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Preface

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PRISON LABOUR, HUMAN RIGHTS AND INTERNATIONAL ACCOUNTABILITY: RETHINKING STATE RESPONSIBILITY FOR WAGE JUSTICE

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Abstract

Prison labour occupies a paradoxical position in international human rights law. While the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights guarantee everyone the right to just and favourable remuneration for work, the principal international instruments prohibiting forced labour, most notably International Labour Organization Convention No. 29, carve out an explicit exception for work exacted as a consequence of a lawful criminal conviction. This exception has allowed States to treat incarcerated persons as a category of worker to whom ordinary labour and wage protections need not fully apply, producing what this paper terms a "accountability gap" between the international law of forced labour, which asks only whether prison work is coerced or voluntary and adequately supervised, and the international law of labour standards, which asks whether work is adequately remunerated, safe, and dignified. This paper interrogates that gap. It examines the international legal framework governing prison labour — ILO Conventions Nos. 29 and 105, Article 8 of the International Covenant on Civil and Political Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), and regional instruments — alongside comparative domestic practice in the United States, the United Kingdom, and India, to show how the "punishment exception" has been read expansively by domestic courts to deny prisoners meaningful wage protection, even as international human rights bodies have begun to insist that remuneration for prison labour must be "equitable." The paper then asks whether, and how, the denial of fair wages to working prisoners can be characterised as an internationally wrongful act attracting State responsibility under the International Law Commission's Articles on Responsibility of States for

Internationally Wrongful Acts, and evaluates the adequacy of existing accountability mechanisms — UN treaty body reporting, regional human rights courts, and domestic constitutional litigation — in remedying wage injustice in prisons. Employing a doctrinal and comparative methodology, the paper argues that the punishment exception was never intended to immunise wage exploitation, that the emerging jurisprudence of the European Court of Human Rights and the Indian Supreme Court supports a duty of equitable remuneration independent of the forced-labour exception, and that international accountability for prison wage injustice should be reconceived through the twin lenses of non-discrimination and the prohibition on inhuman or degrading treatment. It concludes by proposing a normative framework, anchored in the Nelson Mandela Rules and the duty of due diligence, for holding States internationally accountable for wage injustice inflicted on the incarcerated workforce.

Keywords: Prison labour; forced labour exception; wage justice; State responsibility; international accountability; Nelson Mandela Rules; ILO Convention No. 29.

1. Introduction

Prisons are frequently described as sites of exception — spaces in which the ordinary guarantees of civil life are lawfully suspended in the name of punishment and security.[1] Nowhere is this exceptionalism more consequential, and less examined, than in the field of prison labour. Millions of incarcerated persons around the world perform productive work — in manufacturing, agriculture, services, and prison maintenance — much of it for wages that fall far below, and in some jurisdictions bear no relationship at all to, the prevailing minimum wage.[2] This is not an incidental feature of incarceration; it is structural. The principal international instrument prohibiting forced labour, the ILO Forced Labour Convention, 1930 (No. 29), expressly excludes from its scope "any work or service exacted from any person as a consequence of a conviction in a court of law," provided the work is carried out under the supervision of a public authority and the prisoner is not hired to, or placed at the disposal of, private parties.[3] Article 8(3) of the International Covenant on Civil and Political Rights contains

[1]Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975), for the classical account of the prison as a disciplinary institution operating outside ordinary civil norms.
[2]See, e.g., Whitney Benns, American Slavery, Reinvented, The Atlantic (Sept. 21, 2015) (documenting wages of a few cents per hour paid to incarcerated workers in several United States correctional systems).
[3]Forced Labour Convention, 1930 (No. 29), art. 2(2)(c), June 28, 1930, 39 U.N.T.S. 55.

a near-identical carve-out.[4] These provisions were drafted to answer a narrow question — is prison labour "forced labour" for the purposes of the prohibition? — and they answer it in the negative. But domestic legal systems, and in places international bodies themselves, have allowed the answer to that narrow question to resolve a much broader one: whether prisoners who work are owed anything at all in return.

