



Written Statement of the American Civil Liberties Union

**Before the United Nations Working Group on the
Use of Mercenaries as a Means of Violating
Human Rights and Impeding the Exercise
of the Right of Peoples to Self Determination**

Panel on

*Private Military and Security Companies in Places of
Deprivation of Liberty and their Impact on Human Rights*

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The American Civil Liberties Union (ACLU) welcomes this opportunity to submit testimony to the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self Determination, for this panel on Private Military and Security Companies in Places of Deprivation of Liberty and their Impact on Human Rights.

For nearly 100 years, the ACLU has been the guardian of liberty in the United States of America, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution, the laws, and ratified treaties of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties issues and cases to defend all people from government abuse and overreach. With more than two million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin. Consistent with that mission, the ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of incarcerated people. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state, and federal levels through public education, advocacy, and successful litigation.

The ACLU submits this testimony to highlight our grave concerns with the use of private military and security companies in places of deprivation of liberty, including prisons, jails, and immigration detention facilities. Because the ACLU has been asked to testify on Panel II ("Accountability and remedy for victims of human rights abuses"), our testimony will focus on the gaps in accountability and remedy mechanisms in privatized places of deprivation of liberty, and measures to strengthen such accountability.

I. The History, Extent, and Terrible Human Rights Record of For-Profit Incarceration

The modern private prison industry began in 1983 with the founding of the U.S.-based company Corrections Corporation of America. In the ensuing 34 years, this company and the broader private prison industry have grown tremendously, along with the increasing use of immigration detention and the rise of mass incarceration in the United States.¹ Today, the United States holds the dubious distinction of being the world's leader in incarceration, with more than 2 million people behind bars.² And although the U.S. holds a smaller percentage of its prisoners in private prisons than some other countries, the sheer size of the U.S. prison system means that it nevertheless maintains the largest number of privately-incarcerated prisoners in the world.³

¹ Carl Takei, Michael Tan & Joanne Lin, ACLU, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*, at 9-10 (2016), https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf; David Shapiro, ACLU, *Banking on Bondage: Private Prisons and Mass Incarceration*, at 10-12 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

² Sentencing Project, *Trends in U.S. Corrections*, at 2 (Mar. 7, 2017), <http://www.sentencingproject.org/publications/trends-in-u-s-corrections/>.

³ Cody Mason, Sentencing Project, *International Growth Trends in Prison Privatization*, at 2 (Aug. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/International-Growth-Trends-in-Prison-Privatization.pdf>.

Private prisons are now an international, multi-billion-dollar industry. The three largest U.S.-based private prison companies are the Corrections Corporation of America (which recently rebranded as “CoreCivic”⁴ and is therefore referred to as “CCA/CoreCivic” in this document), GEO Group, and Management & Training Corporation (MTC). Of these companies, CCA/CoreCivic currently operates only in the United States, but the other two have expanded internationally. GEO Group operates five prisons in Australia, one prison in South Africa, and one immigration detention facility in the United Kingdom of Great Britain and Northern Ireland.⁵ Meanwhile, MTC recently launched “MTCNovo,” a joint venture with multiple U.K.-based partners that operates three correctional facilities in the U.K.⁶

Additionally, two major private prison companies based in the U.K. have both developed an increasingly broad international footprint in recent years: G4S and Serco. G4S operates prisons, immigration detention facilities, and youth detention facilities through its various subsidiaries, including G4S Secure Solutions and G4S Youth Services, in several countries.⁷ Serco operates prisons and immigration detention facilities in the U.K., Australia, and New Zealand; the company also recently began lobbying to obtain immigration detention contracts in the United States.⁸ In general, prison privatization appears to be most prevalent in Anglophone countries. It is not clear whether this pattern is due to the fact that the dominant private prison companies are all based in the U.S. and U.K., or if it is due to other factors.⁹

Notably, Israel’s Supreme Court decided in 2009 that prison privatization is inherently impermissible, because the delegation of the State’s most invasive powers to a private, profit-motivated corporation violates the human dignity of the people held inside and undermines the legitimacy of that imprisonment.¹⁰

In the United States, each of the fifty states operates its own state prison system for people convicted of state crimes. The federal prison system is a separate system that holds people convicted of federal crimes; it is overseen by the Federal Bureau of Prisons (BOP), an agency of the U.S. Department of Justice. Meanwhile, immigration detention facilities comprise a third independent system; such facilities can be overseen either by Immigration and Customs Enforcement (ICE) or by Customs and Border Protection (CBP), with ICE being responsible for all facilities intended to hold people for more than 72 hours. Both ICE and CBP are agencies of the U.S. Department of Homeland Security.

U.S. state prison officials rely on private prison companies to widely varying degrees. In 2015, for example, Texas state authorities held 14,293 people in private prisons and Florida state authorities held 12,487 people in private prisons, while nineteen U.S. states did not rely on

⁴ See Devlin Barrett, *Private-Prison Firm CCA to Rename Itself CoreCivic*, THE WALL STREET JOURNAL (Oct. 28, 2016), <https://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800>.

⁵ GEO Group, 2016 Annual Report, at 11 (Feb. 2017).

⁶ MTCNovo, “Services” (undated), <http://www.mtcnovo.co.uk/services/> (last visited Apr. 15, 2017).

⁷ G4S, 2016 Integrated Report and Accounts, at 161-75 (2017).

