilities without the burden of oversight[39]. While States remain the primary duty-bearers, corporate responsibilities are also articulated. Through human rights due diligence, corporations are encouraged to develop an ongoing risk management process "in order to identify, prevent, mitigate and account for how [a company] addresses its adverse human rights impact,"[40]. Through human rights due diligence, guided initiatives are able to provide greater oversight without imposing explicit legal obligations onto corporations[41]. These initiatives are also likely to receive substantial buy-in.

Enforceable approaches refer to human rights obligations imposed on States and corporations – aligned with the UN Norms proposal. Through monitoring and enforcement mechanisms, corporations would be held accountable for their human rights impact. Corporations would be required to engage in human rights due diligence in the following manner:

- Establishing policy commitment to human rights;
- Assessing their human rights impact before and during an operation;
- Integrating and acting on their findings through developing internal policy and practices;
- Tracking responses from stakeholders and monitoring the effectiveness of the policies and practices; and
- Openly communicating and reporting information about their human rights impact and corresponding responses[42].

Enforceable approaches are the most effective, because they impose explicit legal obligations onto corporations; require internal policy change; promote transparency; and address the need for punitive and remedial measures[43].

While these normative approaches attempt to address corporate accountability, their success is contingent upon buy-in from States and corporations. The past three decades of initiatives have

[39] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[40] Business and Human Rights Resource Center. *Human Rights Due Diligence.* Web. https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies
[41] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[42] Danish Institute of Human Rights. *Human Rights Impact Assessment.* Web. https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox
[43] Rights and Accountability in Development. *Principles Without Justice: The Corporate Takeover of Human Rights.* March 2016. Web. http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf

solely relief on voluntary and guided approaches to address the nexus of business and human rights.

UN Global Compact

In 2000, the United Nations launched the UN Global Compact, which served as a voluntary "policy initiative for businesses that are committed to aligning their operations and strategies with … universally accepted principles in the areas of human rights, labor, environment and anti-corruption"[44]. The UN Global Compact provides ten principles that attempt to mobilize corporations to engage in sustainable, responsible operations. It focuses on re-configuring the corporate system to internalize these principles into their policies and practices. In consultation with a variety of stakeholders, the UN Global Compact works with corporations to "drive business action in support of the sustainable development goals,"[45]. The SDGs consider the following: responsible business and leadership practices; implementing the principles to work towards the goals; connecting global/local platforms; and impact, measurement and performance[46]. This process provides corporations the opportunity to acquire competitive advantage through ethical business innovation and sustainability, focused on the triple-bottom-line.

This initiative has motivated "thousands of companies to participate in the Global Compact and report publicly on steps they take to comply with the ten principles"[47]. Despite this success, the Global Compact is a voluntary initiative, which is not legally binding. Furthermore, it doesn't operate as a "performance or assessment tool … nor does it make judgments on performance"[48]. Without proper oversight, there is virtually no way to assess the impact of the UN Global Compact on improving the impact of corporations on human rights.

Working Group on the Working Methods and Activities of Transnational Corporations

In 1998, the United Nations Sub-Commission on the Promotion and Protection of Human Rights established the Working Group on the Working Methods and Activities of Transnational

[44] Business and Human Rights Resource Centre. *A Brief Introduction to Business and Human Rights.* Web. https://www.business-humanrights.org/en/business-human-rights-a-brief-introduction
[45] United Nations Global Compact. *Our Global Strategy.* Web. https://www.unglobalcompact.org/what-is-gc/strategy
[46] Ibid.
[47] Ibid.
[48] Business and Human Rights Resource Centre. *A Brief Introduction to Business and Human Rights.* Web. https://www.business-humanrights.org/en/business-human-rights-a-brief-introduction

Corporations[49][50]. The Working Group was tasked with "identifying issues, examining information regarding the effects of transnational corporations on human rights, examining investment agreements for their compatibility with human rights agreements, making recommendations regarding the methods of work and activities of transnational corporations in order to ensure the protection of human rights, and consider the scope of the State's obligation to regulate transnational corporations"[51][52]. This work was to be streamlined into a UN Human Rights Norms for Business[53].

The Norms

The Norms detail a comprehensive list of the human rights obligations of multinational corporations and other business enterprises[54]. They set forth the baseline for business operations. While the Norms affirm that States remain the primary duty-bearers of human rights, it recognized that the influence and power of business enterprises warranted the imposition of human rights responsibilities "within their respective spheres of activity and influence"[55].

Throughout their work, the Working Group drew upon the existing international standards and consulted with "representatives of NGOs interested in corporate responsibility, human rights, development and the environment; representatives of companies and unions; and several scholars," to develop a more substantive, comprehensive report[56][57]. After various iterations of the Draft Norms were disseminated to a variety of actors – including State governments, IGOs, NGOs, transnational corporations and other business enterprises, and other interested parties –

[49] UN Sub-Commission on the Promotion and Protection of Human Rights. *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations.* E/CN.4/Sub.2/ RES/1998/8.
[50] Hereafter, this entity will be referred to as the "Working Group".
[51] Weissbrodt. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.* The American Journal of International Law: Volume 97 (2003). Web. https://www-jstor-org.ezp2.lib.umn.edu/stable/pdf/3133689.pdf
[52] UN Sub-Commission on the Promotion and Protection of Human Rights. *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. E/CN.4/Sub.2/2003/12.
[53] Hereafter, the UN Human Rights Norms for Business will be referred to as the "Norms".
[54] Amnesty International. The UN Human Rights Norms for Business: Towards Legal Accountability. Amnesty International Publications (2004). Web. https://www.amnesty.org/download/Documents/IOR4200022004ENGLISH.PDF
[55] United Nations. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
[56] Ibid.
[57] Ibid.

the Working Group took all suggestions, observations, recommendations and comments into account, and further developed the Draft Norms[58].

In 2003, the Working Group presented the draft Norms to the Sub-Commission. This document consisted of fourteen fundamental human rights obligations related to the "spheres of activities" of business enterprises and five general provisions for implementation – aimed at creating a comprehensive framework for corporate accountability[59]. In the first operative paragraph, the Norms introduced the document by clarifying the expectations of both States and business enterprise, stating:

> "States have the primary responsibility to promote … [and] ensure respect of and protect human rights … including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law…"[60]

The Norms provided a baseline for business obligations regarding human rights. Based on positive and negative obligations of businesses, these obligations addressed issues including non-discrimination; protection of civilians and laws of war; use of security forces; workers' rights; corruption and consumer protection rights; human rights; economic, social and cultural rights; environmental rights; and the rights of Indigenous peoples'[61].

Similar to standards developed by other business and human rights instruments, the Norms stated that corporations must "adopt, disseminate and implement international rules of operation in compliance with the norms,"[62]. The general provision of implementation proposed by the Norms included "training, supply chain management, reporting, and internal and external monitoring and evaluation"[63]. However, the Norms also attempted to establish direct obligations for business

[58] Amnesty International. The UN Human Rights Norms for Business: Towards Legal Accountability. Amnesty International Publications (2004). Web. https://www.amnesty.org/download/Documents/IOR4200022004ENGLISH.PDF
[59] United Nations. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] King. *The United Nations Human Rights Norms for Business and the UN Global Compact.* King Zollinger and Company (2004). Web. https://www2.ohchr.org/english/issues/globalization/business/docs/kingzollinger.pdf

entities, supported by a rigid enforcement mechanism[64]. First, it proposed external monitoring and verification for NGOs, IGOs, and industry-based groups[65]. Secondly, it proposed that States must establish national enforcement mechanisms, including "passing, strengthening, and enforcing laws and regulations", and enforcing them in national courts or tribunals[66].

Despite its soft-law classification, this was the first significant IGO proposal to establish national and international legal mechanisms, aimed at ensuring compliance and enforcement. This tenet was arguably the most exceptional part of the Norms – which helped shift dialogue about corporate liability for human rights abuses. However, the proposal for an international enforcement mechanism ultimately became the demise of the document. The rampant disapproval of the Norms by corporations, and consequently States, would lead to its eventual failure.

While the Norms were unanimously adopted by the Sub-Commission in Resolution 2003/16, they were abandoned by the Commission on Human Rights two years later[67]. However, the Commission[68] believed that the document had useful ideas that warranted further exploration. In 2005, at the Commissions' request, the UN Secretary General appointed Special Representative John Ruggie, to explore the tenets of business and human rights[69].

Special Representative of the Secretary-General, Ruggie Report

In July 2005, John Ruggie was appointed as the Special Representative of the Secretary-General (SRSG) to conduct further exploration on this topic. Ruggie held a fact-finding mandate – where he was to identify the nature of the problem(s); examine existing international legal standards and how they were discharged; and clarify where corporate responsibility to human rights rested[70]. Throughout the span of three years, Ruggie submitted various reports and addenda to the Commission on Human Rights. In 2007, Ruggie submitted the Main Report, which assessed

[64] Miretski et al. *Global Business and Human Rights: The UN Norms – A Requiem.* Core AC (2012). Web. https://core.ac.uk/download/pdf/9553402.pdf
[65] Amnesty International. The UN Human Rights Norms for Business: Towards Legal Accountability. Amnesty International Publications (2004). Web. https://www.amnesty.org/download/Documents/IOR4200022004ENGLISH.PDF
[66] Ibid.
[67] Ibid.
[68] Hereafter, the Commission on Human Rights will be referred to as the Commission.
[69] Ibid.
[70] Mantilla. *Emerging International Human Rights Norms for Transnational Corporations.* Global Governance (2009). Web. https://www.jstor.org/stable/27800755.

the normative environment of legal responsibility for corporations and other business enterprises in five clusters[71]. The five clusters considered the following:

- States' duty to protect human rights, including against abuses by non-state actors;
- Corporate accountability for selected international crimes;
- Corporate responsibility for other human rights violations under international law;
- Soft-law mechanisms; and
- Self-regulation by corporations and/or business organizations[72]

In the first cluster, Ruggie found that the State's duty to protect against non-state abuses of human rights – including corporations – exists within the foundation of the human rights regime. Thus, this duty applies to protection of all substantive rights defined in international human rights instruments[73]. In the second and third clusters, Ruggie found that the civil and criminal liability of corporations has evolved in many States. States who've developed domestic judicial systems related to corporate accountability do in fact hold corporations accountable – which may be indicative of the future direction of international law[74]. Unfortunately, this is primarily limited to civil liability, as the allegations against corporations rarely meet the standards for the burden of proof to impose direct criminal accountability[75]. The fourth cluster identified that the major international human rights sources don't impose direct legal responsibility onto corporations. Considering the failure of the Norms, Ruggie believed that soft-law mechanisms may be the most suitable compromise between the human rights regime and corporations. Lastly, in the fifth cluster, Ruggie explored voluntary initiatives, including corporate self-regulating mechanisms. He argued that these corporate governance mechanisms could "motivate [and] activate" corporations to abide by human rights standards[76].