This slippage matters because the right to just and favourable remuneration is not confined to the law of forced labour. It is an independent guarantee under Article 23(3) of the Universal Declaration of Human Rights and Article 7(a) of the International Covenant on Economic, Social and Cultural Rights, neither of which contains a punishment exception.[5] The United Nations Standard Minimum Rules for the Treatment of Prisoners, revised in 2015 and renamed the Nelson Mandela Rules, similarly provide that prison labour "shall in no circumstances be inflicted as a punishment" and that prisoners "shall be equitably remunerated" for their work.[6] There is, in other words, a distinct and free-standing international expectation that prison labour be fairly paid, sitting alongside — not subsumed within — the forced-labour exception. This paper argues that the persistent conflation of the two has produced an accountability gap: because prison labour is lawful under the law of forced labour, States have faced little international pressure to justify how, or how little, they pay for it, and existing accountability mechanisms have struggled to characterise wage injustice in prisons as a distinct internationally wrongful act.

The stakes of closing this gap are not merely doctrinal. Underpaid prison labour depresses the earning capacity that prisoners might otherwise accumulate toward restitution, family support, and post-release reintegration; it has been linked, in several jurisdictions, to for-profit exploitation of a literally captive workforce; and it raises acute questions of racial and economic justice where, as in the United States, the incarcerated population performing such labour is disproportionately drawn from historically marginalised communities.[7] This paper proceeds in seven further parts. Part 2 sets out the problem and the paper's objectives. Part 3 describes the methodology and reviews the relevant literature. Part 4 undertakes the substantive analysis, examining in turn the international legal framework, the historical origins and contemporary

[4]International Covenant on Civil and Political Rights art. 8(3)(a), (3)(c)(i), Dec. 16, 1966, 999 U.N.T.S. 171.
[5]Universal Declaration of Human Rights art. 23(3), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights art. 7(a), Dec. 16, 1966, 993 U.N.T.S. 3.
[6]United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) r. 97(1), 103(1)–(2), G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).
[7]See Noah D. Zatz, Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships, 61 Vand. L. Rev. 857 (2008) (analysing the legal construction of prison labour as falling outside ordinary employment protections).

reach of the punishment exception, comparative State practice on wage justice, the law of State responsibility, and the adequacy of existing accountability mechanisms. Part 5 sets out findings and recommendations. Part 6 concludes.

2. Statement of Problem and Objectives

The central problem this paper addresses is a doctrinal and institutional one: international law permits States to compel prisoners to work without treating that compulsion as forced labour, but it has not developed a correspondingly clear or enforceable standard for what prisoners who work must be paid, nor a settled account of when underpayment becomes internationally wrongful. Domestic courts have, for the most part, resolved the ambiguity in the State's favour. United States federal courts, for example, have consistently held that incarcerated workers fall outside the protection of the Fair Labor Standards Act because the prisoner-institution relationship is penological rather than economic in character.[8] The Thirteenth Amendment to the United States Constitution itself preserves involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted," a text whose lineage runs through the nineteenth-century characterisation of the prisoner as, in the words of one court, "a slave of the State."[9] India presents a more contested picture: Article 23 of the Constitution of India prohibits "begar" and other forms of forced labour, and the Supreme Court of India has held that labour paid below the statutory minimum wage amounts to "forced labour" within the meaning of Article 23, a principle later extended, in litigation concerning prison wages, to require that prisoners be paid equitable remuneration for the work they perform.[10] Yet even this more protective jurisprudence has not been uniformly implemented across Indian states, and comparable litigation has not travelled to many other jurisdictions.

At the international level, the picture is similarly fragmented. The European Court of Human Rights has held that the absence of a minimum wage or social security coverage for prison labour does not, without more, violate the Convention, while nonetheless insisting that remuneration be more than nominal and that discriminatory exclusion from social insurance

[8]See Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992) (holding that a prisoner's labour is "involuntary servitude" exempted from the Thirteenth Amendment and that the FLSA accordingly does not apply); see also Ali v. Johnson, 259 F.3d 317, 318 (5th Cir. 2001) (per curiam).
[9]Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871); U.S. Const. amend. XIII, §1.
[10]People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235 (India) (holding that labour or service paid less than the minimum wage is "forced labour" under Article 23 of the Constitution); State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392 (India) (directing State governments to frame schemes for equitable wages for prison labour).

schemes requires objective justification.[11] The UN treaty bodies have, in periodic reporting cycles, repeatedly noted low prison wages as a matter of concern without generating a binding standard on quantum.[12] No treaty body or court has yet articulated a general international-law standard for "equitable" prison wages, nor has any authoritative body squarely addressed whether chronic, structural underpayment of prison labour engages State responsibility as an internationally wrongful act distinct from the forced-labour question.