⁸ Oliver Laughland & Renee Feltz, *British firm aims to open immigration detention center near US-Mexico border*, THE GUARDIAN (June 9, 2016), <https://www.theguardian.com/business/2016/jun/09/texas-mexico-detention-center-serco-obama-administration>.

⁹ See *International Growth Trends in Prison Privatization*, supra note 3 at 2.

¹⁰ *Academic Center of Law and Business v. Minister of Finance, Israeli High Court of Justice*, Case No. HCJ 2605/05 (November 19, 2009)

private prisons at all.¹¹ The U.S. federal government, however, relies more heavily on private prisons than any U.S. state. In 2015, the Federal Bureau of Prisons held 34,934 people in private prisons—nearly 18% of the total federal prison population.¹² Meanwhile, Immigration and Customs Enforcement overwhelmingly relies on private prisons. In late 2016 (the most recent statistics available), 73 percent of the approximately 40,000 people detained by the agency were held in facilities operated by private prison companies. This represented a significant increase over 2009, when 49 percent of ICE detention beds were run by private prison companies.¹³

The United States' heavy federal reliance on private prisons has enriched private prison investors while taking a terrible human toll. The private prisons that contract with the Federal Bureau of Prisons have come under particular scrutiny in recent years.¹⁴ In 2016, after extensive NGO and media exposure of abuses in these private prisons, the U.S. Department of Justice's Office of Inspector General published a damning report that identified a litany of potentially deadly "deficiencies" ranging from medical care, to violence, to the misuse of solitary confinement cells as overflow housing.¹⁵ These findings spurred the Justice Department to announce, on August 18, 2016, that it would begin phasing out all of the Bureau of Prisons' private prison contracts.¹⁶ (On February 23, 2017, however, the Trump administration announced the reversal of this decision.¹⁷ The reversal was not based on any new research; in fact, the Office of Inspector General had released another negative audit of private prison contracting just two months prior, in December 2016.¹⁸)

The private prisons that contract with Immigration and Customs Enforcement have also received considerable scrutiny. Immigration detention is ostensibly non-punitive; it exists primarily to hold people while their court proceedings are pending and to ensure compliance with any court orders, rather than to serve as punishment.¹⁹ Nevertheless, from the Bush administration²⁰ to the

¹¹ E. Ann Carson & Elizabeth Anderson, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2015*, NCJ 250229, at 28 Appendix Tbl. 2 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

¹² *Id.*

¹³ *Shutting Down the Profiteers*, *supra* note 1 at 9-10.

¹⁴ See ACLU, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System* (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>; Seth Freed Wessler, *This Man Will Almost Certainly Die*, THE NATION (Jan. 28, 2016), <https://www.thenation.com/article/privatized-immigrant-prison-deaths/>; Seth Freed Wessler, *Federal Officials Ignored Years of Internal Warnings About Deaths at Private Prisons*, THE NATION (June 15, 2016), <https://www.thenation.com/article/federal-officials-ignored-years-of-internal-warnings-about-deaths-at-private-prisons/>.

¹⁵ Office of the Inspector General, U.S. Dep't of Justice, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, Evaluation and Inspections Division 16-06 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁶ Matt Zapotosky & Chico Harlan, *Justice Department says it will end use of private prisons*, WASH. POST (Aug. 18, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/>.

¹⁷ Matt Zapotosky, *Justice Department will again use private prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.3b3893a8e149.

¹⁸ Office of the Inspector General, U.S. Dep't of Justice, *Audit of the Federal Bureau of Prisons' Contract with CoreCivic, Inc. to Operate the Adams County Correctional Center in Natchez, Mississippi*, Audit Division 17-08 (Dec. 2016), <https://www.oig.justice.gov/reports/2016/a1708.pdf>.

¹⁹ See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

²⁰ See, e.g., *Lost in Detention*, FRONTLINE (Oct. 18, 2011), <http://www.pbs.org/wgbh/frontline/film/lost-in-detention/>; Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. TIMES (May 5, 2008), <http://www.nytimes.com/2008/05/05/nyregion/05detain.html>.

Obama administration, multiple NGO reports and press reports have outlined the ongoing failure of ICE to safeguard the human rights of people held in its sprawling network of detention facilities, a system that is composed of jails and jail-like facilities and relies extremely heavily on private prison contractors.²¹ The U.S. Commission on Civil Rights, an independent, bipartisan, fact-finding federal agency, affirmed these findings in a 2015 report.²² Human rights bodies, including the U.N. Human Rights Committee, have expressed similar concerns regarding conditions of confinement in U.S. detention facilities, including private detention facilities.²³

Watchdog organizations in other countries have highlighted similar serious complaints about mistreatment by private prison companies, particularly in the realm of immigration detention. Until the U.K.'s High Court ruled the detention of children unlawful in 2011, private-prison contractor Serco operated Yarl's Wood as a family detention center. A 2009 report by the U.K.'s Children's Commissioner described the environment at Yarl's Wood as "bleak and grey" and noted that many children said it "felt very much like a prison." Meanwhile, health care was "below the standard we would expect to be provided by the National Health Service (NHS)" and inadequately addressed children and adults with mental health needs.²⁴

Similarly, in 2014, the Australian Human Rights Commission conducted a detailed inquiry into Australia's practice of contracting with Serco to hold children in immigration detention at Christmas Island. Among other things, the report identified numerous incidents of assault, sexual assault, and self-harm involving children.²⁵

