



Complaints to the Swiss and United Kingdom National Contact Points under the Specific Instance Procedure of the 2023 OECD Guidelines for Multinational Enterprises

National Contact Points (NCPs)

Swiss National Contact Point
Holzikofenweg 36
3003 Bern
Switzerland

UK National Contact Point
Department for International Trade
Old Admiralty Building
Admiralty Place
London
SW1A 2DY
United Kingdom

Respondents

Swiss National Bank
Bundesplatz 1
3003 Bern
Switzerland

UBS
Bahnhofstrasse 45
8001 Zurich
Switzerland

Barclays
1 Churchill Place
London E14 5HP
United Kingdom

HSBC
8 Canada Square
London E14 5HQ
United Kingdom

Complainants

BankTrack
Vismarkt 15
6511 VJ Nijmegen
The Netherlands
Email contact: ryan@banktrack.org

Coalition for Immigrant Freedom
5030 Broadway, Suite 639
New York, NY 10034
United States
Email contact: ajoseph@coalitionfreedom.org

Worth Rises
85 Delancey Street, 2nd Floor
New York, NY 10002
Email contact: dfloberg@worthrises.org

Subject

Alleged non-compliance with the 2023 OECD Guidelines for Multinational Enterprises by Swiss National Bank, UBS, Barclays, and HSBC in relation to their business relations with CoreCivic and GEO Group.

Date

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Table of Contents

1.	Executive summary.....	4
2	Criteria for making an initial assessment	6
2.1	Jurisdiction.....	6
2.2	The identity of the parties concerned and their interest in the matter.....	7
2.2.1	The Complainants.....	7
2.2.2	The Respondents	8
2.3	Whether the issue is material and substantiated	8
2.3.1	The Respondents have failed to carry out adequate risk-based due diligence with regards to their investment activities.	8
2.3.2	The Respondents have failed to seek ways to prevent or mitigate adverse human rights impacts to which they are directly linked.	11
2.4	Whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance	19
2.4.1	The Respondents’ business links with CoreCivic and GEO Group	21
2.4.2	CoreCivic and GEO Group violate international prohibitions against arbitrary detention and ill treatment.	24
2.4.3	CoreCivic and GEO Group violate human rights related to international prohibitions against forced labour.	29
2.5	The relevance of applicable law and procedures, including court rulings	32
2.5.1	How similar issues have been, or are being, treated in other domestic or international proceedings	32
2.5.2	Similar specific instances against the Respondents	33
2.6	Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.....	34

1. Executive summary

BankTrack, Coalition for Immigrant Freedom, and Worth Rises (collectively, “the Complainants”) are submitting complaints to Switzerland’s and the UK’s National Contact Points (NCPs) against Swiss-based banks UBS and Swiss National Bank, and UK-based banks Barclays and HSBC (collectively, “the banks” or “the Respondents”) in alleging non-compliance with the 2023 OECD Guidelines for Multinational Enterprises (“2023 OECD Guidelines”). The complaints relate to the banks’ investments in CoreCivic and GEO Group, which are causing ongoing human rights violations against migrants and others detained in their immigration detention facilities.

CoreCivic and GEO Group are the largest private prison corporations contracting with the United States Department of Homeland Security (DHS), which oversees Immigration and Customs Enforcement (ICE), including immigration detention. CoreCivic and GEO Group operate the majority of private prisons and jails in the US. There have been numerous reports over the years of violence and abuse by CoreCivic and GEO Group (collectively “the contractors”) against the migrants and others they detain or transport.¹ Civil society organizations, government representatives, journalists, and academic scholars have documented the inhumane and abusive conditions often present in the detention facilities run by the contractors.² They often, for example, force detained migrants to perform uncompensated or undercompensated labour under threat of solitary confinement, physical restraint, suspension of attorney and family visitation, deprivation of necessities like food, water and hygiene products, and negative interference with ongoing asylum cases.³

The Respondents’ business links with the contractors began when the banks were held to the standards in the 2011 OECD Guidelines for Multinational Enterprises (“2011 OECD Guidelines”), which will therefore be referenced throughout these complaints. The harm has continued past

¹ TEXAS LAW IMMIGRATION CLINIC AND GRASSROOTS LEADERSHIP, CRUELTY AND CORRUPTION: CONTRACTING TO LOCK UP IMMIGRANT WOMEN FOR PROFIT AT THE HUTTO DETENTION CENTER 3, 8–9 (Mar. 2021) [hereinafter TEXAS LAW IMMIGRATION CLINIC] (detailing the history of abusive immigration detention at Hutto Detention Center).

² See, e.g., HUMAN RIGHTS FIRST, “I’M A PRISONER HERE”: BIDEN ADMINISTRATION POLICIES LOCK UP ASYLUM SEEKERS 10 (Apr. 2022) [hereinafter HUMAN RIGHTS FIRST]; ANTONIO CUCHO & KARRIE KEHOE, HOW US IMMIGRATION AUTHORITIES USE SOLITARY CONFINEMENT, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/solitary-voices/how-us-immigration-authorities-use-solitary-confinement/> (last visited Aug. 15, 2022); OFFICE OF INSPECTOR GEN., U.S., DEP’T OF HOMELAND SEC., OIG-19-47, CONCERNS ABOUT DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (Jun. 3, 2019).

³ Samantha Sherman, *Defining Forced Labor: The Legal Battle to Protect Detained Immigrants from Private Exploitation*, 88 U. CHICAGO L. REV. 1201, 1222–29 [hereinafter *Defining Forced Labor*]; TEXAS LAW IMMIGRATION CLINIC.

June 2023, the time at which the Respondents became subject to the more explicit expectations regarding due diligence and mitigation found in the 2023 OECD Guidelines.⁴ As of June 30, 2023, the banks each held considerable shares in CoreCivic or GEO Group (see 2.4.1). The Complainants have sought to engage with all the banks, describing the issues raised in these complaints to them in a May 2022 letter.⁵ The letter the Complainants sent the Respondents laid out each bank's shareholdings in CoreCivic and GEO Group, described the human rights violations the companies are causing, and asked for dialogue with the banks about their responsibilities under the Guidelines. Further engagement with some of the banks occurred in the period between September and December 2022. However, since then no bank has taken action to influence the contractors to prevent or mitigate the impacts raised in this complaint, in line with the banks' due diligence responsibilities under the OECD Guidelines. More information on engagement with the Respondents can be found in section 2.3.2.4.

Thus, despite efforts by the Complainants to engage with the Respondents and encourage them to utilize their leverage to address ongoing violations caused by the contractors, none of the Respondents have demonstrated an intention to utilize their leverage or address their links to the violations through their shareholdings, instead pointing to external entities and clients as the responsible parties.

The Complainants hope that the NCPs will accept the complaints and offer their good offices to the parties to encourage good faith dialogue on expectations regarding the scope of due diligence and use of the banks' individual and collective leverage. It may also further clarify the recommendations of the OECD relating to institutional investors in regard to passive investments in mutual funds, including index funds.

⁴ ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 15–19 (2023), <http://mneguidelines.oecd.org/mneguidelines/> [hereinafter 2023 OECD GUIDELINES].

⁵ For example, BANKTRACK AND COALITION FOR IMMIGRANT FREEDOM, Credit Suisse's Financial Ties to Human Rights Violations in US Immigration Detention Facilities Run by CoreCivic and GEO Group, (Apr. 20, 2022), https://www.banktrack.org/download/letter_from_banktrack_coalition_for_immigrant_freedom_to_credit_suisse_on_financial_ties_to_human_rights_violations/credit_suisse_corecivic_geo_group_letter.pdf [hereinafter BANKTRACK AND COALITION FOR IMMIGRANT FREEDOM].

2 Criteria for making an initial assessment

The Complainants respectfully submit that the issues raised in these complaints are bona fide and relevant to the implementation of the OECD Guidelines. The following sections address the criteria that the NCPs should consider when making an initial assessment.⁶

2.1 Jurisdiction

The Swiss and UK NCPs have jurisdiction over this complaint, as under the Guidelines' procedural rules, a complaint will ordinarily be dealt with in the country in which violations of the Guidelines have arisen.⁷ Specific instances or parts of specific instances relating to financial institutions are regularly handed by the NCPs in which the institution is domiciled.⁸

The OECD Guide for National Contact Points on Coordination when Handling Specific Instances (2019) furthermore stipulates that where the issues raised in a specific instance concern several NCPs, care should be taken to ensure that decisions made on coordination should “maximize the potential for the NCPs to contribute to the resolution of issues.”⁹

In *Society for Threatened Peoples vs. Credit Suisse*, concerning risks arising from the North Dakota Access Pipeline (DAPL), the Swiss NCP rejected the argument that the complaint should be referred to the US NCP and accepted it, since “according to the expectations of the submitting parties...the main issues to be discussed concern the coherence between internal policies of [Credit Suisse] regarding corporate responsibility (e.g. code of conducts and sector policies) and international standards such as the OECD Guidelines and their implementation in practice,” and Credit Suisse is headquartered in Switzerland.¹⁰ “For the discussion on such policies,” the NCP stated, it was therefore competent.¹¹ Similarly, in the *International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) v.*

⁶ ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 82–83 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter 2011 OECD GUIDELINES].

⁷ 2023 OECD GUIDELINES at 69.