Against this backdrop, the paper pursues four objectives: first, to map the international legal framework governing prison labour and to demonstrate that it contains a free-standing, if underdeveloped, obligation of equitable remuneration independent of the forced-labour exception; second, to trace, comparatively, how the punishment exception has been read by domestic courts in the United States, the United Kingdom, and India, and to identify the doctrinal move by which exemption from the forced-labour prohibition has been converted into exemption from wage regulation altogether; third, to apply the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts to determine the conditions under which a State's failure to ensure equitable prison wages could constitute an internationally wrongful act; and fourth, to assess the adequacy of existing accountability mechanisms and to propose reforms capable of closing the accountability gap identified above.

3. Methodology and Literature Review

This paper adopts a doctrinal and comparative methodology. The doctrinal component involves a close textual and contextual reading of the principal international instruments bearing on prison labour — ILO Conventions Nos. 29 and 105, the ICCPR, the ICESCR, the UDHR, the Nelson Mandela Rules, and the European Prison Rules — read together with the travaux préparatoires and subsequent interpretive practice of the ILO supervisory bodies, where available. The comparative component examines domestic constitutional and statutory treatment of prison wages in three jurisdictions selected for their contrasting approaches: the United States (a jurisdiction of near-total judicial deference to the punishment exception), India (a jurisdiction of expansive constitutional interpretation requiring equitable wages), and the United Kingdom (an intermediate jurisdiction that pays modest, centrally fixed wages without

[11]Stummer v. Austria, App. No. 37452/02, Grand Chamber Judgment, 2011-VI Eur. Ct. H.R. 33 (July 7, 2011); Van Droogenbroeck v. Belgium, App. No. 7906/77, Judgment, 50 Eur. Ct. H.R. (ser. A) (June 24, 1982).
[12]See, e.g., U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 17, U.N. Doc. CCPR/C/USA/CO/4 (2014) (expressing concern at reports of prison labour conditions in several States).

treating them as subject to national minimum wage legislation).[13] The analytical component then applies the secondary rules of State responsibility — attribution, breach, and circumstances precluding wrongfulness — codified in the International Law Commission's 2001 Articles, which the International Court of Justice and other tribunals treat as substantially reflective of customary international law, to the primary obligations identified in the doctrinal analysis.[14]

The literature on prison labour divides broadly into three strands relevant to this inquiry. A first, historical-critical strand situates contemporary prison labour within the longer history of penal servitude and, in the United States, within the specific continuity between chattel slavery and the convict-leasing systems that followed emancipation, arguing that the Thirteenth Amendment's punishment clause was drafted, and has since been used, to preserve rather than abolish coerced, unpaid, or underpaid black labour.[15] A second, doctrinal strand, concentrated in United States labour law scholarship, examines why courts have refused to treat incarcerated workers as "employees" for the purposes of federal and state labour statutes, and identifies the conceptual work done by characterising the prisoner-institution relationship as custodial rather than contractual.[16] A third, human-rights-oriented strand, situated in international and comparative human rights scholarship, has examined the Nelson Mandela Rules and regional case law on prison conditions, but has generally treated wage adequacy as one element within a broader inquiry into humane prison conditions rather than as an independent object of legal analysis.[17] This paper draws on all three strands but departs from the existing literature in bringing the law of State responsibility to bear directly on prison wage practices — a connection that, to date, has been made only in passing, if at all, and has not been developed into a coherent accountability framework.

[13]In the United Kingdom, prison work is remunerated according to a national pay scheme set by the Prison Service rather than the National Minimum Wage Act 1998, which does not apply to sentenced prisoners: see National Minimum Wage Regulations 2015, SI 2015/621, reg. 53(c) (Eng.).
[14]Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), annexed to G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001); see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 385, 398 (Feb. 26) (treating the Articles as reflective of customary international law on attribution).
[15]See Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008); Benns, supra note 4.
[16]Zatz, supra note 8.
[17]See Penal Reform International & Thailand Institute of Justice, Guidance Document on the Nelson Mandela Rules 118–22 (2018) (discussing Rule 103 on remuneration within the broader framework of prison labour standards).