II. Barriers to Accountability for Private Prison Companies

Like other forms of private military and security contractors, private-prison companies exercise State-like privileges of force and coercion without being subject to the same accountability and oversight mechanisms as State actors. Particularly since the accountability mechanisms for State

²¹ See, e.g., Human Rights First, *Family Detention: Still Happening, Still Damaging* (Oct. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>; ACLU, Detention Watch Network, & National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* (Feb. 2016), http://immigrantjustice.org/sites/immigrantjustice.org/files/Fatal%20Neglect_ACLU%2C%20DWN%2C%20NIJC.pdf; *Shutting Down the Profiteers*, *supra* note 1; Southern Poverty Law Center, National Immigration Project of the National Lawyers Guild, Adelante Alabama Worker Center, *Shadow Prisons: Immigrant Detention in the South* (Nov. 2016), https://www.splcenter.org/sites/default/files/leg_ijn_shadow_prisons_immigrant_detention_report.pdf; Detention Watch Network, *A Toxic Relationship: Private Prisons and U.S. Immigration Detention* (Dec. 2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship_DWN.pdf ; .

²² U.S. Commission on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* (Sept. 2015), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

²³ U.N. Human Rights Committee, Concluding observations on the fourth periodic review of the United States of America, CCPR/C/USA/CO/4, ¶ 20 (Apr. 23, 2014).

²⁴ Children's Commissioner for England Report, *The Arrest and Detention of Children Subject to Immigration Control: A report following the Children's Commissioner for England's visit to Yarl's Wood Immigration Removal Centre* (Apr. 2009), http://www.childrenscommissioner.gov.uk/force_download.php?fp=%2Fclient_assets%2Fcp%2Fpublication%2F361%2Fimmigration_control_full_report.pdf.

²⁵ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), http://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.

actors are already insufficient to deter many abuses, this leads to impunity for many contractors who engage in human rights abuses.

Even State-operated prisons are secretive institutions that tend to resist reform. In a place whose very purpose is to assert total State control over the bodies of the people inside, it is already difficult for citizens and non-governmental organizations to carry out the kind of observation and activism that is possible, for example, with police forces that operate in public spaces. But when a for-profit company takes over the institution, this inherently closed nature functions to shield the activities of an entity whose primary duty is to deliver value to its shareholders.

The U.N. Human Rights Council was correct to emphasize its utmost concern that private prison companies and their personnel “are rarely held accountable for violations of human rights.”²⁶ The experience of the United States with such companies helps illustrate that this concern is well-founded and will be extraordinarily difficult to address with measures short of an outright prohibition against the use of private, for-profit prisons.

1. Market-Based Mechanisms Fail to Ensure Accountability

The U.N. Human Rights Council’s September 29, 2016 resolution encouraged States to “establish national regulatory mechanisms for the registering and licensing” of private military and security contractors, “in order to ensure that imported services provided by those companies neither impede the enjoyment of human rights nor violate human rights in the recipient country.”²⁷ However, the United States has not adopted any such national regulatory mechanisms for the operation of private prisons. Accordingly, contract terms and agency oversight serve as the only real restrictions on the activities of private prison contractors, and the U.S. can serve as a test case for other countries considering similar forms of prison privatization. The U.S. experience shows that such reliance on market-based mechanisms cannot adequately protect the human rights of people in the custody of private prison contractors.

Indeed, the agencies that are most heavily dependent on private prison contractors are the most at the mercy of these contractors. Take the U.S. Immigration and Customs Enforcement agency, for example. In a given detention contract, the agency may apply one of three different generations of detention standards (ranging from outdated standards that pre-date the creation of ICE as a separate agency, to the agency’s most recent standards, promulgated in 2011), with the variations depending largely on the contractor’s willingness or resistance to adopt new standards.²⁸ And these standards are poorly enforced; ICE’s oversight mechanisms often fail to identify and address violations, and do not punish detention contractors even when substandard medical care contributes to preventable deaths in detention.²⁹ However, because ICE lacks the capacity to

²⁶ Human Rights Council, Resolution adopted by the Human Rights Council on 29 September 2015, A/HRC/33/4 ¶ 7 (Oct. 5, 2016).

²⁷ *Id.* ¶ 6.

²⁸ U.S. Government Accountability Office, GAO-15-153, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards* (Oct. 2014), <http://www.gao.gov/assets/670/666467.pdf>; National Immigrant Justice Center, *The Immigrant Detention Transparency and Human Rights Project: August 2015 Report*, at 4, 10 (Aug. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf>.

²⁹ See GAO, *supra* note 28; Detention Watch Network & National Immigrant Justice Center, *The Immigration Detention Transparency and Human Rights Project, Lives in Peril: How Ineffective Inspections Make ICE Complicit*

carry out detention itself, it is deeply entangled with private security contractors.³⁰ In December 2016, a report by the Homeland Security Advisory Council, an expert panel convened by the U.S. Secretary of Homeland Security, noted that “[b]ecause legitimate restriction on physical liberty is inherently and exclusively a governmental authority, much could be said for a fully government-owned and government-operated detention model, if one were starting a new detention system from scratch.” However, the committee splintered over the question of whether ICE should continue its reliance on private-prison contractors, in large part because shifting away from such reliance would require a wholesale change in the agency’s model of detention.³¹