⁸ See, e.g., SWITZERLAND NATIONAL CONTACT POINT, INITIAL ASSESSMENT, SPECIFIC INSTANCE REGARDING CREDIT SUISSE SUBMITTED BY THE SOCIETY FOR THREATENED PEOPLES SWITZERLAND 8 (Oct. 19, 2017), <https://www.oecdwatch.org/complaint/society-for-threatened-peoples-vs-credit-suisse/> [hereinafter SWITZERLAND NATIONAL CONTACT POINT] (involving impacts due to the North Dakota Access Pipeline and handled by the Swiss NCP).

⁹ ORG. FOR ECON. CO-OPERATION AND DEV., GUIDE FOR NATIONAL CONTACT POINTS ON COORDINATION WHEN HANDLING SPECIFIC INSTANCES 7 (2019), <https://mneguidelines.oecd.org/Guide-for-NCPs-on-Coordination-when-handling-Specific-Instances.pdf>.

¹⁰ SWITZERLAND NATIONAL CONTACT POINT.

¹¹ *Id.*

Norges Bank Investment Management (NBIM), the Norwegian NCP stated that since the “investors named in the submission are headquartered in the Netherlands and in Norway respectively, and the Dutch and Norwegian NCPs [were] therefore the correct entities to handle the parts of the submission relating to these investors’ due diligence.”¹²

The violations of the Guidelines alleged in these complaints relate to the failure to engage in due diligence, ultimately due to decisions made by the chief executive officers of the banks, based at their international headquarters in Switzerland and the UK. Specifically, the officers who represented the banks in conversations with the Complainants, and who demonstrated insufficient efforts or intentions to engage in due diligence and utilization of leverage are located in Switzerland and the UK. The banks should have assessed the human rights risks, acted to address them (including by exercising their leverage to encourage the contractors to prevent or mitigate the adverse impacts), and then communicated publicly what actions had been taken. Instead of this, at each level, there was failure to act. Because the practices that are the subject of these complaints are being determined at the highest levels of the banks in Switzerland and the UK, the involvement of the Swiss and UK NCPs is essential to facilitate fair and meaningful dialogue with those entities.

2.2 The identity of the parties concerned and their interest in the matter

2.2.1 The Complainants

BankTrack is a non-profit civil society organization founded in 2003 to track and campaign on private sector commercial banks and the activities they finance. It is based in the Netherlands, and its mission includes challenging commercial banks globally to act to respect human rights in accordance with international standards.

Coalition for Immigrant Freedom, is a non-profit organization whose mission is to educate, defend, and protect the rights of all immigrants. It is a frontline organization meeting the needs of underrepresented communities with direct legal services, education, and advocacy. Its clients include persons who have been detained in CoreCivic and GEO Group facilities.

Worth Rises is a non-profit advocacy organization founded in 2017 to address the prison industry’s exploitation of incarcerated people and their loved ones. Worth Rises advocates

¹² NORWAY NATIONAL CONTACT POINT, INITIAL ASSESSMENT, THE INTERNATIONAL UNION OF FOOD, AGRICULTURAL, HOTEL, RESTAURANT, CATERING, TOBACCO AND ALLIED WORKERS’ ASSOCIATIONS (IUF), THE EUROPEAN FEDERATION OF FOOD, AGRICULTURE AND TOURISM TRADE UNIONS (EFFAT-IUF), THE SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) AND THE UNIÃO GERAL DOS TRABALHADORES (UGT) v. NORGES BANK INVESTMENT MANAGEMENT (NBIM) 7 (June 21, 2021), <https://files.nettsteder.regjeringen.no/wpuploads01/sites/263/2021/06/Initial-assessment-for-publication-21-June-2021.pdf>.

against predatory government policies and corporate practices on behalf of incarcerated people, including those that have been detained in CoreCivic and GEO Group facilities.

2.2.2 The Respondents

Swiss National Bank is the central bank of Switzerland, responsible for the nation’s monetary policy and the sole issuer of Swiss franc banknotes. As of June 30, 2023, it holds 249,718 shares of CoreCivic and 271,200 shares of GEO Group.¹³

UBS Group is a multinational bank headquartered in Zurich, Switzerland. As of June 30, 2023, it holds 264,521 shares of CoreCivic and 346,308 shares of GEO Group between the firm and its subsidiary UBS Asset Management. UBS acquired Credit Suisse, a Swiss multinational bank headquartered in Zurich, Switzerland, in a merger that completed in June 2023. UBS is therefore now also responsible for Credit Suisse’s shares of CoreCivic and GEO Group: as of June 30, 2023, Credit Suisse owned 676,116 shares of CoreCivic and 146,091 shares of GEO Group.

Barclays is a multinational bank headquartered in London, United Kingdom. As of June 30, 2023, it holds 304,539 shares of CoreCivic and 70,500 shares of GEO Group.

HSBC is a British multinational bank, headquartered in London. As of June 30, 2023, it holds 20,813 shares of CoreCivic and 15,128 shares of GEO Group.

2.3 Whether the issue is material and substantiated

The Complainants allege that the banks’ financial involvement with CoreCivic and GEO Group contravenes their responsibilities under the 2023 OECD Guidelines in two key respects: (1) they have breached the OECD principle to carry out adequate human rights due diligence with regards to their investment activities; and (2) they have failed to seek ways to prevent or mitigate adverse human rights impacts to which they are directly linked.

2.3.1 The Respondents have failed to carry out adequate risk-based due diligence with regards to their investment activities.

First, the banks are in breach of the principle to carry out human rights risk-based due diligence. The OECD’s Responsible Business Conduct (RBC) for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises (2017) provides further guidance as to what this due diligence expectation means in the context of institutional investors. It acknowledges that “[m]any investors have a large

¹³ All share data for the Respondents pulled from Nasdaq’s “Institutional Holdings” at Nasdaq.com.

investment portfolio which can make continuous identification of RBC risks amongst their investee companies highly resource intensive,” and companies should therefore “identify general areas where the risk of adverse impacts is most significant” and do more detailed investigations in those areas.¹⁴ The United Nations Office of the High Commissioner for Human Rights (OHCHR) has similarly recommended that where investors “hold shares in a very large number of entities,” they should “identify the general areas where human rights risks are the most significant, for example potential or existing investments in particular industry sectors, countries, or operating contexts.”¹⁵

For nominee shareholding, the OHCHR outlines a two-pronged approach to assessing actual and potential adverse human rights impacts. First, financial institutions (FIs) must “assess the risks connected to its beneficial owner clients.”¹⁶ Using asset owner institutions like pension funds as an example, “FIs assess the alignment between the institution’s policies and procedures, governance, reporting, and track-record on investment practices” against OECD guidance.¹⁷ Second, where risks with clients are identified, including questions of their “ability or willingness to address risks to which they are connected to by way of investee companies, or where there is a particularly high risk section of its nominee shareholder portfolio,” then “the FI [financial institution] should undertake due diligence on higher risk investee companies.”¹⁸

The OHCHR notes that the “limited visibility of human rights risks inherent to the construction of certain financial services,” such as nominee shareholding, “does not change or constrain the responsibility of FIs to ensure they are not connected to human rights abuse through this kind of business relationship.”¹⁹ Rather, “human rights due diligence processes need to be adapted to take this difficulty into account,” and FIs could rely on certain tools and “best practices of due diligence exercised for example in the context of anti-money laundering and combating

¹⁴ ORG. FOR ECON. CO-OPERATION AND DEV., RESPONSIBLE BUSINESS CONDUCT FOR INSTITUTIONAL INVESTORS: KEY CONSIDERATIONS FOR DUE DILIGENCE UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 26 (2017), <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf> [hereinafter RESPONSIBLE BUSINESS CONDUCT].

¹⁵ OHCHR, REQUEST FROM THE CHAIR OF THE OECD WORKING PARTY ON RESPONSIBLE BUSINESS CONDUCT 7 (Nov. 27, 2013), <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterOECD.pdf> [hereinafter REQUEST FROM THE CHAIR].

¹⁶ OHCHR, OHCHR RESPONSE TO REQUEST FROM BANKTRACK AND OECD WATCH FOR ADVICE REGARDING THE APPLICATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS WHERE PRIVATE SECTOR BANKS ACT AS NOMINEE SHAREHOLDERS 5 (Aug. 30, 2021), <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf> [hereinafter OHCHR RESPONSE].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ OHCHR RESPONSE at 4–5.

the financing of terrorism and proliferation, which involve similar challenges to those of human rights due diligence.”²⁰

The human rights violations at CoreCivic and GEO Group facilities — including sexual, physical, and verbal abuse; punitive use of solitary confinement; medical neglect; inhumane conditions; denial of necessities; and lack of access to legal assistance — are well-known and have been widely reported over many years. For example, migrants detained in the contractors’ detention centers have decried the contractors’ forced labour programs in publicly available lawsuits since 2014²¹ and the sexual abuse of women detained at the Hutto detention facility has been reported on internationally.²² Thus, any FI investment in or financing of the contractors reflects massive due diligence failures. FIs should prioritize due diligence for these companies even if they hold limited shares in them.²³

In addition, in 2019, a private citizen filed a specific instance to the Dutch NCP against G4S and ING Bank for its funding of G4S (at that time, the largest private detention contractor operating worldwide).²⁴ At that time, G4S was providing detainee transportation services to a US government agency, US Customs and Border Protection (CBP), and ING was providing loan financing to G4S. The complaint included evidence that several authorities on human rights had condemned the grave and ongoing abuses against immigrant detainees, including children, held in immigration detention centers in the US. For example, it quoted a July 2019 report by the United Nations High Commissioner on Human Rights, in which she characterized the treatment of children in those facilities as “appalling” and stated that she was “deeply

²⁰ *Id.* at 4–5.