4. Substantive Analysis

4.1 The International Legal Framework Governing Prison Labour

International law addresses prison labour through two distinct, and only partially overlapping, regimes. The first is the law of forced labour. ILO Convention No. 29 defines forced or compulsory labour broadly as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily," and then immediately excludes from that definition "any work or service exacted from any person as a consequence of a conviction in a court of law," subject to two conditions: the work must be carried out under the supervision and control of a public authority, and the prisoner must not be "hired to or placed at the disposal of private individuals, companies or associations."[18] ILO Convention No. 105, adopted in 1957, adds a further, narrower layer: it prohibits the use of any form of forced or compulsory labour — including, by implication, prison labour — as a means of political coercion, labour discipline, punishment for participation in strikes, or racial, social, national, or religious discrimination.[19] Article 8(3) of the ICCPR mirrors the Convention No. 29 exception almost verbatim, excluding from the prohibition on forced or compulsory labour "any work or service, not referred to in subparagraph (c)(ii), normally required of a person who is under detention in consequence of a lawful order of a court."[20] None of these provisions purports to regulate wages; their sole office is to determine whether compelled prison labour is, or is not, "forced labour" for the purposes of the prohibition.

The second regime is the law of labour standards and social rights, which is not limited by any punishment exception. Article 23(3) of the UDHR provides that "everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity," without qualification by legal status.[21] Article 7(a) of the ICESCR commits States parties to recognise the right of everyone to the enjoyment of just and favourable conditions of work, including fair wages and equal remuneration for work of equal value.[22] Neither provision exempts prisoners, and the UN Committee on Economic, Social and Cultural Rights has not read one into the text. Sitting between these two regimes, and functioning as a bridge, are the Nelson Mandela Rules. Rule 97(1) provides that prison labour

[18]ILO Convention No. 29, supra note 2, arts. 2(1), 2(2)(c).
[19]Abolition of Forced Labour Convention, 1957 (No. 105), art. 1, June 25, 1957, 320 U.N.T.S. 291.
[20]ICCPR, supra note 3, art. 8(3)(c)(i).
[21]UDHR, supra note 3, art. 23(3).
[22]ICESCR, supra note 3, art. 7(a).

"shall in no circumstances be of an afflictive nature," and Rule 103 specifically requires that "there shall be a system of equitable remuneration for the work of prisoners," out of which prisoners should be permitted to spend a portion, send a portion to their family, and save a portion for release.[23] Although the Rules are formally non-binding, they have been repeatedly invoked by the UN Human Rights Committee and the Special Rapporteur on Torture as an authoritative benchmark for the treatment obligations that attach to detention, and several regional courts have treated them as relevant, if not dispositive, evidence of the applicable standard.[24] The Rules thus supply exactly what Conventions Nos. 29 and 105 do not: a substantive, if imprecisely quantified, standard of remuneration.

4.2 The Punishment Exception: Origins and Contemporary Overreach

The punishment exception in Convention No. 29 was not drafted as a general licence to withhold fair wages; its drafting history shows a narrower preoccupation with distinguishing lawful penal labour, administered by public authorities under judicial sentence, from the colonial forced-labour practices — corvée labour, labour requisitioned for private plantations, and punitive labour imposed without judicial process — that the Convention as a whole was designed to suppress.[25] The two conditions attached to the exception — public supervision and the prohibition on hiring prisoners to private parties — confirm this narrower purpose: the drafters were concerned with who controls the prisoner's labour and to whose benefit it accrues, not with whether the prisoner is paid, still less with how much. It is therefore a significant interpretive leap, unsupported by the text, to read Article 2(2)(c) as also resolving the separate question of remuneration.

That leap has nonetheless been made repeatedly at the domestic level, most starkly in the United States. Because the Thirteenth Amendment permits involuntary servitude "as a punishment for crime," American courts have reasoned that the prisoner-institution relationship is not an employment relationship at all, but a custodial one incident to the sentence, from which it follows, syllogistically, that none of the statutory protections attaching to employment — minimum wage, overtime, workers' compensation — apply.[26] The doctrinal move is subtle