After mapping the issue and identifying governance gaps in human rights protection, Ruggie was to make suggestions on how to close those gaps. Ruggie submitted the 2008 Report, which

[71] Ibid.
[72] Buhmann. *Corporate Social and Human Rights Responsibilities: Global, Legal and Management Perspectives.* Springer (2010).
[73] Mantilla. *Emerging International Human Rights Norms for Transnational Corporations.* Global Governance (2009). Web. https://www.jstor.org/stable/27800755.
[74] This is especially true for States who have incorporated the principle of extraterritoriality in their domestic legal systems.
[75] Mantilla. *Emerging International Human Rights Norms for Transnational Corporations.* Global Governance (2009). Web. https://www.jstor.org/stable/27800755.
[76] Ibid.

provided "a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors,"[77]. Serving as the final report under his mandate, SRSG Ruggie developed the Protect, Respect and Remedy' policy framework based on three core principles: "the State duty to protect against human rights abuses by third parties"; "the corporate responsibility to respect human rights"; and "the need for greater access by victims to effective remedies, judicial and non-judicial,"[78].

After incorporating the requests of the HRC, Ruggie submitted the UN Guiding Principles[79]. In June 2011, in resolution A/HRC/RES/17/4, the Human Rights Council endorsed the UN Guiding Principles, creating the first global standard addressing the human rights impact of business activities[80].

Section IV – The UN Guiding Principles on Business and Human Rights

The Guiding Principles provided an authoritative directive for States and all business enterprises to respect human rights and address negative impacts, according to their distinct "spheres of influence" and legal responsibilities[81]. The Guiding Principles – composed of thirty-one principles – are organized under the following three pillars: State Duty to Protect Human Rights, Corporate Responsibility to Respect Human Rights, and Access to Remedy[82].

Pillar One – The State Duty to Protect Human Rights

The first pillar is grounded in the recognition of "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms,"[83]. Following traditional international law, this pillar re-affirms the role of the State as the primary duty-bearer of human rights. Although States' are not inherently responsible for human rights abuses committed by third parties, they may breach their international legal obligations, if they fail to "take appropriate steps to prevent, investigate, punish and redress private actors' abuses,"[84].

[77] SRSG, "The 2008 Report", *supra* note 2, summary.
[78] OHCHR. *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.* Web. https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx
[79] Ibid.
[80] Ibid.
[81] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[82] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[83] Ibid.
[84] Ibid.

The range of appropriate steps may include preventative and remedial measures. Accordingly, States should establish appropriate policies and legislation, to clearly define the expectations of all business enterprises with regard to human rights[85]. Importantly, these laws and policies must be equipped to govern the evolving operations of business enterprises and their impact. Secondly, States must institute corresponding oversight, regulatory and adjudication mechanisms[86]. These mechanisms must be equipped to impose a fiduciary duty on corporations to conduct human right due diligence, assess a business enterprise's human rights impact, provide effective guidance and impose enforcement measures[87]. The establishment of these mechanisms is crucial for the operationalization of the Guiding Principles – as it imposes not only negative, but positive obligations on the State to ensure the realization of human rights. These duties can be fulfilled by competent governmental departments, agencies and other State-based institutions. The positive obligations imposed on the State are extremely important as human rights concerns are often exacerbated in the absence of effective legal mechanisms[88].

Pillar Two – The Corporate Responsibility to Respect Human Rights

The second pillar is grounded in the recognition that "the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights,"[89]. Accordingly, all enterprises must *respect* human rights in order to avoid infringing on the rights of others[90]. The intentional use of the term 'respect' rather than 'duty', implies that while corporations are not duty-bearers under international law, they have affirmative duties to ensure they comply with human rights standards[91]. Even in the absence of good governance and effective judicial mechanisms, corporations must continue to act in accordance with human rights standards. These standards are defined in the commentary of Principle 11,

[85] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[86] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[87] Ibid.
[88] Sullivan. *Business and Human Rights – Dilemmas and Solutions*. EBSCOhost: Routledge (2003). Web. http://web.b.ebscohost.com/ehost/ebookviewer/ebook/bmxlYmtfXzU2MTU0M19fQU41?nobk=y&sid=fdffdb2b-0326-4597-bd2a-2e2f357b1087@pdc-v-sessmgr03&vid=6&format=EB&rid=1
[89] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[90] Ibid.
[91] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles

> "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights,"[92]

In order to respect human rights, business enterprises should fulfill the following requirements:

a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
b. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts [93]

Corporations should internalize human rights due diligence procedures to ensure their respect for human rights. This can be done through six key steps[94]. First, corporations must establish a policy commitment to meet their responsibility to respect human rights[95]. Second, corporations must assess their human rights impact[96]. This can be conducted through integrating issue-specific impact assessments into all contracts and activities. Third, corporations must integrate and act upon their findings[97]. This can be done through integrating relevant policies and practices for the project and general business operations. In addition, it requires that corporations ensure the organizational capacity needed to ensure integration can occur – through training, allocation of adequate resources and budget[98]. Fourth, corporations must track and monitor their impact, and the effectiveness of their policies and practices[99]. This can be conducted through consulting with internal and external sources, including affected stakeholders. Fifth, corporations must communicate and report relevant information about their due diligence practices and the human

[92] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[93] Ibid.
[94] Danish Institute of Human Rights. *Human Rights Impact Assessment.* Web. https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox
[95] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[96] Ibid.
[97] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[98] Ibid.
[99] Ibid.

rights impact(s) of their operations. This information must be disseminated in an accessible manner to all interested parties. Lastly, where corporations identify they have cause or contribute to adverse impacts, they should provide or cooperate in legitimate remediation processes.

Pillar Three – Access to Remedy

The third pillar is grounded in the recognition of "the need for rights and obligations to be matched to appropriate and effective remedies when breached,"[100]. Drawing upon the positive obligations of the State, States must take "appropriate steps to investigate, punish and redress business-related human rights violations when they occur"[101]. States should ensure the effectiveness of their domestic mechanisms, including judicial, administrative, legislative or other appropriate measures[102]. States have two options for grievance mechanisms: judicial and non-judicial mechanisms.

Effective judicial mechanisms possess "impartiality, integrity and ability to accord due process"[103]. Furthermore, they must address practical and procedural barriers to accessing judicial remedy. This includes ensuring claimants have access to remediation, irrespective of where the abuse occurs; claimants have access to legal representation; and state prosecutors have adequate resources, expertise and support to fulfill their duties. Effective remediation will provide particular attention to claimants in each stage of the process: access, procedures and outcome[104].

State-based non-judicial grievance mechanisms act as a part of a comprehensive State-based system. Administrative, legislative and other non-judicial mechanisms play a crucial role in supplementing judicial mechanisms. Non-judicial mechanisms may include mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes. These mechanisms are important because they provide claimants options to pursue remediation in appropriate mechanisms.

As detailed in pillar two, corporations are recommended to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely

[100] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.

impacted"[105]. These mechanisms are extremely important, as they can be directly accessed by those adversely impacted by a corporation. Operational-level grievance mechanisms carry out two key functions. First, they support the identification of adverse impacts as a part of ongoing human rights due diligence[106]. Additionally, they provide affected persons the opportunity to raise concerns and complaints. Secondly, these mechanisms "make it possible for grievances … to be addressed and for impacts to be remediated early on … thereby preventing harms from compounding and grievances from escalating,"[107]. Lastly, the Guiding Principles acknowledge that industry-based, multi-stakeholder and other collaborative initiatives play an important role in assessing the effectiveness of grievance mechanisms.

All non-judicial grievances mechanisms must meet be legitimate, accessible, predictable, equitable, transparent– in order to ensure further damage is not inflicted[108].

Section V – Where We Are at Now

While the aforementioned initiatives have played a crucial role in establishing the need to consider corporate impact on human rights, they failed to provide the regulatory and enforcement mechanisms necessary to ensure human rights are respected. They've played a normative role in a space that urgently needs judicial and remedial mechanisms. They've focused on corporate voluntarism in a space that urgently needs soft and hard law. These voluntary and guided initiatives failed to protect human rights against corporate abuses. Notably, this failure was also present in States with strong governance and judicial mechanisms. The violent effects of the failure to adequately address corporate impact is exemplified in the United States immigration detention industry.

[105] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[106] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[107] Ibid.
[108] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations.* University of Minnesota Law School (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles

Part Three: The Intersection of Business and Human Rights in the United States

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In recent decades, the United States has witnessed the expansion of public procurement – where traditional government functions are outsourced to contractors. These public-private contracts are intended to generate innovation and greater cost efficiency. While there are instances where corporations may be more suitable to deliver services on behalf of the State, the contracting federal agency must determine which activities can be commercialized and define how contractors are to fulfill their contractual obligations in alignment with federal standards.

The private immigration detention industry illustrates the dangerous consequences of outsourcing functions to contractors in the name of cost-efficiency. The existence of this industry raises significant constitutional concerns regarding what activities/functions are considered to be inherently governmental; who has the authority to perform these activities/functions; and what standards should be expected for entities who perform these activities/functions.