²¹ Jacqueline Stevens, J., *One Dollar Per Day: A Note on Recent Forced Labor and Dollar-Per-Day Wages in Private Prisons Holding People Under Immigration Law*, 52 VAL. U. L. REV. 343, 346 (2018) [hereinafter *One Dollar Per Day*]; Class Action Complaint for Unpaid Wages and Forced Labor at 1, *Menocal v. GEO Grp., Inc.*, No. 1:14-cv-02887 (D. Colo. Oct. 22, 2014) [hereinafter *Menocal Complaint*].

²² See, e.g., Emily Shugerman, E., *Immigrant Woman Attempts Suicide After Reporting Allegations of Sexual Abuse at Texas Detention Centre*, THE INDEPENDENT (Jan. 20, 2018), <https://www.independent.co.uk/news/world/americas/suicide-texas-detention-center-sexual-assault-immigrant-woman-laura-monterrosa-a8169066.html>; Clark Mindock, *Laura Monterrosa: Woman Put in Solitary Confinement After Claiming She Was Sexually Abused by Immigrant Prison Guard*, THE INDEPENDENT (Feb. 14, 2018), <https://www.independent.co.uk/news/world/americas/laural-monterrosa-immigrant-sexual-abuse-assault-guard-texas-jail-prison-solitaryconfinement-hutto-detention-center-a8211206.html>.

²³ See, e.g., HUMAN RIGHTS FIRST at 10.

²⁴ G4S PLC was based in the UK and their subsidiary in question, G4S Secure Solutions (USA) Inc. operated in the United States.

shocked that children are forced to sleep on the floor in overcrowded facilities, without access to adequate healthcare or food, and with poor sanitation conditions.”²⁵

In its Initial Assessment, published in January 2021, the Dutch NCP rejected the complaint as not meriting further consideration. The NCP noted that “[t]his decision does not entail substantive research or fact-finding, nor does it entail a judgement on whether or not G4S and ING have violated the OECD Guidelines.”²⁶ Rather, the NCP rejected that complaint based on the fact that the complainant was “an individual party who does not represent other individual stakeholders or organizations with an interest in this matter,” and “[t]he mere fact that a citizen claims that he is an interested party on the grounds that he is a taxpayer with concerns about circumstances at CBP facilities and therefore could appeal to the good offices of the NCP to enter into a mediation process with companies that are in some way linked to these facilities does not, according to the NCP, lead to admissibility under the OECD Guidelines.”²⁷

That 2019 specific instance Complaint, by clearly and thoroughly detailing the US government’s human rights abuses against detained migrants, should have put FIs on notice of such abuse. The continued financial engagement with US detention contractors that are engaged in ongoing human rights violations, therefore, demonstrates a due diligence failure.

Nevertheless, no public record exists of due diligence by the banks in relation to the detention abuses by either contractor; and any due diligence that was conducted has not addressed the banks’ ongoing direct link to abuses that have for years been widely and publicly evidenced. The Complainants called on the banks to “take all measures appropriate under the Guidelines” and requested a meeting to discuss such measures, including meaningful ways the banks were using their leverage. The Respondents did not disclose any efforts to use their leverage to address the issues raised, nor to end their direct investment link to the contractors. The banks have clearly failed in their due diligence responsibilities.

2.3.2 The Respondents have failed to seek ways to prevent or mitigate adverse human rights impacts to which they are directly linked.

2.3.2.1 OECD guidance

Under both the 2011 and 2023 OECD Guidelines, multinational enterprises (MNEs) should “seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business

²⁵ HUMAN RIGHTS FIRST at 2.

²⁶ NETHERLANDS NATIONAL CONTACT POINT, INITIAL ASSESSMENT, U.S. CITIZEN VS G4S AND ING 1 (Jan. 20, 2021), <https://www.oecdguidelines.nl/documents/publication/2021/01/20/initial-assessment-of-the-notification-of-a-u.s.-citizen-vs-g4s-and-ing> [hereinafter NETHERLANDS NATIONAL CONTACT POINT].

²⁷ *Id.* at 3.

relationship.”²⁸ Ways that MNEs may do so, according to OECD Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance), include “[m]odifying business operations or activities,” “[u]sing leverage to affect change in the practices of the entity that is causing the adverse impact(s) to the extent possible,” “[s]upporting business relationships in the prevention or mitigation of adverse impact(s),” “[d]isengaging from the business relationship,” and “[a]ddressing systemic issues.”²⁹

Leverage is considered to exist where the enterprise could effect change in the wrongful practices of the entity that causes the harm.³⁰ The OECD emphasizes that “enterprises have a responsibility to carry out due diligence and effectively exercise *any* leverage they may have.”³¹ The degree of leverage the enterprise has over its business relationship with the entity causing the adverse impact is useful in considering what it can do to persuade that entity to take action, “but is not relevant to considering whether it should carry out due diligence and exercise any leverage it may have. It should.”³²

Examples of ways enterprises can use their leverage as investors include “attendance and speaking at Annual General Meetings to express views on RBC matters and using voting rights to express views on RBC issues, requesting information from and engaging with investee companies to obtain relevant information and make expectations clear.”³³ All enterprises may engage in “[e]ngagement with regulators and policymakers on RBC issues for them to effect change in the wrongful practices of the entity causing the harm.”³⁴ According to OHCHR, for nominee shareholders, upon the identification of risks or adverse impacts, FIs are “expected to use and build their leverage” first with the beneficial owners — for example, suggesting to clients that they take action and providing advice on proxy voting, and including contractual clauses that “allow the FI to exit the relationship with the client should efforts to prevent and mitigate harms connected to the investee company fail.”³⁵ Where the FI cannot use or build leverage with the beneficial owner, it should engage investee companies. For example:

[N]ominee shareholders may participate in collaborative efforts with peers or through multi-stakeholder engagement platforms to put pressure on investee

²⁸ 2011 OECD GUIDELINES at 7–8; 2023 OECD GUIDELINES at 15.

²⁹ ORG. FOR ECON. CO-OPERATION AND DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT 77 (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [hereinafter DUE DILIGENCE GUIDANCE].

³⁰ *Id.* at 78.

³¹ *Id.* at 79. See *also* RESPONSIBLE BUSINESS CONDUCT at 13–15.

³² ORG. FOR ECON. CO-OPERATION AND DEV., DUE DILIGENCE IN THE FINANCIAL SECTOR: ADVERSE IMPACTS DIRECTLY LINKED TO FINANCIAL SECTOR OPERATIONS, PRODUCTS OR SERVICES BY A BUSINESS RELATIONSHIP 8 (June 2014), <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf> [hereinafter DUE DILIGENCE IN THE FINANCIAL SECTOR].

³³ *Id.*

³⁴ *Id.*

³⁵ OHCHR RESPONSE at 6.

companies. They may also call on State institutions and other standard-setting bodies to promote responsible and accountable business practices through the creation of enabling environments for responsible business conduct. This may include publicly expressing support for robust regulatory responses that address legal and regulatory gaps that expose people to heightened risk.³⁶

Where enterprises have insufficient leverage, they are expected to take steps to increase their leverage to the extent possible. The 2023 OECD Guidelines clarify what was already understood in the 2011 Guidelines by offering examples of how enterprises can build their leverage, including “support, training and capacity building,” “engagement to urge them to prevent and/or mitigate impacts,” “building expectations around responsible business conduct and due diligence specifically into commercial contracts,” “engaging with regulators and policymakers on responsible business conduct issues,” “communicating the possibility of responsible disengagement if expectations around responsible business conduct are not respected,” and “collaborating with other enterprises (at sectoral, risk or country level) to pool leverage and implementing common standards of responsible business conduct.”³⁷ The OECD Due Diligence Guidance from 2018 already offered concrete examples for how minority shareholders could act “together with other minority shareholders to increase their leverage”: collaboration such as “writ[ing] a joint letter to an investee company signaling expectations on RBC and encouraging the company to prevent/mitigate impacts as relevant,” and “join[ing] geographic or issue-specific initiatives that seek to prevent and mitigate adverse impacts in the areas identified (e.g. country, commodity or sector roundtables, multi-stakeholder initiatives and on-the-ground programmes).”³⁸

2.3.2.2 The Respondents failed to utilize or increase their leverage to effect change.

The Respondents, individually as big-name institutions with global reputations and collectively, have significant leverage based on their shareholdings in the CoreCivic and GEO Group. Yet there is no evidence that the Respondents have engaged in any of the recommended methods of utilizing or increasing leverage to encourage its investees, the contractors, to mitigate the severe adverse human rights impacts. In May 2022, BankTrack and Coalition for Immigrant Freedom contacted the banks to request meetings regarding what measures, if any, the banks were taking to fulfill their obligations under the Guidelines in relation to CoreCivic and GEO Group.³⁹ The Respondents engaged via online meetings; however, they did not disclose that they had taken or planned to take any action to utilize or increase their leverage to mitigate adverse human rights impacts by CoreCivic and/or GEO Group. Further details on engagement with the Respondents can be found in section 2.3.2.4

³⁶ *Id.*

³⁷ 2023 OECD GUIDELINES at 19.