Even in correctional systems that have not lost these in-house capabilities, the lock-in effects created by dependence on a particular contractor are a serious issue. As soon as an agency houses too many people in private prisons to easily relocate them, its officials lose the ability to quickly cancel contracts if they become dissatisfied with the performance of their contractors. As one commentator noted, “Plainly, the states need to house their prisoners somewhere,” and because the private-prison contractors know this, they understand that if they fail to provide satisfactory contract performance, they may still be able to retain the contract.³²

An example of this dynamic is the Kingman prison in Arizona. In 2010, three men imprisoned at Kingman escaped from the prison, which was operated by private prison company MTC. They then carjacked and murdered an elderly couple before being rearrested. After the escape, the Arizona state authorities conducted a security review, which concluded that MTC’s staff were inexperienced, undertrained, and routinely ignored alarms. The state government responded by transferring 238 prisoners out of the prison, but MTC in turn threatened to sue state officials, claiming that the state’s removal of these prisoners violated a 97% minimum occupancy guarantee in its contract. In the end, the state agreed to compensate MTC an additional \$3 million for the empty prison beds and maintained its contract with MTC until 2015. And when the state finally cancelled MTC’s contract, officials awarded it to a different private prison company that had contributed \$52,000 to the governor’s reelection campaign.³³

The lock-in problem is even worse when a private prison company both owns and manages the prison: in that situation, cancelling contracts and relocating prisoners would require government officials to either build an entire new prison or identify available space elsewhere (usually out-

in Immigration Detention Abuse (Oct. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf>; ACLU, Detention Watch Network, & National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* (Feb. 2016), <http://immigrantjustice.org/sites/immigrantjustice.org/files/Fatal%20Neglect%20DWN%20NIJC.pdf>.

³⁰ See Carl Takei, *From Mass Incarceration to Mass Control and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 81, 101-04 (2017).

³¹ See Homeland Security Advisory Council, *Report of the Subcommittee on Privatized Immigration Detention Facilities*, at 5, 11 (Dec. 1, 2016),

<https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>. A majority of the subcommittee that authored the report recommended continued reliance on private prison contractors.

However, when the report was presented to the full advisory committee for approval, a majority of voting members instead endorsed the dissenting view that ICE should begin a “measured but deliberate shift away from the private prison model.” *Id.* at 11 & n. 14.

³² See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 495-500 (2005) (discussing limited willingness of state agencies to cancel private prison contracts).

³³ See Takei, *supra* note 30 at 107; David Shapiro, American Civil Liberties Union, *Banking on Bondage: Private Prisons and Mass Incarceration*, at 29 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

of-state) owned by another private prison company.³⁴ Indeed, CCA/CoreCivic tells its investors that its owned-and-managed facilities have a greater than 90% contract retention rate because of “high barriers to entry & switching costs.” For its government customers, constructing a replacement prison would require “significant capital” and a “[l]ong construction timeline.”³⁵

In 2010, for example, the Federal Bureau of Prisons was considering whether to renew its contract with the GEO Group’s Reeves prison in Texas. Although BOP officials concluded that the prison contractor “did not fulfil [sic] contract terms from [2006] award until Oct. 2010,” “Lack of healthcare has greatly impacted inmate health and wellbeing,” and “Contractor shows little sign of improvement,” they chose to renew the contract because non-renewal would cost time and money and cause BOP to lose its “credibility as a solid customer” with the private prison companies.³⁶ In exchange for that customer “credibility,” however, the agency sacrificed both human rights and fiscal prudence. A 2015 contract audit by the U.S. Department of Justice’s Inspector General identified numerous subsequent performance and staffing issues at Reeves, as well as millions of dollars in “unallowable or unsupported costs” paid to the contractor.³⁷

Some commentators have suggested that social impact bonds and so-called “pay for success” schemes—adjusting the compensation of private prison contractors according to whether prisoners released from their institutions have better or worse recidivism statistics than public prisons—would alleviate these problems.³⁸ Unfortunately, social impact bonds have a troubling track record, particularly in the prison and jail sector.³⁹ Additionally, tying contract compensation to recidivism rates is a dangerous path, for three reasons:

- It is too easy for the companies to subtly shift the metrics or game the system in ways that favor them. For example, there is evidence that private prisons already do this in existing contracts by screening out prisoners who require too much medical care.⁴⁰
- In systems where a company has multiple contracts with different incentive structures, it is too easy for the company to defeat the incentives built into any particular contract by arbitraging prisoners between different contracts, and this arbitraging problem only

³⁴ See Takei, *supra* note 30, at 107-09.

³⁵ CCA, Fourth Quarter 2015 Investor Presentation, at A-13, (Feb. 2016), <http://www.cca.com/investors/presentations-webcasts-events> (click on “Fourth Quarter 2015 Investor Presentation”).

³⁶ *Warehoused and Forgotten*, *supra* note 14 at 54-55.

³⁷ Office of the Inspector General, U.S. Dep’t. of Justice, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007 Awarded to Reeves County, Texas to Operate the Reeves County Detention Center I/II Pecos, Texas*, 8-38 (April 2015), <https://oig.justice.gov/reports/2015/a1515.pdf>.