Historical Context of Private Prisons and Detention Facilities

In the 1980s and 1990s, the United States corrections system experienced widespread capacity issues[109]. Two phenomena increased national incarceration rates, which provoked a myriad of structural issues. First, the War on Drugs' "tough on crime" approach enabled states to impose harsher sentencing policies – including mandatory minimum sentencing laws – which exacerbated the pace of mass incarceration[110]. Secondly, in the 1980s, the Reagan-era Immigration and Naturalization Service "began systematically apprehending undocumented migrants … and opened a number of new detention centers … to cope with the resulting surge in detainees,"[111].

Issues of overcrowding, insufficient state facilities and depletion of state resources prompted the State to find a solution. The United States addressed these issues through a carceral lens – looking to improve the law enforcement system through innovative partnerships. Local, state and

[109] American Civil Liberties Union. *Banking on Bondage: Private Prisons and Mass Incarceration.* November 2011. Web. https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf
[110] Detention Watch Network. *The Influence of the Private Prison Industry in the Immigration Detention Business.* Web. https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Private%20Prison%20Influence%20Report.pdf
[111] Global Detention Project. *United States Immigration Detention Profile.* May 2016. Web. https://www.globaldetentionproject.org/countries/americas/united-states

federal governments began relying on the private sector to fill these gaps. These partnerships were said to have provided cost-efficient servicing to private prisons and detention facilities.

By 1990, "private prison companies had established a firm foothold, boasting 67 for-profit facilities… During the next twenty years, the number of people incarcerated in private prisons increased by more than 1600%."[112]. The next two decades of immigration laws and policies fused the U.S. immigration enforcement system with the criminal justice system. As immigration – including asylum-related – processes became criminalized, the number of detained migrants rapidly increased, fueling the expansion of the private detention industry.

In an effort to formalize the framework of the growing realm of public-private contracts, Congress explored legislative and regulatory measures.

Section VI – The Legal Framework of the Private Detention Industry

Through public procurement, the State works to provide services and goods, in a manner that maximizes the value of tax dollars. Accordingly, it prompts competition between public and private entities, in order to determine which entity is best suited to deliver goods and services on behalf of the State. The more suitable entity wins the contract. Private contracting has been linked to increased efficiency, cost savings, specialization for better quality products/services, and innovation. However, federal legal and regulatory frameworks define "inherently governmental functions" which are ineligible for outsourcing[113].

The FAIR Act

In 1998, Congress enacted the Federal Activities Inventory Reform (FAIR) Act, which provides a statutory definition of the limitations of private-public contracting at the federal level[114]. The Act made a distinction between commercial activities and inherently governmental activities – which determines if a function is eligible for federal contracting.

The Act defines "inherently governmental functions" as the following:

- "Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise;

[112] American Civil Liberties Union. *Banking on Bondage: Private Prisons and Mass Incarceration.* November 2011. Web. https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf
[113] Manuel. *Definitions of 'Inherently Governmental Function' in Federal Procurement Law and Guidance.* Congressional Research Service. December 2014. Web. https://fas.org/sgp/crs/misc/R42325.pdf
[114] Ibid.

- Determining, protecting and advancing economic, political, territorial property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise;
- Significantly affecting the life, liberty or property of private persons; or
- Exerting ultimate control over the acquisition, use or disposition of United States property (including tangibles and intangibles)"[115]

The Office of Management and Budget Initiatives

The Office of Management and Budget (OMB) plays a central role in shaping federal procurement practices. It provides direction for regulation and procedures for public-private contracts – in order to "promote economy, efficiency and effectiveness in acquisition processes,"[116]. The OMB has engaged in a range of initiatives to guide State agencies through this process.

First, the OMB published Circular A-76 which defines activities that may be commercialized – providing guidance to "agencies on how to resolve the 'make or buy' question"[117]. It calls upon the State to "rely on the private sector to supply its needs" when it maximizes the value of tax dollars. This policy focused on ensuring states "achieve economy and enhance productivity, retain governmental functions in-house, and rely on the commercial sector"[118].

In 2001 and 2003, the Bush Administration made revisions to the Circular A-76, which encouraged agencies to "develop their own competitive sourcing goals"[119]. The revised circular helped agencies determine which entity would be responsible for supplying commercial goods and services"[120][121]. State agencies were required to:

[115] The Institute for Public Procurement. *Outsourcing the Public Sector.* 2013. Web. https://www.nigp.org/docs/default-source/New-Site/position-papers/nigpposoutsourcing.pdf?sfvrsn=5a07e140_2
[116] White House. *The Office of Federal Procurement Policy.* Web. https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/
[117] Congressional Research Service. *The Federal Activities Inventory Reform Act and Circular A-76.* April 2007. Web. https://www.everycrsreport.com/files/20070406_RL31024_79e3f14a3b186d8051d7e6380742e663ddcaa5b1.pdf
[118] Ibid.
[119] Ibid.
[120] Competitive sourcing refers to the process of selecting a source – either a government agency or a private contractor – through a competitive process. On the other hand, outsourcing refers to the process of awarding a contract to a private contractor. While these terms are occasionally conflated, they address different phases of the contractual process.
[121] Congressional Research Service. *The Federal Activities Inventory Reform Act and Circular A-76.* April 2007. Web. https://www.everycrsreport.com/files/20070406_RL31024_79e3f14a3b186d8051d7e6380742e663ddcaa5b1.pdf

- "Identify all activities performed by government personnel as either commercial or inherently governmental;
- Perform inherently governmental activities with government personnel"[122]

Once an agency determines which activities were eligible for outsourcing, they begin the competitive sourcing process. This process was conducted through two phases: the competitive activities inventories and competitive process analysis. In the inventory assessment phase, agencies would assess their existing commercial activities. In the competitive process, the agencies would take this inventory information, and conduct a competitive comparison between the State and corporations to determine who was best suited to execute the contract[123]. This process consisted of three stages: "developing a performance statement, which describes the work to be done; designing the most efficient organization, which, in effect, becomes the government's bid; and comparing the government's and contractors' bid to determine who can perform the work most efficiently"[124]. Once this entire process is completed, the activity will either be incorporated into a government agency's responsibilities or outsourced to a private contractor.

This process is extremely relevant to the private detention industry, as it requires governmental agencies to solicit proposals from potential contractors to determine their capabilities and select the corporation who can provide immigration detention services in the most cost-efficient manner. Thus, when an agency within DHS establishes a public-private contract, they are responsible for ensuring the contractor remains competent and cost-effective.

Second, the OMB established a policy-oriented definition for inherently government activities "as an activity that is so intimately related to the public interest as to mandate performance by government personnel,"[125]. Through Policy Letter 11-01, the OFPP established two tests capable of determining whether an activity is or is not inherently governmental – the "exercise of

[122] Ibid.

[123] Notably, Circular A-76 prompted a competitive comparison between State agencies and corporations, but it did not require a cost-saving analysis when assessing which entity was best suited to deliver the service(s). This is an important tenet as contractual outsourcing has benefited from the dialogue around its cost-efficiency. However, if a comparative cost analysis is not completed – prior to the contract, during the execution of the contract, and as the contract ends – it is difficult to assess the validity of this argument.

[124] Congressional Research Service. *The Federal Activities Inventory Reform Act and Circular A-76.* April 2007. Web. https://www.everycrsreport.com/files/20070406_RL31024_79e3f14a3b186d8051d7e6380742e663ddcaa5b1.pdf

[125] The Institute for Public Procurement. *Outsourcing the Public Sector.* 2013. Web. https://www.nigp.org/docs/default-source/New-Site/position-papers/nigpposoutsourcing.pdf?sfvrsn=5a07e140_2

discretion" test and "nature of the function" test[126]. While each test assesses different aspects of the function in question, if either test determines the function is inherently governmental, it becomes ineligible for federal contracting[127]. The following tests have provided a legal argument for ending the use of private detention centers.

The 'Exercise of Discretion' Test

In order to assess if an activity can be outsourced, the government agency is required to conduct the "exercise of discretion" test. This test determines if the activity requires the authoritative discretion – if it does, it may fall into the statute's definition of inherently governmental functions[128]. As detention is not explicitly addressed in any of the provided definitions, the contracting federal agency would be responsible for conducting this test.

Detention requires an authoritative entity to exercise discretion in a manner that is "intimately related to the public interest"[129]. When operating detention facilities, authorities use discretion to control the conditions of the facility and detainees. This discretionary function directly impacts the conditions, treatment and discipline of detainees, which consequently "affect[s] the life [and] liberty … of private persons"[130]. The impact of discretion is exacerbated when disciplinary action is imposed onto detainees. Accordingly, if the use of discretion is inherently tied to the ability of authorities to maintain order and safety in a detention facility, it must be considered an inherently governmental function.

The 'Nature of the Function' Test

The "nature of the function" test assesses if the activity requires the State to exercise its sovereign power[131]. The Policy Letter 11-01 states,

[126] Office of Management and Budget. *Publication of the OFPP Policy Letter 11-01.* United States Government Publishing Office: Federal Register. Volume 76: 176 (2011). Web. https://www.govinfo.gov/content/pkg/FR-2011-09-12/pdf/2011-23165.pdf
[127] O'Carroll. *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers.* Emory Law School Journal. Volume 67: 293 (2017). Web. https://law.emory.edu/elj/_documents/volumes/67/2/ocarroll.pdf
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Office of Management and Budget. *Publication of the OFPP Policy Letter 11-01.* United States Government Publishing Office: Federal Register. Volume 76: 176 (2011). Web. https://www.govinfo.gov/content/pkg/FR-2011-09-12/pdf/2011-23165.pdf

> "functions which involve the exercise of sovereign powers of the United States are governmental by their very nature. Examples of functions that, by their nature, are inherently governmental are … arresting a person, and sentencing a person convicted of a crime to prison,"[132]

The law enforcement process begins with an arrest and moves to sentencing – which both involve the "legitimate use of government power to restrict a person's liberty,"[133]. By arresting and sentencing an individual, the State exercises its authoritative power to deprive a person of their liberty "in the name of law enforcement, public safety or border control,"[134]. In this capacity, the State is the only entity that can make decisions regarding the detainees' liberty. The next phase of the law enforcement process is detention. Similar to an arrest and sentencing, detention enforces the law and is intended to serve the public interest. The logical continuation of the law enforcement process should define detention as an inherently governmental function – as it is the truest form of depriving a person's liberty. However, detention is not seen as an inherently governmental function – thus rendering it eligible for public procurement.