³⁸ DUE DILIGENCE GUIDANCE at 79.

³⁹ BANKTRACK AND COALITION FOR IMMIGRANT FREEDOM.

below. The Respondents could have and should have, for example, advised their clients who invested, or wished to invest, in the contractors of their problematic human rights records, and participated in collaborative efforts with peers to put pressure on the contractors.

2.3.2.3 The Respondents failed to divest if they lack sufficient leverage to effect change.

Where minority shareholders lack sufficient leverage to effect change, an investor “should consider ending the relationship by disinvesting/selling its shares.”⁴⁰ The more severe the adverse human rights impact, according to OHCHR, “the more quickly a business enterprise will need to see change before it takes a decision on whether it should end the relationship.”⁴¹ For as long as both the abuse and the business relationship continue, MNEs should be able to demonstrate “ongoing efforts to mitigate the impact and be prepared to accept any consequences — reputational, financial or legal — of continuing the connection.”⁴²

The OECD also call for divestment of shares:

[A]s a last resort after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impact does not take immediate action to prevent or mitigate them.⁴³

The OECD’s Responsible Business Conduct for Institutional Investors advises that once adverse impacts have been identified, responses for passive investments may include “redesign of investment strategy to avoid investments with highly severe impacts (e.g., exiting a passive index and investing in an adjusted or tailored index which excludes severe risks identified by the investor).”⁴⁴

In addition to failing to engage in any of the recommended methods of increasing or utilizing leverage to mitigate CoreCivic and GEO Group’s severe adverse human rights impacts, the Respondents have not disengaged from those business relationships. In contrast to the Respondents’ inaction, Norwegian bank KLP, after receiving the Complainants’ May 2022 letter, meeting with the Complainants, and conducting its own investigation into CoreCivic and

⁴⁰ OHCHR, THE APPLICATION OF THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS TO MINORITY SHAREHOLDINGS OF INSTITUTIONAL INVESTORS 6 (Apr. 26, 2013), <https://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf> [hereinafter MINORITY SHAREHOLDINGS].

⁴¹ *Id.*

⁴² *Id.*

⁴³ DUE DILIGENCE GUIDANCE at 31.

⁴⁴ RESPONSIBLE BUSINESS CONDUCT at 33.

GEO Group, decided to exclude those contractors from its investments.⁴⁵ KLP issued a public statement describing how, as part of its assessment, KLP sent inquiries to the contractors regarding their training and evaluation of refugee center staff, how “possible violations of company guidelines are notified, dealt with and resolved,” and “how the companies ensure that the minimum wage is paid and good working conditions maintained,” and that GEO Group and CoreCivic responded by referencing their ESG reports, denying the allegations against them as baseless and politically motivated, and referencing their contracts with authorities as source of immunity.⁴⁶ Based on its assessment, KLP concluded:

Both Core Civic and GEO Group operate reception centres which, in and of themselves, constitute a violation of international law provisions concerning arbitrary detention. Statements by the UNHCR and [UN Working Group on Arbitrary Detention] leave little room to doubt that the practice of detaining refugees without legal cause and without their rights being safeguarded is highly censurable. In addition, the allegations against the companies are of a serious nature. They span a long period of time and are documented in reports by human rights organisations and litigation in the courts. In many cases, the residents themselves are the source of the information that has come to light. In KLP’s assessment, there is a considerable risk that the human rights abuses will continue. The companies show little understanding of the allegations levelled against them and have repeatedly denied that censurable conditions exist in their operations. The companies have responded to KLP’s queries and can document that policies relating to working conditions, discrimination, healthcare and staff training are in place. However, they can show scant evidence that these policies are actually enforced. At the same time, the companies vehemently reject the existence of any censurable conditions, preferring instead to attack those making the allegations. If the allegations against the companies had come solely from civil litigation, this attitude could have sown doubt about the actual state of affairs. However, when censurable conditions are also uncovered by UN working groups and state authorities, claims that every single allegation has been fabricated or incorrectly presented have little credibility. This dismissive attitude undermines confidence in the companies’ ability to change their practices and improve the conditions in question over time. As such, there is a risk of future norm violations.⁴⁷

KLP’s removal of CoreCivic and GEO Group from its investments brings it in line with other banks across Europe that have taken similar steps. Many institutions have enacted policies such as that of Dutch bank ING against links to “Prisons and detention centres where the

⁴⁵ KLP, *Decision to Exclude Core Civic and GEO Group*, <https://www.klp.no/en/corporate-responsibility-and-responsible-investments/exclusion-and-dialogue/Decision%20to%20exclude%20Core%20Civic%20og%20GEO%20Group.pdf>.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

borrower manages the Custodial Services directly or indirectly through an outsourcing contract” or “Private security companies involved in Custodial Services.”⁴⁸ ING’s ESG policy defines “custodial services” as “the daily management of the prison, detention and/or immigration centre, including guarding, securing and protecting the prisoners and detainees, where potential use of coercive actions (either physical or mental) can be linked to the service provided.” ING, like many major banks, has completely divested from CoreCivic and GEO Group.

The Respondents also could have and should have contacted index fund providers to express concerns about CoreCivic and GEO Group and the desire for the contractors to be excluded, as French bank BNP Paribas did after receiving the same May 2022 letter from the Complainants that was sent to the Respondents. In response to communications from the Complainants, BNP Paribas explained that its ownership of CoreCivic and GEO Group shares results from hedging transaction to US small-cap index tracker Russell 2000®, and that BNP had therefore decided to send a letter to the index sponsor, FTSE Russell, drawing attention to the issue and asked whether it would remove the contractors from the index in accordance with the sustainability policy of LSEG, FTSE Russell’s parent company. The Respondents have failed to engage in that or any other ways of effecting change.

The Respondents, if lacking sufficient leverage to effect change and unable to build such leverage, should have excluded CoreCivic and GEO Group from investments.

2.3.2.4 Engagement with the Respondents

The Complainants have first sought engagement with the Respondents on May 20, 2022, by sending a letter addressed to the banks’ Chief Executive Officers, which described the issues raised in this complaint. The letter laid out each bank’s shareholdings in CoreCivic and GEO Group, described the human rights violations the companies are causing, and asked for dialogue with the banks about their responsibilities under the Guidelines. Following this first communication, the following interactions occurred:

1. Regarding Barclays: In a letter dated August 18, 2022, Barclays’ Sustainability & ESG team, based in Barclays’ London headquarters, responded acknowledging an existing credit commitment with GEO Group but stating that it would allow it to expire and that the bank did not plan to enter new lending arrangements with either company. Regarding shareholdings, the letter argued that its shares in the companies were through the secondary market, in response to demands from its clients, as opposed to strategic shareholding in the company. Barclays’ response did not express any intention to address such shares. In September 2022, Andrea Saldarriaga, Director of Social and Environmental Policy for Barclays, spoke briefly with Ryan Brightwell from BankTrack but did not agree

⁴⁸ ING, Environmental Social Risk Framework 11 (June 2021), <https://www.ing.com/MediaEditPage/INGs-Environmental-and-Social-Risk-ESR-policy-framework.htm>.

to further engage on the topic with the Complainants. After the Complainants informed Barclays, along with the other Respondents, of the impending OECD filing, Barclays reached out for further discussion but ultimately did not provide any concrete plans to address its remaining business links with CoreCivic and GEO Group.

2. Regarding HSBC: In an email dated 16 June 2022, Zein Verdi, Global NGO Reporting and Engagement Lead, responded on behalf of Noel Quinn, HSBC Chief Executive Officer, citing client confidentiality, and indicating that the bank's name may appear on company share registers where the company is part of an index, or where the bank holds shares on a custodial basis. Mr. Verdi also welcomed the opportunity to discuss the bank's approach to human rights further. On September 2, 2022, the Complainants had a video call with five HSBC representatives, William Morgan, Group Public Affairs, Lucy Hastings, Head of Enterprise and ESG Risk, Kelly W Fisher, Head of Corporate Sustainability, HSBC US, Shanna Conley, GBM/CMB Reputational and Sustainability Risk, Americas, and Stephanie Akinyelure, Sustainability Engagement. The bank did not acknowledge its relationship with the companies concerned and has not shared any information about its due diligence or any actions taken regarding these companies. After the Complainants informed HSBC, along with the other Respondents, of the impending OECD filing, HSBC reached out for further discussion but ultimately did not provide any concrete plans to address its remaining business links with CoreCivic and GEO Group.
3. Regarding UBS: In an email dated 24 June 2022, Robert Ramer, Corporate Responsibility Manager, responded to the Complainants' letter by stating that investors — including UBS — invest in a wide range of companies which are often listed in financial indices, and do so often on behalf of clients. Mr. Ramer also described the bank's responsible investment approach, indicating UBS engages with its investee companies where risks and opportunities are identified, and with leading sustainability index providers and industry initiatives to promote human rights. No details or evidence of such engagements were disclosed, as Mr. Ramer further stated that these are held confidentially, but that aggregated statistics and case studies are provided in the bank's annual stewardship report. On 2 September 2022, the Complainants held a call with UBS representatives Christian Leitz, Sustainability, Megan Morrow, Sustainability, Nicole Jurgen, Legal, Christiana Tsiligianni, UBS AM Sustainable & Impact Investing, and Francis Condon, Head of Thematic Engagement & Collaboration, Sustainable Investment Research, with UBS Asset Management. The bank has not disclosed any information on its due diligence or actions taken regarding these companies.
4. Regarding Swiss National Bank: In a letter dated June 10, 2022, Plenio Martin, Swiss National Bank Head of Legal responded to the Complainants' letter stating the bank does not comment on individual investments. Mr. Plenio also indicated that Swiss National Bank in applying its investment policy has two main objectives, namely, to preserve the value of currency reserves, and to ensure that its balance sheet can be used for monetary policy at any time. Mr. Plenio indicated that the bank's equity portfolio is managed passively, and that the bank does not invest in shares and bonds of companies whose products or production processes grossly violate values that are broadly accepted at

societal level, further adding information about the bank’s investment policy. Further, on 5 December 2022, Plenio Martin, and Sophie Faber, Swiss National Bank Head of Risk Management (both based in Zurich) held a call with the Complainants. They have also not publicly disclosed information on their due diligence or actions taken regarding the companies in question.