[23]Nelson Mandela Rules, supra note 5, rr. 97(1), 103(1)–(2).
[24]See, e.g., Muršić v. Croatia, App. No. 7334/13, Grand Chamber Judgment, ¶ 96, 2016-VI Eur. Ct. H.R. (Oct. 20, 2016) (drawing on the Standard Minimum Rules in assessing conditions of detention under Article 3 ECHR).
[25]See ILO, Eradication of Forced Labour: General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), ¶¶ 49–59, Report III (Part 1B), International Labour Conference, 96th Sess. (2007) (tracing the drafting history and purpose of the Article 2(2)(c) exception).
[26]Vanskike, 974 F.2d at 809–10 (reasoning that because Congress did not clearly express an intent to extend the FLSA to prisoners, and because the prisoner-institution relationship is fundamentally penological, the FLSA's

but consequential: the constitutional permission to compel labour without it counting as "involuntary servitude" is treated as if it were also a permission to compel labour without paying for it, even though the constitutional text says nothing about wages. The same move recurs, in attenuated form, in the United Kingdom, where the exclusion of sentenced prisoners from the National Minimum Wage Regulations rests on the prisoner's status as a person performing work "otherwise than under a contract," a characterisation that similarly treats the absence of an ordinary employment relationship as dispositive of the wage question, without independent inquiry into what remuneration might nonetheless be equitable.[27]

India illustrates a different, more corrective trajectory. In People's Union for Democratic Rights v. Union of India, the Supreme Court held, in the context of workers engaged on public construction projects, that payment of wages below the statutorily prescribed minimum wage amounts to "forced labour" within the meaning of Article 23 of the Constitution, reasoning that a person who accepts work at less than the minimum wage does so not out of genuine choice but out of economic compulsion, and that such compulsion is itself a form of "force".[28] The Court subsequently extended this reasoning to prison labour: in State of Gujarat v. Hon'ble High Court of Gujarat, it directed State governments across India to devise schemes for the equitable payment of wages to prisoners engaged in prison industries, holding that requiring prisoners to work without adequate remuneration offends both Article 21's guarantee of a life with dignity and Article 23's prohibition on forced labour.[29] The significance of this jurisprudence lies precisely in its refusal to treat the forced-labour exception as resolving the wage question: the Indian courts have located the wage obligation not in the law of forced labour but in the more general constitutional guarantee of a dignified life, thereby avoiding the doctrinal trap into which United States and United Kingdom law have fallen. Implementation of this jurisprudence, it should be noted, remains uneven, and several Indian states continue to pay prison wages well below the applicable minimum wage notwithstanding the Supreme Court's directions — a gap between doctrine and practice to which this paper returns in Part 5.

4.3 Wage Justice in Comparative and International Perspective

The European Court of Human Rights has approached the wage question obliquely,

minimum-wage guarantee does not apply).

[27]National Minimum Wage Regulations 2015, SI 2015/621, reg. 53(c) (Eng.); see also HM Prison and Probation Service, Prison Service Instruction 76/2011, Sentence Management — Incentives and Earned Privileges (setting the applicable pay bands, which in 2023 ranged from approximately £4 to £25.55 per week).

[28]People's Union for Democratic Rights, (1982) 3 SCC 235, ¶¶ 15–20.

[29]State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392, ¶¶ 27–35.

through the lens of Article 4 (prohibition of forced labour) read together with Article 14 (non-discrimination) and Article 1 of Protocol No. 1 (protection of property), rather than through any free-standing wage guarantee. In the Vagrancy Cases, the Court held that work required of a detained person does not violate Article 4 where it does not exceed what is "ordinary" in the circumstances of detention, without addressing quantum of pay at all.[30] In Stummer v. Austria, the Grand Chamber went further, holding by a narrow majority that the exclusion of working prisoners from the Austrian old-age pension scheme, notwithstanding their inclusion in health and accident insurance, did not violate Article 14 read with Article 1 of Protocol No. 1, on the ground that the difference in treatment between prisoners and free workers pursued a legitimate aim and fell within the State's margin of appreciation, given the absence of European consensus on the point.[31] Stummer is nonetheless instructive for what it did not hold: the Court did not suggest that prison wages could be set at nominal or arbitrary levels, and its analysis proceeded on the explicit premise that some remuneration, and some form of social protection, was owed; the dispute concerned only the scope of that protection, not its existence.