In the case of immigrant detention, States are given the authority to detain individuals "whenever the public interest requires it,"[135]. In the aftermath of the Zero Tolerance Policy, migrants – including refugees and asylum-seekers – have been subjected to criminal prosecution and detention. Thus, the State executes its "sovereign [authoritative] power to control borders" through law enforcement – including detention[136]. As detention is the most explicit deprivation of an individual's liberty, this function should be seen as inherently governmental.

Discretion of the Federal Agency

[132] Ibid.
[133] O'Carroll. *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers.* Emory Law School Journal. Volume 67: 293 (2017). Web. https://law.emory.edu/elj/_documents/volumes/67/2/ocarroll.pdf
[134] Ibid.
[135] Manuel. *Definitions of 'Inherently Governmental Function' in Federal Procurement Law and Guidance.* Congressional Research Service. December 2014. Web. https://fas.org/sgp/crs/misc/R42325.pdf
[136] O'Carroll. *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers.* Emory Law School Journal. Volume 67: 293 (2017). Web. https://law.emory.edu/elj/_documents/volumes/67/2/ocarroll.pdf

While the 'nature of the function' test provides a more substantial legal argument for the federal government to render detention eligible for outsourcing, the decision to outsource remains within the agency in question.

According to Policy Letter 11-01, when an activity is "closely associated" with an inherently governmental function, state agencies have the authority to determine if outsourcing is in the best interest of the public[137]. The State can choose to use contractors in such situations, if they establish "(I) specified ranges of acceptable behavior or conduct … (II) subject the discretionary decisions or conduct to meaningful oversight"[138]. These procedures enable agencies to ensure the contractors' conduct aligns with public interests and guards the contractor from engaging into inherently governmental functions.

If a DHS agency decides to outsource the function of detention, at a minimum they should establish specific ranges of acceptable behavior and conduct meaningful oversight. Current DHS policy articulates the principles of contractual compliance and oversight of private facilities – requiring each contracted detention facility to have two onsite monitors and one contracting officer from the Federal Bureau of Prisons[139]. However, the implementation of this policy lacks in practice. This imbalance is exemplified in the amount of alleged human rights violations arising from private detention facilities.

For example, many of ICE's private detention facilities have been accused of inadequate medical and mental health services, rampant sexual abuse and assault, and dangerous overcrowding. If ICE adequately followed the procedures outlined in Policy Letter 11-01, the BOP officers should've been able to prevent harm by immediately addressing inappropriate conduct when it occurs. In the event that harm does occur, the BOP officers should've immediately proceeded with investigating the allegations and disciplining perpetrators – in order to ensure no further harms were imposed on detainees. The lack of effective regulatory mechanisms enables federal agencies to neglect their responsibilities to oversee contractual operations – allowing human rights violations to be a normative risk of contractual operations. It is important to note that this

[137] Office of Management and Budget. *Publication of the OFPP Policy Letter 11-01.* United States Government Publishing Office: Federal Register. Volume 76: 176 (2011). Web. https://www.govinfo.gov/content/pkg/FR-2011-09-12/pdf/2011-23165.pdf

[138] *See* Policy Letter 11-01, *supra* note 16, at 56, 237-38.

[139] O'Carroll. *Inherently Governmental: A Legal Argument for Ending Private Federal Prisons and Detention Centers.* Emory Law School Journal. Volume 67: 293 (2017). Web. https://law.emory.edu/elj/_documents/volumes/67/2/ocarroll.pdf

isn't a failure of the system, but an inherent design of the public procurement infrastructure. The United States has the resource capacity to adequately monitor and manage these public-private contracts but chooses not to. The unwillingness and/or inability of a State to ensure corporations are engaging in human rights due diligence, further troubles the notion that voluntary and guided initiatives are capable of protecting human rights.

Section VII – The Legislative Framework of the Private Detention Industry

The United States has responded to the migration flows out of unstable regions in Central and South America, with deterrence-focused immigration policies. Within the past decade, two monumental legislative initiatives enabled a paradigm shift, which led to detention being the primary tool of immigration enforcement.

The Detention Bed Mandate

In 2010, President Obama's proposed FY 2011 budget sought to maintain the DHS Appropriations Act introduced in FY 2010 congressional appropriations. This Act mandated the ICE to "maintain a level of not less than 33,400 detention beds,"[140]. Later in the year, Congress passed "a series of continuing resolutions" that align with FY 2010 Appropriations Act, which tied ICE's funding to their ability to execute the 33,400-bed mandate[141]. It must be noted that the number itself is arbitrary and does not reflect DHS's capacity needs[142].

The implementation of this mandate has dramatically increased the number of immigrants held in private detention facilities – including asylum seekers and those who pose no threat to public safety. According to the National Immigrant Justice Center, as of 2019, "roughly 71 percent of immigrants held by ICE on any given day are in privately operated prisons, versus 8.5 percent of incarcerated individuals in state and federal prisons"[143]. Not only does this mandate costs

[140] National Immigrant Justice Center. *Immigrant Detention Bed Quota Timeline.* January 2017. Web. https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017_01_05.pdf
[141] Ibid.
[142] National Immigrant Justice Center. *Immigration Bed Quota 101.* Web. https://immigrantjustice.org/sites/immigrantjustice.org/files/Bed%20Quota%20101%20Backgrounder%20FINAL.pdf
[143] Grantmakers Concerned with Immigrants and Refugees. *How to Divest from Immigrant Detention.* August 2019. Web. https://www.gcir.org/resources/how-divest-immigrant-detention-philanthropic-primer

taxpayers more than $2 billion each year, it also has solidified the private detention industry as an exceptionally profitable enterprise [144].

The Zero Tolerance Policy

On April 6, 2018, Attorney General Jeff Sessions announced the enactment of the Zero Tolerance Policy under 8 U.S.C. § 1325(a). The Zero Tolerance Policy transitioned the immigration infrastructure from a civil procedural to criminal prosecutorial model. The Policy criminalized the act of entering the United States as an undocumented person – requiring federal agencies to swiftly apprehend and detain all undocumented immigrants – including asylum seekers – pending federal criminal procedure[145][146].

As a result, CBP border apprehension and corresponding transfers into ICE detention significantly increased in FY 2018 – with "border apprehension of family units increasing by 30.5% and adult apprehension increasing by 28.1%"[147]. Since the implementation of the Zero Tolerance Policy, each fiscal year has broken records on rates of apprehension, detention and removal of undocumented persons. As a result, the costs of DHS operations continue to increase each fiscal year. For FY 2020, ICE requested $77.8M to maintain "51,500 adult beds and 2,500 family beds, for a total of 54,000 detention beds"[148].

Immigration-related federal initiatives – including legislation and appropriations – have been paid for by American taxpayers. Aligned with OMB Circular A-76, federal agencies should be extremely intentional with how taxpayer dollars are spent – ensuring value maximization and increased public safety. However, recent immigration policy which criminalizes immigration has

[144] American Friends Service Committee. *How For-Profit Prison Corporations Shape Immigrant Detention and Deportation Policies.* Web. https://www.afsc.org/resource/how-profit-prison-corporations-shape-immigrant-detention-and-deportation-policies

[145] Refugees International. *The Trump Zero Tolerance Policy.* July 2018. Web. https://www.refugeesinternational.org/reports/2018/7/31/trump-zero-tolerance-policy

[146] The Zero Tolerance Policy directly conflicts with the United States' obligations under the 1951 Refugee Convention and its 1967 Protocol. In particular, the Article 31 states: "Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened… enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." Troublingly, this policy imposes punitive measures on those fleeing persecution.

[147] Department of Homeland Security. *ICE Budget Overview: Fiscal Year 2020.* Web. https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf

[148] Department of Homeland Security. *ICE Budget Overview: Fiscal Year 2020.* Web. https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf

been less effective in advancing public safety, but more effective in funding the private immigration detention industry.

The DHS, especially ICE, has relied on private contractors to meet their growing detention capacity needs. Troublingly, over 70 percent of detainees are held in private immigration detention facilities[149][150]. A significant portion of DHS's operational budget – related to detention – has allowed private contractors to enjoy billions of dollars in profit each year.

Section VIII – The Profiteers of the Private Immigration Detention Industry

The private immigration detention industry is a multi-billion-dollar enterprise – which engages a range of actors including governmental agencies, corporations and banks.

The primary profiteers of this industry are the private contractors that operation immigration detention centers. The industry's corporate conglomerates are GEO Group and CoreCivic[151]. The public-private contracts held by these corporations are crucial to their trajectory – with more than 40% of their respective revenues stemming from federal contracts[152]. The financial prospective attached to the industry have prompted corporations to invest in the political area.

Contractors have worked diligently to secure their contracts. The profiteers – especially CoreCivic and GEO Group – have engaged in extensive lobbying and political contributions/donations. Through these efforts, corporations are able to shape federal and state immigration initiatives, in a manner that increases the profitability of their public-private contracts.

Lobbying Expenditures

The lobbying expenditures of CoreCivic are as follows:

- "Over the last 18 years, CoreCivic has spent approximately $10.5 million in lobbying expenditures[153];

[149] The Center for Popular Democracy. *Bankrolling Oppression.* April 2018. Web. https://populardemocracy.org/sites/default/files/20180427%20CBOH%20Digital.pdf
[150] Freedom for Immigrants. *Detention by the Numbers.* Web. https://www.freedomforimmigrants.org/detention-statistics
[151] In October 2016, Corrections Corporations of America (CCA) rebranded as CoreCivic. Hereafter, any mention of CCA will be substituted with CoreCivic.
[152] Worth Rises. *Immigration Detention: An American Business.* Web. https://worthrises.org/immigration#block-yui_3_17_2_1_1529983273570_25026
[153] Follow the Money. *CoreCivic.* Web. https://www.followthemoney.org/entity-details?eid=695

- In 2018, CoreCivic reportedly spent approximately $1.42 million in lobbying efforts – "approximately $617,797 was attributable to Federal lobbying-related activities,"[154].