2.3.2.5 The Respondents should respect the standards in the Guidelines, regardless of US government policy.

There have been a few specific instances filed against the contractors directly,⁴⁹ most recently to the Australian NCP in 2014 in *Human Rights Law Centre and Raid v. G4S* (filed in 2014). In that case, the Complainants alleged that G4S Australia, a private company incorporated in Australia and a wholly owned subsidiary of G4S, breached the OECD Guidelines “in its capacity as the company contracted by the Government of the Commonwealth of Australia to oversee management and security at the Manus Regional Processing Centre (MRPC).”⁵⁰ The Australian NCP rejected the complaint, partially on the basis that assessing the conduct of a government contractor would constitute “commentary on government policy,” that “G4S as service provider is not accountable for government policy,” and that the NCP should not “issue commentary, whether intended or otherwise, on government policies or law.”⁵¹ The OECD Investment Committee reviewed the decision and disagreed with the NCP’s analysis, stating that the NCP had in fact “cumulatively contributed to a perception of a lack of impartiality and accessibility”⁵² when it failed to “clearly articulate how it distinguishes issues of corporate responsibility from issues of state duty.”⁵³ Elaborating, the Investment Committee emphasized that:

As the OECD Guidelines cover the conduct of enterprises, an issue raised that *solely* addresses government policy or conduct falls outside the scope of the OECD Guidelines. However, as the OECD Guidelines’ Human Rights chapter notes: ‘States have the duty to protect human rights. Enterprises should... [r]espect human rights.’ The recommendations of the OECD Guidelines, as well as enterprises’ responsibility to respect human rights, represent expectations of enterprises which are distinct and separate from government duties. Furthermore, the commentary on the Human Rights chapter notes ‘[a] State’s failure either to enforce relevant domestic laws, or to implement international

⁴⁹ *Human Rights Council of Australia et al vs Global Solutions* (filed in 2005), *Lawyers for Palestinian Human Rights vs. G4S* (filed in 2013), *Reprieve vs. G4S plc* (filed in 2014), and *Human Rights Law Centre and Raid vs G4S* (filed in 2014).

⁵⁰ AUSTRALIAN NATIONAL CONTACT POINT, STATEMENT BY THE AUSTRALIAN NATIONAL CONTACT POINT SPECIFIC INSTANCE – G4S AUSTRALIA PTY LTD 1 (June 10, 2015), https://ausncp.gov.au/sites/default/files/inline-files/G4S_au.pdf.

⁵¹ *Id.* at 3.

⁵² *Id.* at 8.

⁵³ *Id.* at 11.

human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.’ It is important that NCPs carefully distinguish the enterprise’s responsibility to respect human rights and the due diligence requirements that accompany that, from the broader State duty to protect human rights. The role of NCP is to address the former but not to address the latter.⁵⁴

Similarly, while CoreCivic and GEO Group are contracting with the US government, which is failing to prevent the human rights violations, the contractors and all enterprises with direct links to them, including the Respondents, have responsibilities under the Guidelines.

2.4 Whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance

The Complainants submit that there is a clear link between the banks’ shareholdings in CoreCivic and GEO Group and the alleged contraventions of the OECD Guidelines (as outlined in section 2.2 of this complaint).

The Complainants also submit that each of the banks has a “business relationship” with CoreCivic and GEO Group, and thus have responsibilities under the OECD Guidelines. The 2011 OECD Guidelines broadly define “business relationship” to include “relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services.”⁵⁵ The 2023 OECD Guidelines further clarify that “contractors, franchisees, *investee companies*, clients, and joint venture partners” are included.⁵⁶

Multiple guidance documents by the OECD and OHCHR make it clear that shareholdings can be interpreted as a business relationship under the OECD Guidelines;⁵⁷ hence “investors, even those with minority shareholdings, may be directly linked to adverse impacts caused or contributed to by investee companies as a result of their ownership in, or management of, shares in the company.”⁵⁸ As OHCHR explained, “there is a business relationship — through ownership — between the investor and the investee company,”⁵⁹ as FIs typically own shares in

⁵⁴ *Id.*

⁵⁵ 2011 OECD GUIDELINES at 23.

⁵⁶ 2023 OECD GUIDELINES at 18 (emphasis added).

⁵⁷ See, e.g., DUE DILIGENCE IN THE FINANCIAL SECTOR at 4; MINORITY SHAREHOLDINGS at 4; OHCHR, REQUEST FROM THE CHAIR OF THE OECD WORKING PARTY ON RESPONSIBLE BUSINESS CONDUCT 6 (Nov. 27, 2013), <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/LetterOECD.pdf> [hereinafter REQUEST FROM THE CHAIR].

⁵⁸ RESPONSIBLE BUSINESS CONDUCT at 34.

⁵⁹ REQUEST FROM THE CHAIR at 6.

companies for the purposes of deriving a return on the investment, which depend on the activities of the investee company. Thus, “there is a direct link between the operations of the investor through its investment in the company (however small) and the human rights harm caused by the investee company.”⁶⁰ The OHCHR has also stated that “under both [the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises] there is a business relationship between an FI and an investee company, including in the context of minority shareholdings and index fund investments even with multiple tiers of business relationships.”⁶¹

Furthermore, the Swiss NCP has also recognized the responsibility banks have for their passive investments through index funds. In its initial assessment of *Society for Threatened Peoples Switzerland v. UBS Group*, the Swiss NCP concluded that “a business relationship according to the OECD Guidelines between UBS and Hikvision and a direct link between UBS’ products and services and the alleged human rights violations could not be excluded.”⁶² The Swiss NCP at that time, however, concluded that a business relationship between UBS and Hikvision was not established through UBS’ role as custodian for Hikvision shares on behalf of its clients. In response to a letter requesting clarification from OECD Watch and BankTrack, OHCHR confirmed that “purchasing and holding shares of an investee company constitutes a ‘business relationship’ between an FI and an investee company under the Guiding Principles” including “when the FI does so at the request and on behalf of a client.”⁶³ OHCHR explained that the UNGPs only require “that there is a direct link between [the FI’s] service and the investee company” and this “direct link is created by the fact that the service entails holding and trading shares in the investee.”⁶⁴ Furthermore, it is noted that the UNGPs provide an “expansive interpretation of the scope of companies and business relationships covered,” and there is “no indication that the intention was to carve out a potentially large swath of products or services offered involving different entities in the value chain of the financial sector.”⁶⁵

Thus, whether an FI “invests its own financial resources in an investee company, acts as a custodian and carries out transactions at the request of beneficial owners, or actively or passively manages and advises the investment decisions of beneficial owners,” is not considered arguments against the existence of a business relationship.⁶⁶ Rather, they are “factors that can determine the degree of leverage the FI has to prevent and mitigate adverse

⁶⁰ *Id.*

⁶¹ OHCHR RESPONSE at 3.

⁶² OECD WATCH, *Society for Threatened Peoples Switzerland vs. UBS Group*, <https://www.oecdwatch.org/complaint/society-for-threatened-peoples-switzerland-vs-ubs-group/>.

⁶³ OHCHR RESPONSE at 3.

⁶⁴ *Id.*

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 3–4.

impacts which it is connected to through its business relationships and the associated measures it can take.”⁶⁷

2.4.1 The Respondents’ business links with CoreCivic and GEO Group

The banks have business relationships with CoreCivic and GEO Group, companies that violate internationally recognized human rights, as shown later in this section. The banks’ business relationships vary widely, and include, but are not limited to, investments, trading, financing (direct lending and securities underwriting), and advisory. The following are examples of such links, but this is not an exhaustive list of the banks’ existing and potential business relationships with CoreCivic and GEO Group. In fact, it is difficult to know the extent of the banks’ business relationships with the contractors because much is not captured in public filings.

Investments

All the banks have business relationships with CoreCivic and GEO Group through their investments. These investments may be made on a proprietary basis, using the firm’s own capital, or on a nominee basis, on behalf of a client. Further, these investments may be passively or actively managed, dictating frequency of trading, and include index funds and mutual funds run by internal or external portfolio managers. Most often, the banks’ total investments represent a combination of these differing types of investments.