Outside Europe, the Inter-American and African human rights systems have addressed prison labour largely as an incident of the broader prohibition on inhuman and degrading treatment, without developing a distinct wage standard, while a growing number of national constitutional courts — beyond India, most notably in South Africa and, to a lesser extent, in several Latin American jurisdictions applying constitutional dignity clauses — have begun to treat the adequacy of prison wages as a justiciable question in its own right.[32] What emerges from this comparative survey is a spectrum rather than a binary: at one end, United States law treats the punishment exception as foreclosing wage regulation altogether; at the other, Indian constitutional law treats equitable wages as flowing directly from the guarantee of a dignified life, independent of the forced-labour question; and in between sit jurisdictions such as the United Kingdom and the Council of Europe States, which acknowledge an obligation of some remuneration while declining to fix its quantum by reference to ordinary labour-market standards. The absence of a settled international standard is thus not merely a gap in the treaty text; it is reproduced, and in some respects entrenched, by the divergent domestic jurisprudence that has grown up around it.

[30]De Wilde, Ooms and Versyp v. Belgium ("Vagrancy Cases"), App. Nos. 2832/66, 2835/66, 2899/66, Judgment, 12 Eur. Ct. H.R. (ser. A) ¶ 89 (June 18, 1971).
[31]Stummer, App. No. 37452/02, ¶¶ 89–110.
[32]See, e.g., S. Afr. Const. s. 10 (right to dignity), applied in prison-conditions litigation including Stanfield v. Minister of Correctional Services 2004 (4) SA 43 (C) (S. Afr.), which, while not concerning wages directly, illustrates the South African courts' willingness to review prison conditions against the dignity clause.

4.4 State Responsibility for Prison Wage Injustice

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts provide the secondary rules through which any primary obligation of equitable prison remuneration — wherever it is located, whether in the ICESCR, the UDHR as customary international law, or a State's own constitutional order given international salience through its human rights treaty obligations — could give rise to State responsibility. Two elements must be established: conduct attributable to the State, and a breach of an international obligation in force for that State.[33] Attribution presents little difficulty in the prison context: prisons are, in virtually every jurisdiction, organs of the State or entities exercising elements of governmental authority, and the wages paid, or withheld, are set by State agencies pursuant to State-made rules; even where prison labour is contracted to private companies, Article 5 of the ILC Articles attributes to the State the conduct of persons or entities exercising elements of governmental authority, and Article 8 attributes conduct directed or controlled by the State, so that private-sector involvement does not, without more, sever the chain of attribution.[34] The harder question is breach: does the payment of nominal or sub-minimum wages to prisoners, without more, breach an obligation binding on the State?

For States party to the ICESCR, the answer should, in principle, be yes, subject to the Covenant's built-in flexibility. Article 2(1) ICESCR requires States to take steps, to the maximum of their available resources, to achieve progressively the full realisation of Covenant rights, including the Article 7(a) right to just and favourable remuneration.[35] The Committee on Economic, Social and Cultural Rights has emphasised that progressive realisation does not excuse a failure to take any steps, or the maintenance of deliberately retrogressive measures, and that certain minimum core obligations must be met immediately regardless of resource constraints.[36] A prison wage regime that pays a fixed, non-inflation-adjusted nominal sum year after year, with no mechanism for review and no relationship whatsoever to the cost of living, is difficult to reconcile with even a minimalist reading of the progressive-realisation obligation, and arguably falls below the minimum core. Where such a regime treats working prisoners categorically differently from other classes of low-wage worker, without objective and reasonable justification, it may additionally breach the non-discrimination obligations common

[33]ILC Draft Articles, supra note 12, art. 2.
[34]Id. arts. 4–5, 8.
[35]ICESCR, supra note 3, art. 2(1).
[36]U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, ¶¶ 9–10, U.N. Doc. E/1991/23 (1990).

to the ICCPR, the ICESCR, and, where applicable, regional instruments — an argument that finds indirect support in the Stummer Court's insistence that differential treatment of prisoners requires justification, even where the ultimate conclusion in that case was that the justification offered was adequate.[37]

Two circumstances precluding wrongfulness merit brief attention because they are frequently invoked, whether explicitly or implicitly, to justify low prison wages: necessity and the State's margin of discretion in matters of penal policy. Neither is persuasive as a general defence. Necessity, under Article 25 of the ILC Articles, requires that the conduct in question be the only way to safeguard an essential interest against a grave and imminent peril, a threshold that ordinary budgetary constraint does not meet; the ICESCR's own progressive-realisation clause already builds resource limitations into the primary obligation, making resort to the secondary defence of necessity both unnecessary and, on the facts of most prison wage regimes, unavailable.[38] The margin-of-appreciation reasoning deployed by the European Court in Stummer is not, properly understood, a circumstance precluding wrongfulness at all, but an interpretive technique for determining the content of the primary obligation under the Convention in the first place; its availability, and its width, will vary by treaty regime, and it offers no answer under instruments, such as the ICESCR, that do not incorporate a comparable doctrine.