The lobbying expenditures of GEO Group are as follows:

- "Over the last 18 years, GEO Group has spent approximately $15.2 million in lobbying expenditures[155];
- In 2018, GEO Group paid "an aggregate amount of approximately $4.3 million" on direct lobbying efforts,"[156].

Political Contributions

The amount CoreCivic has spent on political contributions is as follows:

- "In the past 24 years, CoreCivic has given approximately $5.8 million in contributions" – of which, approximately $3.5 million was given to the Republican party[157];
- "In 2018, CoreCivic spent approximately $1.2 million in political contributions,"[158]

The amount that GEO Group has spent on political contributions is as follows:

- "In the past 20 years, GEO Group has given approximately $12 million in contributions" – of which, approximately $8.3 million was given to the Republican party[159];
- "In 2018, GEO Group spent approximately $3.3 million in political contributions,"[160]

Contractors' Profit

The multi-billion-dollar private detention industry has allowed contractors to enjoy massive profits. These profits have significantly augmented from recent federal immigration legislation – including the detention bed mandate and the Trump Administration's aggressive immigration policy approach.

The profit acquired by CoreCivic is as follows:

[154] CoreCivic. *Political Activity and Lobbying Report 2018.* Web. http://ir.corecivic.com/static-files/e621a712-a923-43b7-8533-0fef1c04cab0
[155] Follow the Money. *GEO Group.* Web. https://www.followthemoney.org/entity-details?eid=1096
[156] GEO Group, Inc. *Political Activity and Lobbying Report 2018.* Web. https://www.geogroup.com/Portals/0/SR/Political%20Engagement/Political_Activity_and_Lobbying_Report_2018.pdf
[157] Follow the Money. *CoreCivic.* Web. https://www.followthemoney.org/entity-details?eid=695
[158] Ibid.
[159] Follow the Money. *GEO Group.* Web. https://www.followthemoney.org/entity-details?eid=1096
[160] Ibid.

- After the implementation of the detention bed mandate, CoreCivic's profits increased "from $133,373,000 in 2007 to $195,022,000 in 2014"[161][162]
- Since the inauguration of President Trump, CoreCivic's profits have continued to increase. Based on year, CoreCivic's total revenue increased from: $1.7 billion in 2017[163]; $1.8 billion in 2018[164]; and $1.98 billion in 2019[165].

The profit acquired by GEO Group is as follows:

- After the implementation of the detention bed mandate, GEO Group's profits "increase[d] from $41,845,000 in 2007 to $143,840,000 in 2014, a 244 percent increase."[166][167]
- Since the inauguration of President Trump, GEO Group's profits have exacerbated. Based on year, GEO Group's total revenue increased from earned: $2.26 billion in 2017[168]; $2.33 billion in 2018[169]; and $2.48 billion in 2019[170].

The Role of Financial Institutions

While the private contractors are the primary profiteers in the industry, their operations would not be possible without the financial services provided by banks. GEO Group and CoreCivic rely on debt financing – in the form of bonds, credit and loans – in order to conduct their daily

[161] Grassroots Leadership. *Payoff: How Congress Ensures Private Prison Profit with Immigration Detention Quota.* April 2015. Web. https://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota

[162] American Friends Service Committee. *How For-Profit Prison Corporations Shape Immigration Detention and Deportation Policies.* Web https://www.afsc.org/resource/how-profit-prison-corporations-shape-immigrant-detention-and-deportation-policies

[163] CoreCivic. *2017 Annual Report.* Web. http://ir.corecivic.com/static-files/097a67c7-bd56-442d-aa48-99f2ac87e3a4

[164] CoreCivic. *2018 Annual Report.* Web. http://ir.corecivic.com/static-files/3cc197ff-e1a0-495a-b1fc-1c347733d320

[165] CoreCivic. *2019 Annual Report.* Web. http://ir.corecivic.com/static-files/fc9bf96b-56dc-4b8f-b631-431c1f717e31

[166] Grassroots Leadership. *Payoff: How Congress Ensures Private Prison Profit with Immigration Detention Quota.* April 2015. Web. https://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota

[167] American Friends Service Committee. *How For-Profit Prison Corporations Shape Immigration Detention and Deportation Policies.* Web https://www.afsc.org/resource/how-profit-prison-corporations-shape-immigrant-detention-and-deportation-policies

[168] GEO Group, Inc. *2017 Annual Report.* Web. http://www.snl.com/Interactive/newlookandfeel/4144107/2017-GEO-Annual-Report.pdf

[169] GEO Group, Inc. *2018 Annual Report.* Web. http://www.snl.com/interactive/newlookandfeel/4144107/GEOGroup2018AR.pdf

[170] GEO Group, Inc. *2019 Annual Report.* Web. http://investors.geogroup.com/Cache/IRCache/e8834b22-d61e-72a5-e092-5fdb26d2c9e4.PDF?O=PDF&T=&Y=&D=&FID=e8834b22-d61e-72a5-e092-5fdb26d2c9e4&iid=4144107

business operations[171]. According to financial documents filed with the U.S. Securities and Exchange Commission, six Wall Street banks have rigorously financed the private detention industry: Bank of America, JPMorgan Chase, BNP Paribas, SunTrust, U.S. Bancorp, and Wells Fargo. These financial institutions have supported GEO Group and CoreCivic's operations by providing extended revolving credit, term loans, and underwriting bonds.

According In the Public Interest and Popular Democracy reports, Wall Street banks have provided the following financing[172]:

The amount of revolving credit[173] provided to CoreCivic and GEO Group is as follows:

- CoreCivic: As of December 2018, CoreCivic has an "$800 million line of credit with a syndicate of ten banks"[174]. The primary contributors are Bank of America, JPMorgan Chase, SunTrust and Wells Fargo – which have each loaned 14.7 percent of the credit[175];
- GEO Group: As of December 2018, GEO Group had a "$900 million revolving line of credit with a syndicate of six banks" – Bank of America, Barclays, BNP Paribas, JPMorgan Chase, SunTrust and Wells Fargo[176][177].
- According to SEC 2018 filings, "Wall Street banks currently have credit arrangements of $2.692 billion with CoreCivic and GEO Group,"[178].

The amount of term loans[179] provided to CoreCivic and GEO Group is as follows:

[171] In the Public Interest. *The Banks that Finance Private Prison Companies.* November 2016. Web. https://www.inthepublicinterest.org/wp-content/uploads/ITPI_BanksPrivatePrisonCcompanies_Nov2016.pdf
[172] Ibid.
[173] Revolving credit refers to an agreement with a [set of] bank(s) allowing an individual/entity to borrow and repay a specified amount on any day until the agreement's end date.
[174] Popular Democracy. *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons.* April 2019. Web. https://populardemocracy.org/sites/default/files/%28Updated%29%202019%20Data%20Brief%20The%20Wall%20Street%20Banks%20Still%20Financing%20Private%20Prisons%20FINAL%20EMBARGOED%20UNTIL%204-8-19%201030am.pdf
[175] In the Public Interest. *The Banks that Finance Private Prison Companies.* November 2016. Web. https://www.inthepublicinterest.org/wp-content/uploads/ITPI_BanksPrivatePrisonCompanies_Nov2016.pdf
[176] Ibid.
[177] Popular Democracy. *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons.* April 2019. Web. https://populardemocracy.org/sites/default/files/%28Updated%29%202019%20Data%20Brief%20The%20Wall%20Street%20Banks%20Still%20Financing%20Private%20Prisons%20FINAL%20EMBARGOED%20UNTIL%204-8-19%201030am.pdf
[178] Ibid.
[179] Term loans refer to an agreement with a bank allowing an individual/entity to borrow a set amount that must be repaid on an agreed-upon schedule.

- CoreCivic: As of December 2018, CoreCivic has a "term loan valued at $200 million"[180]. The primary syndicates of this loan came from Bank of America, JPMorgan Chase, PNC, and SunTrust[181];
- GEO Group: As of December 2018, GEO Group owed a total of $768 million on a term loan valued at $792 million[182]. The lenders are BNP Paribas, Bank of America, Barclays, SunTrust and Wells Fargo[183].

The amount of underwritten bonds[184] provided to CoreCivic and GEO Group is as follows:

- CoreCivic: As of December 2018, CoreCivic has "issued seven bonds totaling over $1.516 billion. Four of those bonds are senior notes, totaling $1.175 billion,"[185]. A syndicate of banks underwrote these corporate bond offerings including Bank of America, JPMorgan Chase, SunTrust, Wells Fargo, PNC, US Bank, among others,"[186];
- GEO Group: As of December 2018, GEO Group issued four bonds totaling $1.150 billion,"[187]. A syndicate of banks underwrote these bond offerings including Wells Fargo, Bank of America, SunTrust, JPMorgan Case, BNP Paribas, among others[188].

[180] Popular Democracy. *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons.* April 2019. Web. https://populardemocracy.org/sites/default/files/%28Updated%29%202019%20Data%20Brief%20The%20Wall%20Street%20Banks%20Still%20Financing%20Private%20Prisons%20FINAL%20EMBARGOED%20UNTIL%204-8-19%201030am.pdf

[181] In the Public Interest. *The Banks that Finance Private Prison Companies.* November 2016. Web. https://www.inthepublicinterest.org/wp-content/uploads/ITPI_BanksPrivatePrisonCompanies_Nov2016.pdf

[182] Popular Democracy. *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons.* April 2019. Web. https://populardemocracy.org/sites/default/files/%28Updated%29%202019%20Data%20Brief%20The%20Wall%20Street%20Banks%20Still%20Financing%20Private%20Prisons%20FINAL%20EMBARGOED%20UNTIL%204-8-19%201030am.pdf

[183] Ibid.

[184] Bonds refer to an agreement with a bank that issues a series of notes in exchange for money. An underwritten bond would involve a syndicate of banks that buy all the notes and resell to institutional investors, endowments, and others.