Importantly, in the case of nominee investing, while the banks may not be profiting from the investments themselves, as they often argue, they are profiting from the fees for their investment services. For funds managed internally, the banks collect management fees through their asset management divisions. For funds managed externally, they collect advisory fees through their wealth management divisions.

Below is a summary table of the ownership of CoreCivic and GEO Group shares by the banks as of June 30, 2023.⁶⁸ Note however, that publicly available data does not include all stock exposure. For example, investments in externally managed mutual funds that include CoreCivic and GEO Group are often not captured, and so these are undoubtedly underestimates.

⁶⁷ *Id.* at 3–4.

⁶⁸ All share data pulled from Nasdaq’s “Institutional Holdings” at Nasdaq.com. The shares belonging to Credit Suisse, acquired by UBS in June 2023, are now presumably owned by — and therefore the responsibility of — UBS.

Bank	Stock	Shares Held	% of Total	
			Shares	Value (Mn)
Barclays	CXW	304,539	0.3%	\$3.3
Barclays	GEO	70,500	0.1%	\$0.5
Credit Suisse	CXW	676,116	0.6%	\$7.2
Credit Suisse	GEO	146,091	0.1%	\$1.1
HSBC	CXW	20,813	0.0%	\$0.2
HSBC	GEO	15,128	0.0%	\$0.1
Swiss National Bank	CXW	249,718	0.2%	\$2.7
Swiss National Bank	GEO	271,200	0.2%	\$2.0
UBS	CXW	122,378	0.1%	\$1.3
UBS	GEO	210,302	0.2%	\$1.6
UBS Asset Management	CXW	142,143	0.1%	\$1.5
UBS Asset Management	GEO	136,006	0.1%	\$1.0

Comparison with data from March 2023 shows that despite receiving the Complainants' May 2022 letter and engaging in conversation with the Complainants regarding the contractors' abuses, all the Respondents increased their ownership of GEO Group shares between March and June 2023, UBS by over 20% and HSBC by over 47%.⁶⁹ Barclays and Swiss National Bank also increased their ownership of CoreCivic shares during the same period.

Trading

The banks have business relationships with CoreCivic and GEO Group through trading. Sales traders buy and sell securities at the request of clients, and they collect commissions on the execution of those trades. This means that each time a sales trader buys or sells CoreCivic or GEO Group stock, the bank earns.

⁶⁹ Below is a summary table of the ownership of CoreCivic and GEO Group shares by the banks as of March 31, 2023 from Nasdaq's "Institutional Holdings" at Nasdaq.com.

Bank	Stock	Shares Held	% of Total	
			Shares	Value (Mn)
Barclays	CXW	295,237	0.3%	\$2.7
Barclays	GEO	65,154	0.1%	\$0.5
Credit Suisse	CXW	641,620	0.6%	\$6.0
Credit Suisse	GEO	105,445	0.1%	\$0.8
HSBC	CXW	40,305	0.0%	\$0.4
HSBC	GEO	10,263	0.0%	\$0.1
Swiss National Bank	CXW	248,118	0.2%	\$2.3
Swiss National Bank	GEO	268,000	0.2%	\$2.0
UBS	CXW	215,066	0.2%	\$2.0
UBS	GEO	152,211	0.1%	\$1.1
UBS Asset Management	CXW	142,134	0.1%	\$1.3
UBS Asset Management	GEO	136,006	0.1%	\$1.0

Financing

The banks have business relationships with CoreCivic and GEO Group through direct lending and securities underwriting.

For example, Barclays has, on multiple occasions, provided CoreCivic and GEO Group with direct loans and revolving credit lines.⁷⁰ In July 2019, due to the advocacy of immigrant rights groups, Barclays joined several other banks in committing to not provide any new financing to CoreCivic or GEO Group.⁷¹ Notably, the commitment was related to new financing, not existing financing, which meant it would be years before the bank would truly exit its business relationship. Then, between May and July 2022, both CoreCivic⁷² and GEO Group⁷³ amended their existing credit agreements, repaying some of their debt and refinancing the remaining debt, but in doing so both contractors stressed confidential conversations with existing lenders and did not disclose what financing banks continue to offer.

Moreover, despite its commitment, in April 2021, Barclays agreed to be the lead underwriter for a \$634-million bond issue intended to fund the construction of three new CoreCivic facilities. In this role, Barclays would purchase the bonds directly from CoreCivic, the issuer, and resell them to interested investors it also had the responsibility of recruiting, for which it would collect an underwriting fee. The bank underwrote the bonds for CoreCivic through a third-party public finance authority, which also made the securities municipal bonds and conferred the tax benefits of such bonds on their corporate bonds. After significant activist and investor pressure focused on the human rights abuses in the contractors' facilities, Barclays withdrew from its underwriting role and recommitted to not financing CoreCivic and GEO Group.⁷⁴ However, Barclays' choice to engage in the bond underwriting dramatically undermined its commitments and eroded trust in the bank.

⁷⁰ *The Wall Street Banks Still Financing Private Prisons*, IN THE PUBLIC INTEREST (Apr. 2019), <http://www.inthepublicinterest.org/wp-content/uploads/Updated-2019-Data-Brief-The-Wall-Street-Banks-Still-Financing-Private-Prisons-FINAL-EMBARGOED-UNTIL-4-8-19-1030am.pdf>.

⁷¹ E. Rembert, *Barclays is Latest to Cut Finance Ties with Private Prisons*, BLOOMBERG (July 31, 2019) <https://www.bloomberg.com/news/articles/2019-07-31/barclays-is-latest-to-cut-finance-ties-with-private-prison-firms>.

⁷² CoreCivic, 8-K, SEC (May 13, 2022)

https://www.sec.gov/ix?doc=/Archives/edgar/data/1070985/000114036122018956/brhc10037600_8k.htm.

⁷³ GEO Group, 8-K, SEC (July 13, 2022)

<https://www.sec.gov/ix?doc=/Archives/edgar/data/923796/000119312522196691/d346175d8k.htm>.

⁷⁴ D. Moran and A. Albright, *Barclays Drops Prison Bond Deal at Last Minute After Furor*, BLOOMBERG (Apr. 19, 2021), <https://www.bloomberg.com/news/articles/2021-04-19/barclays-pulls-out-of-prison-bond-deal-after-controversy>.

Advisory

The banks have business relationships with CoreCivic and GEO Group through their advisory services. Investment and corporate bankers provide CoreCivic and GEO Group advisory services regarding capital raising and mergers and acquisitions. These relationships are almost never publicly disclosed and thus hard to report on.

2.4.2 CoreCivic and GEO Group violate international prohibitions against arbitrary detention and ill treatment.

2.4.2.1 International prohibitions against arbitrary detention and ill treatment

Chapter IV of the OECD Guidelines calls on companies to respect human rights, including those rights enshrined in the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR).⁷⁵ Both of these international instruments prohibit arbitrary detention.⁷⁶ According to the United Nations Working Group on Arbitrary Detention⁷⁷ and the United Nations High Commissioner for Refugees (UNHCR), to avoid arbitrariness, “any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose.”⁷⁸

Further, indefinite detention can amount to cruel, inhuman, or degrading treatment due to its detrimental effects on physical and mental health, violating Article 5 of the UDHR and Article 7 of the ICCPR. The absolute and non-derogable prohibition on torture and ill-treatment, codified in a wide range of universal instruments and recognized as part of customary international law, applies “at any time and in any place whatsoever.”⁷⁹ No exceptional circumstances, whether “war, internal political instability or any other public emergency, including when triggered by large and sudden movements of migrants, may be invoked as a justification for torture or ill treatment.”⁸⁰

⁷⁵ 2011 OECD GUIDELINES at 25; 2023 OECD GUIDELINES at 25.

⁷⁶ UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217 (III) A, Art. 9 (Dec. 10, 1948) [hereinafter UDHR]. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 U.N.T.S. 171, Art. 9 (Dec. 16, 1966) [hereinafter ICCPR].

⁷⁷ U.N. WORKING GRP. ON ARBITRARY DET., REVISED DELIBERATION NO. 5 ON DEPRIVATION OF LIBERTY OF MIGRANTS, ¶ 20, U.N. Doc. A/HRC/39/45 (July 2018).

⁷⁸ UNHCR, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 15 (2012), <http://www.unhcr.org/505b10ee9.html>.

⁷⁹ GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (FOURTH GENEVA CONVENTION), 75 U.N.T.S. 287, art. 3 (Aug. 12, 1949).