4.5 Accountability Mechanisms and Their Limits

Three families of mechanism currently exist through which prison wage injustice might, in principle, be addressed at the international level, and each suffers from a distinct limitation. The first is periodic reporting to UN treaty bodies — principally the Human Rights Committee under the ICCPR and the Committee on Economic, Social and Cultural Rights under the ICESCR — supplemented by the Universal Periodic Review. These procedures can generate concluding observations expressing concern at prison wage levels, as the Human Rights Committee has done in respect of the United States, but they produce no binding remedy, no quantified standard, and no mechanism for individual redress, and their findings depend entirely on State self-reporting supplemented by shadow reports from civil society, which are patchy in coverage across jurisdictions.[39] The second is regional human rights adjudication, principally before the European Court of Human Rights and, to a lesser extent, the Inter-

[37]Stummer, App. No. 37452/02, ¶¶ 89–10; ICCPR, supra note 3, art. 26; ICESCR, supra note 3, art. 2(2).
[38]ILC Draft Articles, supra note 12, art. 25.
[39]See supra note 11 and accompanying discussion.

American Court, which can produce binding judgments and, occasionally, just satisfaction awards, but which — as Stummer illustrates — has so far declined to articulate a demanding wage standard and affords States a wide margin of appreciation in this specific area, limiting the mechanism's capacity to drive convergence toward equitable remuneration.

The third, and in practice the most consequential, mechanism is domestic constitutional and statutory litigation, illustrated by the Indian jurisprudence discussed above. Domestic litigation has the advantage of enforceability and, where courts adopt an expansive dignity-based approach, can produce standards considerably more protective than anything yet articulated at the international level. Its limitation is equally clear: it is available only where domestic constitutional text and judicial culture permit it, it produces divergent standards across jurisdictions with no mechanism for harmonisation, and, as the persistence of sub-minimum prison wages in India notwithstanding State of Gujarat demonstrates, a favourable judicial ruling does not guarantee administrative compliance absent sustained monitoring.[40] None of the three mechanisms, individually or in combination, currently performs the function that an accountability mechanism for prison wage injustice would need to perform: articulating a reasonably determinate international standard of equitable remuneration, monitoring compliance with that standard on a systematic basis, and providing an avenue, whether through State reporting, inter-State complaint, or individual communication procedures, for testing specific instances of alleged non-compliance against it.

5. Findings and Recommendations

This paper's analysis yields four principal findings. First, the international law of forced labour and the international law of just remuneration are analytically distinct regimes that happen to intersect in the prison context; the punishment exception in ILO Convention No. 29 and Article 8 ICCPR resolves only the former question and was never intended, on its drafting history, to resolve the latter. Second, despite this analytical distinctness, a significant body of domestic jurisprudence — most clearly in the United States, more subtly in the United Kingdom — has conflated the two, treating exemption from the forced-labour prohibition as if it were also exemption from any wage obligation. Third, where domestic courts have instead anchored the wage obligation in a free-standing guarantee of dignity, as the Indian Supreme Court has done through Article 21 of the Constitution, a considerably more protective standard

[40] See supra note 20 and accompanying text (noting uneven implementation of the Gujarat directions).

becomes available, though implementation gaps persist. Fourth, the law of State responsibility supplies a workable, if underused, framework for characterising chronic, unjustified prison wage underpayment as an internationally wrongful act on the part of States party to the ICESCR and comparable instruments, but existing accountability mechanisms lack the institutional capacity to give that characterisation practical effect.