[185] Popular Democracy. *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons.* April 2019. Web. https://populardemocracy.org/sites/default/files/%28Updated%29%202019%20Data%20Brief%20The%20Wall%20Street%20Banks%20Still%20Financing%20Private%20Prisons%20FINAL%20EMBARGOED%20UNTIL%204-8-19%201030am.pdf

[186] In the Public Interest. *The Banks that Finance Private Prison Companies.* November 2016. Web. https://www.inthepublicinterest.org/wp-content/uploads/ITPI_BanksPrivatePrisonCompanies_Nov2016.pdf

[187] Popular Democracy. *2019 Data Brief: The Wall Street Banks Still Financing Private Prisons.* April 2019. Web. https://populardemocracy.org/sites/default/files/%28Updated%29%202019%20Data%20Brief%20The%20Wall%20Street%20Banks%20Still%20Financing%20Private%20Prisons%20FINAL%20EMBARGOED%20UNTIL%204-8-19%201030am.pdf

[188] Ibid.

- According to SEC 2018 filings, Wall Street banks have underwritten approximately $2.666 billion in current CoreCivic and GEO Group corporate bonds[189].

In return, the banks are able to enjoy massive returns by collecting interest and fees on outstanding debt[190]. According to SEC 2018 filings, Wall Street banks have generated billions of dollars in revenue from collecting interest and fees on GEO Group's and CoreCivic's debts. These banks are set to collect the following amount:

- "Over the lifetime of CoreCivic's $925 million of bonds, the company will pay bondholders an estimated $346 million in interest,"[191];
- "Over the lifetime of GEO Group's $1.15 billion of bonds, the company will pay bondholders an estimated $633 million in interest,"[192].

Through debt financing, these banks are not only complicit, but enjoy exceptional profits from the criminalization of immigration in the United States. Through financial incentives, the private immigration detention industry re-conceptualizes the purpose of detention – traditionally, as a space for enforcing the rule of law and imposing accountability – to a profitable business.

Section IX – The Primary Issues of the Private Immigration Detention Industry

Aligned with Jennifer Chacon's framework, the issues embedded into the private immigration detention industry can be generally classified in three broad categories: conditions of detention, illusive accountability, and moral opposition[193]. These three categories articulate issues that concern the realization of human rights in private detention facilities.

Conditions of Detention

The State has relied on the procurement of immigration detention services to address its growing capacity needs, including outsourcing the operationalization of detention facilities. The use of

[189]In the Public Interest. *The Banks that Finance Private Prison Companies.* November 2016. Web. https://www.inthepublicinterest.org/wp-content/uploads/ITPI_BanksPrivatePrisonCompanies_Nov2016.pdf
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Chacon. *Privatized Immigration Enforcement.* Harvard Civil Rights-Civil Liberties Law Review: Volume 52 (2017). Web. https://harvardcrcl.org/wp-content/uploads/sites/10/2017/02/Chacon.pdf

private contractors has been linked to great cost efficiency for the similar provision of services compared to publicly run institutions[194].

The conditions of private detention facilities are central to challenging the existence of the industry at large. The premise of these critique revolves around the vastly distinct intentions for private contractors to operate detention facilities. The State's interests in immigrant detention are based in its ability to exercise sovereign power; protect its borders; and enhance public safety and interest. However, these tenets are not applicable to corporate interests. Aligned with Milton Friedman's shareholder primary theory, the sole purpose and responsibility of corporate activity is profit maximization[195]. Thus, contractors' primary interests concern shareholders, not public interest[196]. In an effort to improve their bottom line, corporations are incentivized to cut operational costs. These short cuts generating substandard living conditions in private detentions facilities – leading to poor services, and increased risk of human rights violation.

Reports document the troubling testimonials from migrants, who detail the inhumane, and potentially unlawful, conditions. These issues include lack of access to fresh water and hot water; lack of access to hygiene products (i.e. toothbrush, soap, toilet paper); unsanitary facilities (i.e. toilets and general areas); inadequate and/or inaccessible medical care and mental health services; and increased safety risk for vulnerable groups (i.e. assault and mistreatment of women and children)[197]. At the operational level, contractors are often unequipped to address these issues. In fact, inadequately trained contractors – especially private detention guards – "posed an increased safety risk and risk of liability,"[198].

On August 18, 2016, these critiques were affirmed by the Department of Justice. Deputy Attorney General Sally Yates distributed a memorandum titled, "Reducing our Use of Private Prisons," – which announced that the Bureau of Prisons was set to sever ties with private contractors. This memorandum drew upon an Office of Inspector General report which

[194] Sentencing Project. *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons.* August 2018. Web. https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/
[195] Friedman. *The Social Responsibility of Business is Profits.* University of Michigan (1970). Web. http://umich.edu/~thecore/doc/Friedman.pdf
[196] American Civil Liberties Union. *Shutting Down The Profiteers.* September 2016. Web. https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf
[197] Chacon. *Privatized Immigration Enforcement.* Harvard Civil Rights-Civil Liberties Law Review: Volume 52 (2017). Web. https://harvardcrcl.org/wp-content/uploads/sites/10/2017/02/Chacon.pdf
[198] American Civil Liberties Union. *Banking on Bondage: Private Prisons and Mass Incarceration.* November 2011. Web. https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf

determined private prisons "do not provide the same level of correctional services, programs, and resources; they do not save substantially on cots; and … they do not maintain the same level of safety and security,"[199]. While this memorandum did not directly apply to private immigration detention facilities, it was consequential for two reasons. First, it confirmed critiques that private contractors provided troublingly low quality of services and enable indecent conditions of prisons. This memorandum is exculpatory for those demanding an end to the private prison and detention industries. Second, it prompted the Department of Homeland Security to evaluate their use of private detention contractors. On August 29, 2016, eleven days after the DOJ memorandum, DHS Secretary Jeh Johnson announced that DHS's Advisory Council was tasked with reviewing agency-level "policy and practices concerning the use of private immigration detention and evaluate whether this practice should be eliminated,"[200]. This statement was the first monumental agency-level initiative that considered the adverse impact of privatization and potential need to eliminate specific functions of public procurement.

Illusive Accountability

The second category concerns the "distorting effects of privatization on democratic accountability,"[201]. Bureaucratic tranches and inconsistent contractual requirements have designed a lack of accountability as a feature of the private detention infrastructure[202]. The lack of accountability stems from the control of information, lack of adequate oversight, and insufficient contractual authority.

The control of information refers to the ability of private contractors to operate outside of the purview of public oversight and accountability[203]. This is experienced by two distinctly separate groups – government actors and civil society. Unlike federally-run facilities, private contractors are not obliged to provide information about detention operations or conditions to government

[199] Department of Justice. *Memorandum for the Acting Director Federal Bureau of Prisons: Reducing our Use of Private Prisons.* August 18, 2016. Web. https://www.justice.gov/archives/opa/file/886311/download
[200] Department of Homeland Security. *Statement by Secretary Johnson on Establishing a Review of Privatized Immigration Detention.* August 29, 2016. Web. https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration
[201] Chacon. *Privatized Immigration Enforcement.* Harvard Civil Rights-Civil Liberties Law Review: Volume 52 (2017). Web. https://harvardcrcl.org/wp-content/uploads/sites/10/2017/02/Chacon.pdf
[202] Ibid.
[203] American Civil Liberties Union. *Banking on Bondage: Private Prisons and Mass Incarceration*. November 2011. Web. https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf

actors – including Congress[204]. Furthermore, they are not subjected the federal standards of public facilities, which require prison or detention authorities to respond to public inquiries – through the federal Administrative Procedures Act, and the federal and state Freedom of Information acts[205]. Therefore, non-DHS and non-Executive actors are unable to request and acquire any information about key detention issues including misconduct, mistreatment of detainees, reported deaths, sexual assault, and health care conditions[206]. Without public awareness of the operational details of these private facilities, it becomes increasingly difficult for individuals or groups to assess the human rights impact, demand accountability for harms, and remediation for those affected.

Consequently, the only entity with the authority to oversee the operations of private detention facilities is the contracting federal agency – either DHS or HHS. In a 2009 immigration detention report, Dora Schriro used a two-prong approach to detail the issues of federal oversight[207]. First, she reported that the contracting federal agency, often times ICE, "lacks information about what is happening in private facilities because they do not have adequate monitoring systems for detainees within them,"[208][209]. According to Policy Letter 11-01, the contracting agency is responsible for conducting meaningful oversight over outsourced activities[210]. Troublingly, current DHS policy only requires each contract facility to have two onsite monitors and one contracting officer from the Federal Bureau of Prisons[211]. It is unrealistic to assume that three officers – only two being present at the detention facility – have the capacity to monitor the daily operations at the detention center that may hold up to 12,000 detainees[212].

[204] Ibid.
[205] Chacon. *Privatized Immigration Enforcement.* Harvard Civil Rights-Civil Liberties Law Review: Volume 52 (2017). Web. https://harvardcrcl.org/wp-content/uploads/sites/10/2017/02/Chacon.pdf
[206] Ibid.
[207] Schriro. *Immigration Detention Overview and Recommendations.* Immigration and Customs Enforcement. October 6, 2009. Web. https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf
[208] Ibid.
[209] Chacon. *Privatized Immigration Enforcement.* Harvard Civil Rights-Civil Liberties Law Review: Volume 52 (2017). Web. https://harvardcrcl.org/wp-content/uploads/sites/10/2017/02/Chacon.pdf
[210] Office of Management and Budget. *Publication of the OFPP Policy Letter 11-01.* United States Government Publishing Office: Federal Register. Volume 76: 176 (2011). Web. https://www.govinfo.gov/content/pkg/FR-2011-09-12/pdf/2011-23165.pdf
[211] Ibid.
[212] Freedom for Immigrants. *The Problem with Private Immigration Detention.* Web. https://www.freedomforimmigrants.org/the-problem

Even if monitoring occurs, there is no existing framework for contracting agencies to reference when contractors fail to uphold their obligations, or even worse, commit violations. This insufficient contractual authority does not provide tools for punitive measures (i.e. penalties and sanctions), nor does it guide systematic termination of the contract[213]. Considering that ICE's budget is contingent upon their ability to fulfill the detention bed quota, it becomes increasingly more unlikely that this agency would have the desire to terminate a contract.