³⁸ See Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339 (2013); Lauren-Brooke Eisen, *Private prisons are poised for a comeback under Trump. Here’s how to reform them*, VOX (Jan. 13, 2017), <http://www.vox.com/the-big-idea/2017/1/13/14258350/private-prisons-reform-trump-incarceration>

³⁹ See Donald Cohen & Jennifer Zelnick, *What We Learned from the Failure of the Rikers Island Social Impact Bond*, NONPROFIT QUARTERLY (Aug. 7, 2015), <https://nonprofitquarterly.org/2015/08/07/what-we-learned-from-the-failure-of-the-rikers-island-social-impact-bond/>; In the Public Interest, *A Guide to Evaluating Pay for Success Programs and Social Impact Bonds* (Dec. 2015), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Pay-for-Success-Guide-Dec-2015.pdf>.

⁴⁰ See Christopher Petrella, ACLU, *An Open Letter to the Corrections Corporation of America* (July 2014), https://www.aclu.org/sites/default/files/field_document/open_letter_to_cca_final.pdf; Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, No. 3 RADICAL CRIMINOLOGY 81 (2014).

worsens as these companies continue to vertically integrate.⁴¹ In the United States, CCA/CoreCivic and GEO Group are aggressively pursuing such vertical integration opportunities by expanding into reentry functions.⁴² Meanwhile, in the U.K., Serco and G4S are already advertising the vertically-integrated nature of their services for this “market.”⁴³

- It is quite difficult to establish that a given recidivism reduction was caused by in-prison programs rather than post-prison experiences or other factors. These causation problems practically invite the private prison industry to continue their expansion into reentry functions and to create a vertically-integrated system of fully-privatized jails, prisons, and reentry functions.⁴⁴

2. Private Prisons Require Aggressive Oversight

As set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), States contracting with private prison contractors should not rely solely on inspections conducted by the agency contracting with the private prison company. They should also permit external inspections conducted by a body that is fully independent of the agency and that will routinely make its reports public, as well as facilitate contact between detainees and the outside world.⁴⁵ Even in circumstances where the companies know that they are subject to independent oversight, however, there are examples of private prison contractors engaging in practices that impede or evade oversight activities. Accordingly, States contracting with private prison contractors would be well-advised to set up oversight mechanisms that assume the contractors are dishonest and that they will seek to deliberately circumvent oversight mechanisms. Otherwise, serious misconduct may well go undetected and unpunished.

CCA/CoreCivic’s conduct in the “Gladiator School” prison in Idaho is a particularly disturbing example of such efforts to evade oversight. In 2010, the ACLU sued CCA/CoreCivic over the extraordinary level of violence at its Idaho Correctional Center, which prisoners nicknamed the “Gladiator School.” In 2011, the parties agreed to settle the lawsuit after CCA/CoreCivic promised to make a number of improvements, including meeting specific requirements for security staffing. Two years later, however, it became clear that company officials had actually been falsifying thousands of hours of records to make it appear as if they were actually staffing security posts that had remained empty. In response, the ACLU asked the judge to find CCA/CoreCivic in contempt of court, forced CCA/CoreCivic to turn over more records, and called CCA/CoreCivic employees to testify. Ultimately, the federal court in Idaho found the company in contempt of court, extended the period of court supervision of CCA/CoreCivic’s

⁴¹ See Takei, *supra* note 30 at 157-58.

⁴² *Id.* at 116-18.

⁴³ See Serco, Safeguarding society and reducing reoffending, <https://www.serco.com/sector-expertise/justice> (last visited Apr. 19, 2017) (describing “market segments” as including full prison management, courts services, electronic monitoring, offender communities, police support services, prison programs, and prisoner escorting and court services); G4S, Care and Justice Services, <http://www.g4s.com/en/What-we-do/Services/Care-and-Justice> (last visited Apr. 19, 2017) (describing G4S “care and justice market” solutions as including electronic monitoring; custody, detention and rehabilitation; secure health; forensic medical and police support; and secure transport).

⁴⁴ See In the Public Interest, *supra* note 39.

⁴⁵ See United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), Rules 58-63, 83-85.

compliance, ordered the appointment of an independent monitor, and set prospective fines of \$100 per hour for each mandatory posts left unstaffed in the future.⁴⁶ However, CCA/CoreCivic appealed the sanctions to the U.S. Court of Appeals for the Ninth Circuit. In 2016 (three years after the contempt ruling and five years after the initial settlement), the appeals court upheld the 2013 sanctions against the company.⁴⁷

3. Occupancy Rate Guarantees Incentivize Over-Use of Private-Prison Contractors

Many private prison contracts include occupancy guarantees, sometimes referred to as “lockup quotas,” which require the government to either provide a certain number of prisoners on a daily basis or pay as if the empty prison beds were filled.

A 2015 report by In the Public Interest, a non-governmental organization, reviewed the contracts for 62 different U.S. state and county-level private prisons and jails, and found that 41 (65 percent of the total) contained a minimum occupancy guarantee. These guarantees ranged from 80 to 100 percent of capacity, with many around 90 percent.⁴⁸ Similarly, a 2015 report by Detention Watch Network and the Center for Constitutional Rights found minimum occupancy guarantees in many U.S. federal immigration detention contracts, adding up to a nationwide commitment to fill thousands of beds with detained immigrants.⁴⁹ No similar survey has been conducted of occupancy guarantees in private prison contracts outside of the United States, but—given the international nature of these companies—it would be surprising if they had not sought or obtained similar guarantees in other countries.