On the basis of these findings, the paper makes five recommendations. **First**, the ILO supervisory bodies, in consultation with the UN human rights treaty bodies, should issue an authoritative General Comment or equivalent interpretive instrument clarifying that Article 2(2)(c) of Convention No. 29 and Article 8(3) ICCPR resolve only the forced-labour question and leave the separate obligation of equitable remuneration, wherever it is sourced, fully intact. **Second**, the Committee on Economic, Social and Cultural Rights should adopt a General Comment on Article 7 ICESCR specifically addressing prison and other custodial labour, drawing on the Nelson Mandela Rules to articulate indicative benchmarks — for example, periodic indexation to a defined fraction of the national minimum wage — against which "equitable remuneration" under Rule 103 can be assessed. **Third**, States should be encouraged, through the Universal Periodic Review and treaty body reporting cycles, to disaggregate and publish prison wage data, without which neither domestic advocacy nor international monitoring can meaningfully assess compliance. **Fourth**, domestic courts in jurisdictions that have not yet done so should be invited, through strategic litigation and comparative constitutional argument, to adopt the Indian approach of grounding prison wage obligations in dignity guarantees rather than in labour-employment classification, thereby avoiding the doctrinal trap that has confined United States and United Kingdom law. **Fifth**, where private companies contract for prison labour, home and host States alike should be understood, consistent with Articles 5 and 8 of the ILC Articles and with the UN Guiding Principles on Business and Human Rights, to bear a due diligence obligation to ensure that such arrangements do not result in wages below the applicable equitable standard, with State responsibility engaged where that due diligence obligation is not discharged.[41]

6. Conclusion

The punishment exception at the heart of international forced-labour law was designed to answer a narrow question: whether labour lawfully exacted from a convicted person, under

[41]Guiding Principles on Business and Human Rights, Principle 1, U.N. Doc. HR/PUB/11/04 (2011).

public supervision and free of private exploitation, counts as forced labour. It was not designed, and on a careful reading of its text and drafting history cannot plausibly be read, to answer the separate question of what such labour must be paid. The conflation of these two questions in significant strands of domestic law has produced a durable accountability gap, in which States face virtually no international scrutiny for the wages, however nominal, that they pay their incarcerated workforce. This paper has argued that the gap can be closed without any new treaty-making: the UDHR, the ICESCR, and the Nelson Mandela Rules already supply the substantive content of an obligation of equitable prison remuneration, and the ILC Articles on State Responsibility already supply the secondary rules through which breach of that obligation can be attributed to States and characterised as internationally wrongful. What is missing is not law but institutional will — the willingness of treaty bodies to articulate the standard with greater precision, of States to collect and disclose the relevant data, and of domestic courts to follow the Indian courts in locating the wage obligation in the guarantee of a dignified life rather than in the increasingly threadbare categories of employment law. Rethinking State responsibility for prison wage injustice along these lines would not abolish the punishment exception; it would simply hold that exception to its proper, and always more modest, scope.

References / Bibliography

Blackmon, Douglas A., Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008).

Benns, Whitney, American Slavery, Reinvented, The Atlantic (Sept. 21, 2015).

Foucault, Michel, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

Penal Reform International & Thailand Institute of Justice, Guidance Document on the Nelson Mandela Rules (2018).

Zatz, Noah D., Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships, 61 Vand. L. Rev. 857 (2008).

International Instruments

Forced Labour Convention, 1930 (No. 29), June 28, 1930, 39 U.N.T.S. 55.

Abolition of Forced Labour Convention, 1957 (No. 105), June 25, 1957, 320 U.N.T.S. 291.

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).

Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001), annexed to G.A. Res. 56/83 (Dec. 12, 2001).

Guiding Principles on Business and Human Rights, U.N. Doc. HR/PUB/11/04 (2011).

Cases

Stummer v. Austria, App. No. 37452/02, Grand Chamber Judgment, 2011-VI Eur. Ct. H.R. (July 7, 2011).

Van Droogenbroeck v. Belgium, App. No. 7906/77, Judgment, 50 Eur. Ct. H.R. (ser. A) (June 24, 1982).

De Wilde, Ooms and Versyp v. Belgium, App. Nos. 2832/66, 2835/66, 2899/66, Judgment, 12 Eur. Ct. H.R. (ser. A) (June 18, 1971).

Muršić v. Croatia, App. No. 7334/13, Grand Chamber Judgment, 2016-VI Eur. Ct. H.R. (Oct. 20, 2016).

Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992).

Ali v. Johnson, 259 F.3d 317 (5th Cir. 2001).

Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871).

People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235 (India).

State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392 (India).

Stanfield v. Minister of Correctional Services 2004 (4) SA 43 (C) (S. Afr.).