The combination of inadequate monitoring mechanisms and limited guidance on punitive measures enables the lack of accountability for private contractors. The lack of accountability diminishes any potential remediation for victims of corporate harm.

Moral Oppositions

While valid, the previous arguments focus on the operational functions of private detention – considering how improved services and systemic accountability can create a more humane detention facility. However, moral oppositions directly challenge the existence of private detention facilities at large. The primary claim is that "private profiteering from the deprivation of liberty of another human being is simply wrong,"[214]. Furthermore, the ability for any entity – public or private, State or individual – to profit from the deprivation of liberty is wrong. By attaching financial incentives to detention, corporation are motivated to engaging in lobbying efforts and political contributions, to prompt governments are motivated to establish mechanisms that fuel the industry (i.e. arbitrary mandates). The financial incentive diminishes the traditional purpose of detention, which focuses on enforcing the rule of law and imposing accountability.

Even if the issues of detention conditions are resolved – the criminalization of immigration and use of the carceral system directly endangers human rights. Until the United States fulfills its treaty obligations – including the right to life, liberty and security; right to freedom from arbitrary detention; and right to seek asylum – the human rights imperative will continue to be threatened and violated.

[213] Chacon. *Privatized Immigration Enforcement.* Harvard Civil Rights-Civil Liberties Law Review: Volume 52 (2017). Web. https://harvardcrcl.org/wp-content/uploads/sites/10/2017/02/Chacon.pdf
[214] Ibid.

Part Four: Where Do We Go from Here?

The realization of human rights requires that all individuals and entities have either a duty to protect and respect these rights. As corporations continue to acquire immense power in the global arena, it is imperative that the international apparatus diligently addresses corporate impact on human rights at large.

Inadequacy of Singular State Action

The inability and/or unwillingness of States to protect against corporate human rights abuses isn't merely a theoretical consideration – it has been continuously demonstrated throughout the globe.

Without international legal obligations, the realization of human rights is contingent upon States willingness and ability to adopt and implement administrative, judicial and legislative mechanisms capable of regulating and remediating corporate harms. In order to ensure universal realization of human rights, this approach requires that States have comparable domestic mechanisms tasked with regulating and sanctioning corporate conduct – which is virtually impossible without imposing legal obligations onto States.

In the absence of the international regulatory obligations, many States do not possess the interest or executional capacity to monitor corporate behavior. This creates a cyclical issue where:

- In the absence of formal international obligations, States are financially incentivized to limit domestic regulation on corporations;
- However, in the instance that the international community seeks to establish regulatory treaties, States will likely be uninterested considering the following issues:
    - Treaty ratification would require States to execute regulation at the national level[215], thus threatening the willingness of the corporation to continue to outsource in their territory;

[215] This is further troubled when considering the power imbalance between developing States and large corporations. States – whose economic stability depends on the financial incentives provided by corporations – may not possess the interest or capability to impose regulations onto corporations. Even in cases where States are able to establish these mechanisms, it is unclear how States will adjudicate corporations when violations occur. Again, the financial discrepancies are displayed, as States are required to consider their ability to challenge corporations who can out-spend, out-resource and out-strategize them.

- Treaty ratification is expensive[216] and does not provide comparable incentives to those that would be lost in the presence of enforceable regulation[217].

This absurd reliance on State action and leadership to regulate corporate conduct is detrimental to the livelihood of vulnerable communities – as it fails to provide a clear approach to accountability and remediation. Ultimately, the realization of human rights is contingent upon the combined force of international authorities and States[218].

Section X – The Demand for an International Business and Human Rights Treaty

The universal enjoyment of human rights cannot be achieved through voluntary or guided initiatives – it requires the establishment of an international treaty imposing explicit obligations onto corporations; a competent treaty committee to monitor the realization of the treaty; and establishment of regulatory and enforcement mechanisms at the State-level.

International Context

The historical initiatives related to business and human rights have been important in norm-setting. To date, we've relied on norm-setting and corporate voluntary initiates to ensure respect for human rights. However, respect for human rights should not be voluntary and corporations should not have to be incentivized to respect human rights. Universal respect for human rights can only be achieved through formalization of international standards. A multilayered international system is necessary to define human rights standards, expectations of State and corporate actors, and ensure accountability. This multilayered system can be achieved through an enforceable international business and human rights treaty.

Similar to other human rights treaties, a business and human rights treaty would transform existing international codes into binding standards; enable international coordination; and provide an oversight and advisory mechanism. The proposed treaty should draw upon the framework provided by the UN Norms, Guiding Principles and other IGO initiatives – when

[216] This tenet is discussed in the ICESCR – which requires States "to take steps" to the maximum of their available resources to progressively achieve the full realization of economic, social and cultural rights. In order to fulfill their treaty obligations, States are required to establish an infrastructure – administrative, legislative, judicial – capable of ensuring the realization of the defined rights. However, in order to build infrastructure, States must have a significant amount of monetary and technical resources (OCHCR, Fact Sheet No. 33).
[217] Grear et al. *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability.* Oxford: Human Rights Law Review (2015). Web. https://watermark.silverchair.com/ngu044.pdf
[218] Ibid.

formulating its articles, addenda, and limitation and derogation clauses. The proposed treaty should conduct the following:

- Define the expectations and duties of the State to ensure human rights realization;
- Define the expectations and responsibilities of corporations to respect human rights;
- Articulate the obligation to operationalize human rights due diligence in internal policies and decision-making mechanisms;
- Establish a corresponding business and human rights treaty committee to advise and oversee the implementation of the treaty's obligations[219].

The proposed treaty should recognize existing human rights, and enumerate specific substantive rights related to business and human rights– including civil, political, social, cultural and economic rights. As international human rights treaties do not impose direct legal obligations onto the business enterprises, the treaty should either impose direct obligations onto corporations, or define the general nature of State obligations. State obligations should include translating the international treaty obligations into domestic law and providing domestic enforcement mechanisms[220]. Lastly, the proposed treaty should establish a committee tasked with overseeing the international implementation of the treaty obligations.

Similar to other human rights treaty committees, the proposed committee should be composed of 15-20 independent experts from geographically diverse backgrounds. The committee's mandate should obligate the committee to (I) review state reports, (II) provide general comments and (III) establish an individual complaint mechanism[221].

For the first tenet, the committee should require mandatory State reporting, and oversee State implementation[222]. For the second tenet, the committee should provide guidance, clarification and interpretation to States on operationalizing their treaty obligations[223]. For the third tenet, the committee should allow individuals to bring complaints to the committee[224].

[219] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[220] Ibid.
[221] OHCHR. *Human Rights Treaty Bodies.* Web. https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx
[222] Ibid.
[223] Ibid.
[224] Ibid.

While other treaties state that an individual complaint mechanism is an optional protocol, the proposed treaty must establish an involuntary, formal complaint mechanism. In the case of business and human rights, a range of issues can arise that prevent an individual from filing a complaint with the State. First, individuals may not be sure which State is responsible for overseeing the human rights impact of a transnational corporation. Second, State enforcement mechanisms may be too weak to adequately address the complaint. Third, States may have an inadequate remediation mechanism. In order to ensure universal accountability and remediation for harms, the committee must be able to accept and address individual complaints about treaty violations.

State Context

With an international business and human rights treaty, State obligations would be clearly defined. The proposed treaty would increase state action and leadership – enabling the development of law-making and institution-building projects capable of enforcing these principles. State's must establish preventative and remedial measures through legislation, and oversight, regulatory and adjudication mechanisms[225]. This can be fulfilled by establishing a monitoring mechanism, imposing a fiduciary duty on corporations, ensuring judiciable accountability, and establishing remedial mechanisms.

First, the monitoring mechanisms can be facilitated by the State or independent entities. State monitoring mechanisms could be facilitated by a committee of subject-matter experts, a competent court, or a federal agency[226]. The federal agency could be a distinct entity solely tasked with overseeing business and human rights activities involved in public procurement and business operations. Or, a sub-agency could be incorporated into existing federal agencies to oversee public procurement. However, as previously discussed, a myriad of issues that may arise with imposing exclusive authoritative power with the State. An independent monitoring mechanism may ensure objective evaluation of the human rights impact of business activities. Independent monitoring mechanism could be facilitated by a variety of entities including domestic NGOs, private auditing firms, or industry-based firms[227]. However, domestic NGOs

[225] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[226] Slye. *Corporations, Veils, and International Criminal Liability.* Brooklyn Journal of International Law: Volume 33 (2008). Web. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1205&context=bjil
[227] Ibid.

may provide the most objective and truthful evaluation, as they are not financially incentivized to report a specific result.

Second, through the legal imposition of fiduciary duty, the State can address the three primary areas of corporate responsibility[228]. First, corporations would be required to express their commitment to human rights through public statements and integrating human rights considerations into internal policies and decision-making mechanisms[229]. Second, corporation would be required to protect and respect human rights within all of their areas of operation – "including employees, contractors, suppliers, local communities, and other parties affected by the company's activities"[230]. Furthermore, this duty would require corporations to implement "human rights due diligence process to identify, prevent, mitigate and account for their human rights impact"[231]. Third corporations would be required to submit reports on their human rights impact. In return, the State should provide guidance to corporations on how to implement and operationalize their human rights responsibilities. This would allow the State to engage in proactive and preventative measures to ensure human rights realization.

Third, if corporations are alleged to have violated human rights, the State should ensure its enforcement mechanisms are capable of adequately investigate alleged corporate abuses. If the corporation is found to have violated human rights, the State should utilize judiciable accountability mechanisms. These mechanisms must be able to adequately punish and redress corporate abuses. The State should consider if deterrence will be most effective by punishing an individual corporate officer or establishing systematic punishment.

While litigating a case of individual criminal liability may be the easier option, it comes with risks. First, individual actions may be insufficient to prove individual culpability – thus voiding the possibility of imposing criminal liability and successfully prosecuting the violator [232].