Occupancy guarantees improperly incentivize incarceration and discourage government officials from pursuing alternatives to incarceration. Their purpose is to protect the profit margins of private prison companies, which is not a proper public purpose. And they can improperly prevent private prison companies from suffering financial consequences for gross human rights violations. As noted above, when Arizona state officials transferred 238 prisoners out of the Kingman private prison in response to documented security failures, the private prison company used the 97% occupancy guarantee in the contract to force the state to compensate the company for the empty beds—even though the beds had gone empty precisely because of the company’s failure to manage the prison appropriately.

4. Grievance Mechanisms will be Insufficient Without State Intervention

The United States imposes no nationwide standards for prison grievance systems, leaving it up to individual prison systems how to handle prisoner grievances. Additionally, although the Federal Bureau of Prisons has a uniform nationwide grievance system for its own prisons, the Bureau’s

⁴⁶ See *Kelly v. Wengler*, 979 F. Supp. 2d 1104 (D. Idaho 2013).

⁴⁷ See *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016).

⁴⁸ In the Public Interest, *Criminal: How Lockup Quotas and “Low-Crime Taxes” Guarantee Profits for Private Prison Corporations*, at 9 (2015), <http://www.nijn.org/uploads/digital-library/Criminal-Lockup-Quota.-In-the-Public-Interest.-9.13.pdf>.

⁴⁹ Detention Watch Network & Center for Constitutional Rights, *Banking on Detention: Local Lockup Quotas & the Immigration Dragnet* (2015), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf>.

contracts with private prisons do not require private prison contractors to use this same system. Instead, the ACLU found in 2014 that many people held at private prisons cannot appeal grievances above the prison warden, who is an employee of the private prison company.⁵⁰ This lack of ability to appeal to a public official is troubling; to the extent it is replicated in other countries, leaving corporate employees as the final level of appeal for grievances is likely to impede accountability for human rights abuses.

A recent concerning trend in U.S. immigration detention is that increasing numbers of detainees have tried to protest their mistreatment and unnecessary detention by engaging in hunger strikes; such incidents appear to have increased as the population of asylum seekers in detention has risen in recent years.⁵¹ Similarly, the Australian Human Rights Commission noted that from January 2013 to March 2014, there were 183 incidents of voluntary starvation/hunger strikes, 27 of which involved children, in that country's detention facilities.⁵² Mass hunger strikes have also been reported in the U.K.'s detention facilities.⁵³ Disturbingly, private prison companies are willing to go to great lengths to squelch such protests. When detainees went on hunger strike at GEO's Northwest Detention Center in Tacoma, Washington to protest conditions of confinement and indefinite detention in 2014, GEO staff invited them to meet with an assistant warden to discuss their grievances—and then escorted them directly into solitary confinement cells without the promised meeting. They were released from solitary only after the ACLU of Washington and Columbia Legal Services filed a lawsuit alleging that these actions violated the First Amendment.⁵⁴ At CCA's Hutto detention facility in Texas, women who had been detained after seeking asylum began refusing to eat in November 2015 in protest of their continued detention; in news reports, ICE denied the existence of a hunger strike even as the women described CCA/CoreCivic retaliation.⁵⁵ It was later revealed that CCA/CoreCivic had adopted a written

⁵⁰ *Warehoused and Forgotten*, *supra* note 14 at 55.

⁵¹ See, e.g., Julián Aguilar, *For Detained Immigrants on Hunger Strikes, Results Aren't Guaranteed*, TEX. TRIB. (Nov. 28, 2015), <https://www.texastribune.org/2015/11/28/detained-immigrants-hunger-strikes-could-be-gamble/>; Associated Press, *Judge Approves Force-Feeding of Detainee on Hunger Strike* (Dec. 8, 2015), <https://www.yahoo.com/news/judge-approves-force-feeding-detainee-hunger-strike-234845109.html?ref=gs>; Jennifer Chowdhury, *South Asian Detainees Seeking Asylum*, NBC NEWS (Oct. 21, 2015, 3:29 PM), <http://www.nbcnews.com/news/asian-america/south-asian-detainees-seeking-asylum-hold-hunger-strike-n448681>; Elise Foley, *Detained Immigrant Women Claim Retaliation for Hunger Strike*, HUFFINGTON POST POL. (Nov. 3, 2015, 5:41 PM), http://www.huffingtonpost.com/entry/immigrant-detention-hunger-strike_563918c3e4b0307f2caaf975; Kate Linthicum, *Why 26 Asylum-Seekers in a California Detention Center Have Stopped Eating*, L.A. TIMES (Nov. 11, 2015, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-in-adelanto-hunger-strike-20151110-story.html>; Aviva Stahl, *More than 100 US Immigrant Detainees Are on Hunger Strike this Thanksgiving*, VICE NEWS (Nov. 26, 2015, 5:10 PM), <https://news.vice.com/article/more-than-100-us-immigrant-detainees-are-on-hunger-strike-this-thanksgiving>; *Why Immigrant Detainees In California Just Launched A Hunger Strike*, THINK PROGRESS (Nov. 2, 2015), <http://thinkprogress.org/immigration/2015/11/02/3718005/adelanto-hunger-strike/>; Roque Planas, *Immigration Detainees Begin Hunger Strike at Georgia Detention Center*, HUFFINGTON POST (Apr. 21, 2016, 7:18 pm ET) http://www.huffingtonpost.com/entry/immigration-detainees-hunger-strike_us_57194fd3e4b0d0042da8bfb1.

⁵² *The Forgotten Children*, *supra* note 25 at 62.