⁸⁰ NILS MELZER (SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT), REPORT OF THE SPECIAL RAPPORTEUR TO THE HUMAN RIGHTS COUNCIL THIRTY-SEVENTH SESSION, ¶10, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018), citing CONVENTION AGAINST TORTURE AND

Physical discomfort and delayed access to procedural rights, which may not amount to ill-treatment alone, can cumulatively and/or over a prolonged or open-ended period “cross the relevant threshold.”⁸¹ Increased mental and emotional suffering caused by detained persons’ inability to influence their situation also heightens the likelihood of reaching the ill-treatment threshold.⁸² Additionally, if those detained are in situations of increased vulnerability, “such as children, women, older persons, persons with disabilities, medical conditions or torture trauma, or members of ethnic or social minorities, such as lesbian, gay, bisexual, transgender or intersex persons,” then “this threshold can be reached very quickly, if not immediately.”⁸³

The United Nations Special Rapporteur on Torture, Nils Melzer, highlighted that immigration detention, specifically, “can even amount to torture, particularly where it is intentionally imposed or perpetuated for such purposes as deterring, intimidating or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation.”⁸⁴ Similarly, ill-treatment or grossly inadequate detention conditions may amount to torture when intentionally imposed for those purposes.⁸⁵ Such policies may amount to “refoulement in disguise”⁸⁶ and violate the principle of good faith.⁸⁷

In 2020, Special Rapporteur stated that solitary confinement exceeding 15 days is presumptively a breach of the prohibition of torture and other ill-treatment due to its prolonged duration.⁸⁸ The United Nations Committee Against Torture has expressed concern over the use of solitary confinement in US prisons, jails, and immigration detention facilities.⁸⁹ People with mental health disabilities are considered a vulnerable group and particularly should not be subjected to solitary confinement, according to the Special Rapporteur on Torture and Committee Against Torture.⁹⁰

OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1465 U.N.T.S. 85, art. 2.2 (Dec. 10, 1984).

⁸¹ *Id.* at ¶ 26.

⁸² *Id.* at ¶ 27.

⁸³ *Id.*

⁸⁴ *Id.* at ¶ 43.

⁸⁵ *Id.* at ¶ 19.

⁸⁶ *Id.* at ¶ 43.

⁸⁷ *Id.* at ¶¶ 40–58.

⁸⁸ NILS MELZER (SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT), REPORT OF THE SPECIAL RAPPORTEUR TO THE HUMAN RIGHTS COUNCIL FORTY-THIRD SESSION, ¶ 57, U.N. Doc. A/HRC/43/49 (Mar. 20, 2020).

⁸⁹ COMMITTEE AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE COMBINED THIRD TO FIFTH PERIODIC REPORTS OF THE USA, ¶ 19, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

⁹⁰ JUAN MÉNDEZ (U.N. SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN, AND DEGRADING TREATMENT AND PUNISHMENT), INTERIM REPORT OF THE SPECIAL RAPPORTEUR TO THE GENERAL ASSEMBLY

All the human rights detailed above should be respected by companies under the OECD Guidelines.

2.4.2.2 CoreCivic and GEO Group’s engagement in arbitrary detention and ill treatment

CoreCivic and GEO Group are contracted to detain thousands of migrants in the US, many of whom are refugees applying for asylum, including torture survivors, LGBTQ individuals, and gender-based violence survivors.⁹¹

US immigration detention can typically be characterized as indefinite, as there is no charge or trial over an undefined period, during which migrants do not know whether or when they will be released; length of detention varies widely based on factors that are mostly uncommunicated, unpredictable, and outside migrants’ control (the average detention length for asylum seekers who have already established credible fear of persecution in interviews was 10.8 months, or 326.8 days, as of March 2022);⁹² and migrants are rarely able to obtain legal counsel due to the geographic remoteness of many of the detention facilities.⁹³

Furthermore, according to the OHCHR Working Group on Arbitrary Detention, the degrading conditions in which most people are incarcerated and migrants are detained demonstrate its punitive, deterrence-based nature.⁹⁴ According to the American Civil Liberties Union, detainees at CoreCivic’s La Palma Correctional Center, for example, face verbal abuse by staff,⁹⁵ frequent use of solitary confinement as punishment, unsanitary conditions,⁹⁶ lack of medical and dental

SIXTY-SIXTH SESSION, ¶ 81, U.N. Doc. A/66/268 (Aug. 5, 2011); COMMITTEE AGAINST TORTURE, CONCLUDING OBSERVATION ON THE SEVENTH PERIODIC REPORT OF SWITZERLAND, ¶19(f), U.N. Doc. CAT/C/CHE/CO/7 (Sep. 7, 2015).

⁹¹ HUMAN RIGHTS FIRST.

⁹² *Id.* at 3.

⁹³ CENTER FOR VICTIMS OF TORTURE, BACKGROUNDER: ARBITRARY & CRUEL: HOW US IMMIGRATION DETENTION VIOLATES THE CONVENTION AGAINST TORTURE AND OTHER INTERNATIONAL OBLIGATIONS 8 (2021), https://www.cvt.org/wp-content/uploads/2023/06/Arbitrary_and_Cruel_d5_FINAL.pdf, *citing* THE CENTER FOR VICTIMS OF TORTURE AND THE TORTURE ABOLITION AND SURVIVOR SUPPORT COALITION, TORTURED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION 11 (2013).

⁹⁴ U.N. WORKING GRP. ON ARBITRARY DET., REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION ON ITS VISIT TO THE U.S., ¶¶ 27, 87 U.N. Doc. A/HRC/36/37/Add.2 (Jul. 17, 2017).

⁹⁵ ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 8 (2020) [hereinafter ACLU]. Migrants detained at La Palma told NGO workers that officers frequently verbally abused them and made racist remarks, often calling the migrants “rats.”

⁹⁶ *Id.* According to NGOs who interviewed migrants, there were additional complaints about “cells being overheated, water leaks in cells, gray drinking water, clogged toilets that were only a foot from the beds, and poor ventilation.”

care,⁹⁷ and lack of access to legal assistance.⁹⁸ Asylum seekers report being put in solitary confinement for double the period that the Special Rapporteur considers a presumptive breach of the prohibition of torture and ill treatment, and that they suffered severe mental health issues as a result. One asylum seeker at La Palma who was put in solitary confinement for two periods of 30 days stated, “When I was in the hole, I began talking to myself, started to hallucinate.”⁹⁹ He also reported that there was no process for challenging those sentences in solitary confinement.¹⁰⁰ At another CoreCivic facility, Stewart Detention Center (Georgia’s largest immigration detention facility), the water was described as “green, non-potable, smelling of feces, or completely shut off,”¹⁰¹ and food as “spoiled or expired. . . undercooked, burnt, or rancid.”¹⁰²

Internal inspections of the DHS, which oversees ICE, corroborate these reports. For example, in one GEO Group facility, inspectors with the DHS Office of the Inspector General found “significant health and safety risks, including nooses in detainee cells, improper and overly restrictive segregation, and inadequate detainee medical care.”¹⁰³ Inspectors also observed “expired,” “spoiled and moldy food”;¹⁰⁴ files indicating that detainees “were not offered any recreation or showers” while in solitary confinement;¹⁰⁵ lack of outdoor recreation areas (“recreation for detainees was located within housing units. . .enclosures inside detainee living areas with mesh cages at the top to allow in outside air”);¹⁰⁶ and prohibitions on in-person visitation (such as with children and other family members).¹⁰⁷

During the COVID-19 pandemic, the situation worsened. Several reports determined that COVID-19 infection rates were higher at privately operated prisons, jails, and immigration

⁹⁷ *Id.* at 57. One asylum seeker told NGO workers that he had a tooth extracted at La Palma (due to pain from being hit in the head in Nicaragua) and was told he would not receive a check up for six months. See *also* HUMAN RIGHTS WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 45 (Jun. 20, 2018).

⁹⁸ ACLU at 56–59.

⁹⁹ *Id.* at 40.

¹⁰⁰ *Id.*

¹⁰¹ PENN STATE LAW CENTER FOR IMMIGRANTS’ RIGHTS CLINIC, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS 32 (May 2017).

¹⁰² *Id.* at 31.

¹⁰³ OFFICE OF INSPECTOR GEN., U.S., DEP’T OF HOMELAND SEC., OIG-19-47, CONCERNS ABOUT DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3 (Jun. 3, 2019) (describing conditions at GEO’s Adelanto facility).

¹⁰⁴ *Id.* at 3–4.

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.* at 7 (describing conditions at CoreCivic’s Aurora facility).

¹⁰⁷ *Id.* at 11 (same).

detention facilities that did not follow government policies than government-run facilities.¹⁰⁸ In May 2020, detainees at CoreCivic’s La Palma, where COVID-19 was spreading, released a letter “begging for help” and reporting “verbal threats” and “indefinite lock ins” to force them to work in the kitchen and other areas without proper protective gear despite the high COVID-19 risk.¹⁰⁹ In August 2020, a federal court ruled GEO Group’s response to the COVID-19 outbreak at its Mesa Verde Detention Center likely amounted to deliberate medical indifference and noted the company had “avoided widespread testing...not for lack of tests, but for fear that positive test results would require them to implement safety measures that they apparently felt were not worth the trouble.”¹¹⁰

Data collected and analyzed (8,488 records of migrant detainees placed in solitary confinement) by the International Consortium of Investigative Journalists showed that more than half of solitary confinements in ICE facilities exceeded 15 days (and therefore presumptively constitute ill treatment).¹¹¹ Further, CoreCivic and GEO Group facilities place people with mental health illness in solitary confinement. Tragically, in a one-year period, two young men who had diagnosed mental health conditions committed suicide in CoreCivic’s Stewart Detention Center in Lumpkin, Georgia after 19 and 21-day placements in solitary confinement.¹¹²

Concerns of ill treatment persist at the contractors’ prisons and jails too. In August 2016, the US Department of Justice Office of the Inspector General released a report revealing that privately operated prisons and jails in the US, of which the majority are operated by CoreCivic and GEO Group, are more dangerous than government-run facilities despite housing largely people with low-security statuses. Administrators at these facilities also consistently put

¹⁰⁸ Kendyl Kearly, *COVID Rates at CoreCivic Prisons Soar Above State-Run Facilities*, TENNESSEE LOOKOUT (Oct. 18, 2021), <https://patch.com/tennessee/across-tn/covid-rates-corecivic-prisons-soar-above-state-run-facilities>.