[228] Magraw. *Universally Liable: Corporate-Complicity Liability Under the Principle of Universal Jurisdiction.* University of Minnesota Law School: Scholarship Repository (2009). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1247&context=mjil
[229] Sullivan. *Business and Human Rights – Dilemmas and Solutions*. EBSCOhost: Routledge (2003). Web. http://web.b.ebscohost.com/ebookviewer/ebook/bmxlYmtfXzU2MTU0M19fQU41
[230] Ibid.
[231] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations and Other Business Entities.* University of Minnesota Law School: Scholarship Repository (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[232] Slye. *Corporations, Veils, and International Criminal Liability.* Brooklyn Journal of International Law: Volume 33 (2008). Web. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1205&context=bjil

Second, holding individual corporate officers criminally liable has had very little impact on deterring corporate harms[233]. The most effective judiciable deterrence action – collective liability – can be conducted as follows:

- Examining collective action may increase the chances of establishing culpability and imposing liability– this is particularly relevant when addressing harms enabled by corporate policy or decision-making processes;
- Consider the effectiveness of systemic punishment as a deterrence measure – which could be conducted through penalties and sanctions including fines, restraints, structural injunctions, publicity, equity awards and dissolution;
- Systemic punishment also expresses societal disapproval, which may be more impactful than prosecuting individuals[234].

Fourth, issue-specific remediation mechanisms must be established. In order to be effective, these mechanisms must be "legitimate, accessible, predictable, equitable, transparent, rights-complaint, a source of continuous learning and based on engagement and dialogue,"[235]. If the proposed treaty aligns with the third pillar of the UN Guiding Principles, States would be responsible for ensuring effective remediation mechanisms are available[236]. Additionally, businesses should be encouraged to "establish effective operational-level grievance mechanisms that are accessible for individuals and communities who may be adversely impacted,"[237].

Section XI – In the Interim

While the call for an international business and human rights treaty is important, the process of treaty negotiations, ratification and enforcement takes a considerable amount of time. Those affected or vulnerable to corporate harms cannot afford to wait for the international community to establish a treaty. In the interim, States should take initiative to begin exploring the domestic business and human rights context and begin planning preventative and judicial measures

[233] Ibid.
[234] Ibid.
[235] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations and Other Business Entities.* University of Minnesota Law School: Scholarship Repository (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles
[236] UNGP Reporting Framework. *The UN Guiding Principles on Business and Human Rights.* Web. https://www.ungpreporting.org/resources/the-ungps/
[237] Weissbrodt. *Human Rights Standards Concerning Transnational Corporations and Other Business Entities.* University of Minnesota Law School: Scholarship Repository (2014). Web. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1225&context=faculty_articles

capable of addressing corporate harm. States with strong governance, rule of law and independent judicial systems, should begin to establish judicial, administrative, legislative or other appropriate measures[238][239]. Accordingly, the United States – as a self-proclaimed human rights leader – should be among the first States to take initiative.

In consideration of existing business and human rights standards, the United States should begin addressing the issue of privatized immigration detention – and eventually private prison and detention at large.

First, the United States should its administrative, judicial and legislative mechanisms are aligned with its human rights obligations. Accordingly, as U.S. law is not self-executing, all treaty obligations should be immediately implemented and enforced in domestic law. If any domestic measures conflict with those obligations, they should be immediately discontinued.

With respect to Article 9(1) of the International Covenant on Civil and Political Rights, the United States must respect the rights to freedom from deprivation of liberty – especially in the form of arbitrary arrest and detention[240]. The detention bed mandate requires ICE to detain an arbitrary number of people – not based on public interest, but to ensure ICE receive its proposed budget. Accordingly, this mandate must be immediately terminated and removed from any future Congressional Appropriations Act.

With respect to the 1951 Refugee Convention and 1967 Protocol, the United States must respect the right to asylum, and immediately discontinue the universal detention and criminal prosecution enabled by Trump's Zero Tolerance Policy[241].

Secondly, the United States should reconceptualize the immigration infrastructure by replacing existing standards with calibrated alternatives. Accordingly, the State should discontinue the universal detention of immigrants and establish substantive accountability measures.

[238] Ibid.
[239] Greene. *Comments from the International Business Community on the Work of SRSG on Business and Human Rights.* American Society of International Law: Volume 103 (2009). Web. https://www-jstor-org.ezp1.lib.umn.edu/stable/10.5305/procannmeetasil.103.1.0293
[240] OHCHR. *Fact Sheet No. 26, The Working Group on Arbitrary Detention.* Web. https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf
[241] Ramji-Nogales. *Non-Refoulment under the Trump Administration.* American Society of International law: Volume 23 (2019). Web. https://www.asil.org/non-refoulement-under-trump-administration

The myriad of issues resulting from immigrant detention may take a considerable amount of time to correct. However, the State should establish a spectrum of temporal goals, aimed at complying with human rights standards[242]:

- Immediately: The United States should release and avoid detaining immigrants – especially asylum seekers – who pose little danger or flight risk. In order to comply with the 236[c] custody requirement, federal agencies should utilize electronic monitoring or house arrest[243]. Coercive measures and intensive supervision should be reserved for those who post great risk of non-compliance or those recently convicted of serious crimes[244];
    - Financial institutions should immediately terminate current contracts with private detention contractors and refuse to finance these activities in the future;[245]
- Short-Term: The United States should establish immigration policy that places low risk immigrants in community-based alternatives provided by trusted non-profit organizations. The contracting federal agency should ensure these public-private contracts specify the following features: vendor tasks, outcome measures, vendor qualification … incentives and sanctions … and reporting requirements" – in order to clearly define the contractual expectations[246];
- Long-Term: The United States must end the outsourcing of the function of detention and prison to private contractors. It should terminate current contracts and refuse to renew or establish any future contracts. Furthermore, the OMB should declare detention as an inherently governmental function – rendering it ineligible for outsourcing.

Third, in order to ensure substantive accountability, federal agencies must amend their monitoring and reporting framework to ensure all contractors are complying with agency-level and human rights standards.

[242] As the primary duty-bearers under international law, these recommendations will be State-centric. However, they will also include recommendations for corporations – acting as a supplemental initiative to the State initiatives.
[243] American Civil Liberties Union. *Shutting Down the Profiteers.* September 2016. Web. https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf
[244] Ibid.
[245] In 2019, many Wall Street banks – including JPMorgan Chase, SunTrust, Wells Fargo, among others – announced that they would no longer provide financial services for private detention contractors. However, each bank who has committed to divestment has only agreed to no long offer new financing in the industry. They will continue to fulfill their current financial agreements until they expire.
[246] Brown et al. *Managing Public Service Contracts.* Duke University Journal: Theory to Practice (2006). Web. https://sites.duke.edu/niou/files/2011/05/Brown-Potoski-and-Van-Slyke-Managing-Public-Service-Contracts.pdf

- Immediately: "The U.S. Congress should pass Senate Bill 1728, which would make private prison companies subject to the Freedom of Information Act, reversing the industry's current exemption and increasing transparency and accountability,"[247];
- Short-Term: Federal agencies should improve monitoring capacity by assigning a more appropriate number of monitors, who are capable of overseeing detention and/or alternative conditions, and reporting misconduct[248];
- Long-Term: The United States should create a universal framework for monitoring, evaluation, and reporting on the agency-level initiatives – which address the operations of the State agencies and contractors. This mechanism should ensure federal oversight of operations, track performance and outcomes, and permanently assigning an appropriate amount of monitoring exerts[249]. In addition to the assigned agency monitors, the federal monitors should be tasked with assessing, tracking and reporting operations. In return, the State should establish appropriate grievance and punitive processes[250];
    - As agencies internalize the universal framework, they should be allowed to include additional measurements relevant to their operations.

Section XII – Remaining Questions to Consider

Ultimately, the primary goal of the international community should be to establish and enforce an international business and human rights treaty and committee – combined with State action. However, UN Member States must conduct due diligence when negotiating and drafting the proposed treaty. The following question must be addressed by the international community:

- For non-self-executing States, which entity will be responsible for monitoring the State implementation of the proposed treaty obligations?
    - Will these responsibilities fall within an existing State entity – such as Congress or the Judicial Branch – or will an ad hoc agency need to be established?

[247] Popular Democracy. *Bankrolling Oppression: How Wall Street Companies Finance the Private Prison Detention Industry.* Web. https://populardemocracy.org/sites/default/files/20180427%20CBOH%20Digital.pdf
[248] American Friends Service Committee. *The Role of For-Profit Prison Corporations.* December 2015. Web. https://www.afsc.org/sites/default/files/documents/BedQuotaWhitePaper.pdf
[249] United Nations. *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Remedy and Respect Framework.* A/HRC/RES/17/4 (2011).
[250] Schriro. *Immigration Detention Overview and Recommendations.* Immigration and Customs Enforcement. October 6, 2009. Web. https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf

    - What type of expertise will the authoritative entity need to possess? How will they track implementation? Who will they report to? Will this information be publicly available or subjected to federal freedom of information laws?
- At the domestic level, which entity will be responsible for overseeing industry-based compliance?
    - Who will corporations report to? How often are will they be required to report? Will this entity be tasked with providing general comments and guidance? If violations occur, who will this entity report the information to?
- At the international level, will the treaty committee provide general comments and guidance to both States and corporations?
    - If so, will the proposed treaty committee's general comments be binding? Will both entities be required to report on the similar issues? If an entity fails to report, what are the repercussions?
- Considering power of corporations, how will the proposed treaty address the inability or unwillingness of a state to regulate corporate activity?
    - How will the State litigate a corporate entity that can out-spend, out-resource, and out-strategize them?
- Operationalizing human rights is expensive and many States will not have the capacity to immediately execute their treaty obligations. So, will it allow for progressive realization of rights – establishing a built-in limitation clause?
    - If so, what will be the minimum core obligations states must demonstrate they're taking their obligations seriously? How will the proposed treaty committee make assessments based on obligation of conduct or obligation of result?
- Will the proposed treaty impose explicitly legal duties and responsibilities on corporations?
    - If so, will corporations be required to report to and consult with the proposed treaty committee?
- Will the proposed treaty establish a formal complaint mechanism, which allows individuals to submit complaints against States and corporations?
    - If so, will this mechanism be contingent to treaty ratification – thus forbidding States to reservations, understandings and declarations to address this mechanism? Or, will this mechanism be an optional protocol?

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