⁵³ Ben Gelblum & Henry Austin, *Yarl's Wood: Hunger strike at immigration removal centre for release of widow*, THE INDEPENDENT (April 22, 2015), <http://www.independent.co.uk/news/uk/yarls-wood-hunger-strike-at-immigration-removal-centre-for-release-of-widow-10196889.html>.

⁵⁴ Steven Hsieh, *After Lawsuit, ICE Releases Hunger Strikers From Solitary Confinement*, THE NATION (Apr. 4, 2014), <https://www.thenation.com/article/after-lawsuit-ice-releases-hunger-strikers-solitary-confinement/>.

⁵⁵ Alexis Garcia-Ditta, *Hutto Hunger Strike Reportedly Growing Despite ICE Denials*, TEXAS OBSERVER (Nov. 5, 2015), <https://www.texasobserver.org/hutto-hunger-strike-reportedly-growing-despite-ice-denials/>.

policy explicitly instructing its staff how to retaliate against detainees who are refusing to eat, which the policy described as “protesting in a passive aggressive manner.” The policy authorizes CCA/CoreCivic staff to put the facility on lock-down in response to a food strike, rescind commissary-purchasing privileges for the entire facility, and rescind TV, radio, visitation, and telephone access for those participating in the protest.⁵⁶

5. Lobbying and Influence-Peddling Impede Efforts to Impose Accountability on Contractors

Private prison companies make their revenue through contracts negotiated with public officials, so it is hardly surprising that a revolving door exists between public corrections agencies and private prison companies in the United States. In 2011, for example, Harley Lappin left his position as Director of the Federal Bureau of Prisons and joined CCA/CoreCivic as the company’s Chief Corrections Officer. The two largest U.S. private prison companies also engage in extensive lobbying of federal and state governments and contribute significant amounts of money to both federal and state campaigns for elected office.⁵⁷

Within the immigration enforcement context, private prison companies have also engaged in extensive lobbying and other influence-peddling that appears to be aimed at maintaining ICE’s heavy reliance on their industry.⁵⁸ There is also a similar revolving door between ICE and the private prison industry, which raises serious concerns about agency capture. David Venturella left a position as an assistant director at ICE (where he pushed to apprehend more immigrants to boost deportation numbers) to become Executive Vice President for Corporate Development at GEO.⁵⁹ Julie Myers Wood, formerly the DHS Assistant Secretary in charge of ICE, now serves on GEO’s board of directors.⁶⁰

6. The Relationship Between the State and Private-Prison Contractors Creates Barriers to Transparency

In the United States, the Freedom of Information Act requires federal agencies to disclose their records to the public upon request. However, the Act has never been found to apply to records that are in the possession of private prison companies—thereby keeping much basic information about private prison operations out of public view. CCA/CoreCivic has spent millions of dollars lobbying to defeat efforts to close this loophole in the Freedom of Information Act. Additionally, private prison companies have aggressively litigated to prevent disclosure of records about their operations even when these records are maintained by the federal agencies with which they

⁵⁶ *A Shocking Glimpse Inside America’s Privatized Detention Facilities for Immigrants*, THINKPROGRESS (Mar. 10, 2016) <http://thinkprogress.org/justice/2016/03/10/3757575/secretive-world-of-privatized-immigrant-detention/>.

⁵⁷ *Banking on Bondage*, *supra* note 33 at 36-40.

⁵⁸ Grassroots Leadership, *Payoff: How Congress Ensures Private Prison Profit with an Immigration Detention Quota*, at 11-13 (Apr. 2015), http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf

⁵⁹ Andrea Jones, *The For-Profit Immigration Imprisonment Racket*, ROLLING STONE (Feb. 22, 2013), <http://www.rollingstone.com/politics/news/the-for-profit-immigration-imprisonment-racket-20130222>; See also Center for Responsive Politics, *David Venturella Employment Timeline* (last visited Sept. 12, 2016), https://www.opensecrets.org/revolving/rev_summary.php?id=78082.

⁶⁰ GEO Group, *Board of Directors, Julie M. Wood* (last visited Sept. 12, 2016), http://www.geogroup.com/Julie_M_Wood

contract.⁶¹ Most recently, after the federal government chose to stop fighting disclosure of its immigration detention contracts with CCA/CoreCivic and GEO Group in a Freedom of Information Act lawsuit, the companies sought to intervene in the lawsuit to prevent disclosure of these contracts.⁶²

7. Legal Relief for People Harmed by Private-Prison Contractors is Limited

In the United States, civil legal liability is not sufficient to deter misconduct by private-prison employees, their supervisors, or the government officials charged with overseeing these contracts. Thus, to the extent that civil legal regimes in other countries mirror U.S. law, they are similarly inadequate.

Under U.S. law, federal civil rights statutes do subject private prisons and their employees to liability for constitutional violations when they contract with state and local-level agencies.⁶³ However, private prisons that contract with federal agencies have greater immunity from liability than their government counterparts. In 2001, the U.S. Supreme Court held that the companies themselves are immune from constitutional liability, and in 2012, the Supreme Court barred suits against private prison employees in most situations where they hold federal prisoners or detainees.⁶⁴ As U.S. Supreme Court Justice John Paul Stevens wrote in his dissent to the 2001 decision, immunizing private prisons from constitutional liability incentivizes the “corporate managers of privately operated custodial institutions to adopt cost-saving policies that jeopardize the constitutional rights of the tens of thousands of inmates in their custody.” Nevertheless, the decisions stand. Moreover, the complex contracting arrangements between public agencies and private prison contractors make it more difficult to hold public officials liable for human rights violations that occur in private prisons.

The consequences have been devastating. Take, for example, the Hutto sexual assault case. Between 2009 and 2010, a CCA/CoreCivic guard responsible for transporting detainees from the CCA/CoreCivic Hutto detention facility to the airport for deportation flights sexually assaulted multiple women while en route, typically at night. His modus operandi was to stop his van on the way to the airport, order each woman outside of the van, and sexually assault them on the side of the road. He was able to do this with impunity because, in violation of CCA/CoreCivic’s contract with ICE, the company permitted him to drive the women without a fellow guard in the van. The only reason why his sexual abuse came to light was that one of the women reported the abuse to an airport employee before boarding her deportation flight.⁶⁵

⁶¹ *Warehoused and Forgotten*, *supra* note 14 at 58-60.

⁶² See Center for Constitutional Rights, Detention Watch Network (DWN) v. Immigration Customs and Enforcement (ICE) and Department of Homeland Security (DHS) <https://ccrjustice.org/home/what-we-do/our-cases/detention-watch-network-dwn-v-immigration-customs-and-enforcement-ice-and> (last visited Apr. 17, 2017).

⁶³ See *Richardson v. McKnight*, 521 U.S. 339 (1997).

⁶⁴ See *Minneci v. Pollard*, 565 U.S. 118 (2012); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

⁶⁵ ACLU, *ACLU of Texas Today Files Federal Lawsuit on Behalf of Women Assaulted at T. Don Hutto Detention Center* (Oct. 19, 2011), <https://www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem>; ACLU of Texas, *Their Stories In Their Own Words* (Oct. 19, 2011), <https://www.aclutx.org/en/press-releases/hutto-sexual-abuse-case-background>; Renee Feltz, *Guard’s arrest highlights sexual assault of immigrant detainees*, PBS (Aug. 27, 2010), <http://www.pbs.org/wnet/need-to-know/security/lax-regulations-lead-to-sexual-assault-of-immigrant-detainees/3149/>.

Subsequently, the guard was criminally prosecuted for the sexual abuse. Eight of his victims then filed a civil lawsuit for damages against the guard, the guard's supervisors at CCA/CoreCivic, the individual federal officials who were supposed to be supervising the CCA/CoreCivic contract, the local government agency that was also a party to the contract, CCA/CoreCivic as a whole, and the federal government as a whole. In 2014, however, the U.S. Court of Appeals for the Fifth Circuit held that the federal officials should be dismissed from the lawsuit under the doctrine of qualified immunity; the court decided that, even though these officials knew that the guard was driving women alone in violation of the contract, "no clearly established law demonstrates that these contractual violations are sufficiently proximate to a substantial risk of serious harm" to the women he assaulted.⁶⁶ In 2016, the same court of appeals found that a lower court had acted properly in dismissing the claims against the local government, the federal government, CCA/CoreCivic, and the CCA/CoreCivic supervisors who had let this happen.⁶⁷ In other words, the only person ever held responsible was the lone guard; all of the individuals and institutions who had created the conditions for him to commit the assaults were let off without any penalty.

Had this guard been a federal employee, rather than a private prison employee, his supervisors and the federal government would not have been able to use the vagaries of these contracts to escape liability. Rather, the case would have turned on whether their knowledge and actions were sufficient to make them deliberately indifferent to the risk of harm.

III. Recommendations

The ACLU urges that States end the practice of contracting out the operation of prisons, jails, immigration detention facilities, and other sites of confinement to for-profit companies. However, to the extent that States continue to contract out such responsibilities, it is essential to build better accountability, oversight, transparency, and remedy mechanisms into both contract mechanisms and governing laws. The principles that should guide such efforts include:

- Ensure that private prison companies and their employees are subject to civil legal liability for violations of human rights, to at least the same extent as public agencies and employees.
- Ensure that private prison companies are required to fully adhere to the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), with particular attention to the rules regarding inspections and contact with the outside world.
- Ensure that records maintained by private prison companies are subject to transparency and open records laws, to the same or greater extent as public agencies.
- Ensure that private prison companies are unable to interfere with the release of records maintained by public agencies under open records laws.
- Ensure transparency regarding the lobbying activities and campaign contributions of private prison companies and their executives.

⁶⁶ *Doe v. Robertson*, 751 F.3d 383, 390 (5th Cir. 2014).

⁶⁷ *Doe v. United States*, 831 F.3d 309 (5th Cir. 2016).

- Regulate the revolving door between public agencies and private prison companies.
- Regulate the vertical integration of companies that provide private prisons, reentry services, and surveillance/monitoring services.
- Ensure that contracts between public agencies and private prison companies provide only limited flexibility to private prisons, set up a clear delineation of responsibilities, include robust monitoring provisions, and set forth effective means for addressing contractor non-compliance up to and including contract cancellation.⁶⁸

IV. Conclusion

The ACLU is grateful for the opportunity to address the Working Group. We hope that our testimony will be helpful to the Working Group as it implements Human Rights Council resolution 33/4.

⁶⁸ The U.S. non-governmental organization In the Public Interest has published a useful guide that contains recommendations for specific contract protections. See In the Public Interest, *Essential Public Interest Protections for Prison Privatization Contracts* (Oct. 2012), https://www.inthepublicinterest.org/wp-content/uploads/Prison_Privatization_FINAL.pdf.