¹⁰⁹ Letter from Detainees, La Palma Corr. Ctr., to the Florence Immigrants & Refugees Rts. Project (May 18, 2020), <https://perma.cc/JG7Y-S47G>.

¹¹⁰ See *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 4554646, at *1 (N.D. Cal. Aug. 6, 2020).

¹¹¹ Spencer Woodman et al, *Thousands of Immigrants Suffer in US Solitary Confinement*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, (May 21, 2019), <https://www.icij.org/investigations/solitary-voices/how-us-immigration-authorities-use-solitary-confinement/>.

¹¹² Jose Olivares, *How Solitary Confinement Kills: Torture and Stunning Neglect End in Suicide at Privately Run ICE Prison*, THE INTERCEPT (Aug. 29, 2019); Spencer Woodman & Jose Olivares, *Immigrant Detainee Called ICE Help Line Before Killing Himself in Isolation Cell*, THE INTERCEPT (Oct. 8, 2018).

people in solitary confinement simply because they did not have room in the general population. Contractor facilities also tended to provide inadequate medical care.¹¹³

The evidence demonstrates that the contractors are violating human rights, and that those violations are common and widely reported on.

2.4.3 CoreCivic and GEO Group violate human rights related to international prohibitions against forced labour.

2.4.3.1 International prohibitions against forced labour

Chapter V of the OECD Guidelines addresses employment and industrial relations and states that businesses should “[c]ontribute to the elimination of all forms of forced or compulsory labour and take immediate and effective measures towards the elimination of forced or compulsory labour as a matter of urgency.”¹¹⁴ The commentary to Chapter V refers to the 1998 International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work and the ILO Forced Labour Convention 29 of 1930, which calls on governments to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period,” and Convention 105, which calls on them to “suppress and not to make use of any form of forced or compulsory labour” for certain enumerated purposes (for example, as a means of political coercion or labour discipline), and “to take effective measures to secure [its] immediate and complete abolition.”¹¹⁵

The ILO’s Convention of 1930 defines forced or compulsory labour as “all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.”¹¹⁶ According to the Committee of Experts on the Application of Conventions and Recommendations of the ILO, “under menace of penalty” “should be understood in a very broad sense: it covers penal sanctions, as well as various forms of coercion, such as physical violence, psychological coercion, retention of identity documents, etc. The penalty here in question might also take the form of a loss of rights or privileges.”¹¹⁷

¹¹³ OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS (Aug. 2016)

<https://oig.justice.gov/reports/2016/e1606.pdf>.

¹¹⁴ 2023 OECD GUIDELINES at 28.

¹¹⁵ *Id.* at 30.

¹¹⁶ INT’L LABOUR ORG., FORCED LABOUR CONVENTION, ILO No. 29 (May 1, 1932) [hereinafter FORCED LABOUR CONVENTION].

¹¹⁷ INT’L LABOUR ORG., *Giving Globalization a Human Face*, ILC.101/III/1B, ¶ 270 (2012)

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf.

Article 2(2)(c) of the 1930 Convention exempts work “exacted” “as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.”¹¹⁸ Voluntary prison labour may be utilized by private companies, but the ILO sets strict limitations due to the particular vulnerability of incarcerated persons: the Committee of Experts requires proof of “genuine” consent in the form of a signed, written agreement,¹¹⁹ that there be no threat of penalty upon refusal,¹²⁰ and that the work be “carried out in the framework of a free employment relationship...including a level of remuneration and social security corresponding to a free labour relationship.”¹²¹ Work conditions must closely resemble those on the outside, including that wages must not be exploitatively low.¹²²

Forced labour practices are also prohibited by the UDHR, which ensures the right to “free choice of employment” and “just and favourable conditions of work;”¹²³ Articles 4 of the UDHR and Article 8 of the ICCPR, which prohibit forced or compulsory labour; and Article 23 of the ICESCR, which recognizes the right to decide freely to accept or choose work.¹²⁴

2.4.3.2 CoreCivic and GEO Group’s engagement in forced labour

CoreCivic and GEO Group force people detained in their prisons, jails, and immigration detention facilities to work for little or no pay. Detainees must perform a variety of tasks, including scrubbing floors and toilets; cleaning offices, solitary confinement units, and warehouses; laundering medical facility and detainee laundry; cutting hair; cooking and serving detainee meals; catering for law enforcement events sponsored by the contractors; preparing clothing for arriving detainees; and cleaning and landscaping the exterior of the

¹¹⁸ FORCED LABOUR CONVENTION at art. 2(2)(c).

¹¹⁹ INT’L LABOUR ORG., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, GENERAL REPORT AND OBSERVATIONS CONCERNING PARTICULAR COUNTRIES, REPORT III PART 1A, 89TH SESS., ¶ 132 (2001) [hereinafter GENERAL REPORT 89TH SESS.].

¹²⁰ FORCED LABOUR CONVENTION at art. 2.

¹²¹ GENERAL REPORT 89TH SESS. at ¶ 6; see also Faina Milman-Sivan, *Prisoners for Hire: Towards a Normative Justification of the ILO’s Prohibition of Private Forced Prisoner Labor*, 36 FORDHAM INT’L L.J. 1619 (Oct. 2013).

¹²² INT’L LABOUR ORG., ERADICATION OF FORCED LABOUR: GENERAL SURVEY CONCERNING THE FORCED LABOUR CONVENTION, 1930 (No. 29), AND THE ABOLITION OF FORCED LABOUR CONVENTION, 1957 (No. 105) (ARTICLES 19, 22 AND 35 OF THE CONSTITUTION), REPORT III PART 1B (ILC 96TH SESSION, 2007), ¶ 116 (Feb. 15, 2007).

¹²³ UDHR at art. 23.

¹²⁴ THE RIGHT TO WORK, GENERAL COMMENT NO. 18 (Adopted Nov. 24, 2005), ARTICLE 6 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, E/C.12/GC/186, ¶ 9 (Feb. 2006).

contractors' buildings.¹²⁵ Sometimes, the contractors pay detainees \$1 to \$2 per day and in other instances detainees go uncompensated for their labour.

CoreCivic and GEO Group force detainees to perform this uncompensated labour under threat of solitary confinement,¹²⁶ physical restraint,¹²⁷ revoking family visitation rights,¹²⁸ withholding mail delivery,¹²⁹ and negative interference in ongoing asylum cases.¹³⁰ If detainees refuse to work for free, the contractors' staff "threaten to lock detainees in their cells, suspend their attorney and personal visits, and prohibit them from interacting with other detained people."¹³¹ Deprivation of necessities constitutes another common coercive method — in *Raul Novoa et al v. GEO Group* (filed in a California federal court in December 2017), plaintiffs reported that GEO Group charges detainees for food, water, and hygiene products, forcing them to work for \$1 a day in order to afford those necessities.¹³²

The contractors have not denied these allegations in most cases, just their illegality. In *Alejandro Menocal v. GEO Group* (filed in a Colorado federal court in October 2014), several current and former migrant detainees at GEO Group's Aurora, Colorado detention center sued the contractor for its "Voluntary Work Program." The program forced detainees to perform various jobs such as "maintaining the on-site medical facility, doing laundry, preparing meals, and cleaning various parts of the facility" for a payment of \$1 per day.¹³³ GEO Group did not dispute the existence of the program or related policies; rather, it argued that the federal anti-trafficking statute does not apply to immigration detention, and that undocumented immigrants do not qualify as "employees" under US labour law and are therefore ineligible for legal protections.¹³⁴ That case, along with *Raul Novoa et al*, remains ongoing.

¹²⁵ *One Dollar Per Day* at 346; see also Menocal Complaint.

¹²⁶ *Owino v. CoreCivic, Inc.*, No. 17-CV-01112, 2020 WL 1550218, at *21 (S.D. Cal. Apr. 1, 2020) *appeal docketed*, No. 21-55221 (9th Cir. Mar. 10, 2021); Menocal Complaint at ¶ 6; *Gonzalez v. CoreCivic, Inc.* (M. Gonzalez), No. 18-CV-00169 (W.D. Tex. filed Feb. 22, 2018) (hereinafter M. Gonzalez); *Gonzalez v. CoreCivic, Inc.* (C. Gonzalez), No. 17-CV-02573 (S.D. Cal. filed Dec. 27, 2017) (hereinafter C. Gonzalez); Complaint for Declaratory and Injunctive Relief and Damages, *Raul Novoa v. The GEO Group, Inc.*, No. 5:17-cv-02514 (C.D. Cal. Dec. 20, 2017); *Barrientos v. CoreCivic, Inc.*, No. 18-CV-00070 (M.D. Ga. filed Apr. 17, 2018) (hereinafter Barrientos).

¹²⁷ M. Gonzalez.

¹²⁸ C. Gonzalez.

¹²⁹ C. Gonzalez.

¹³⁰ Third Amended Complaint at 30, *Novoa v. GEO Grp., Inc.*, No. 17-02514 (C.D. Cal. Nov. 26, 2019), 2019 WL 8329599, ¶ 147.

¹³¹ *Id.* at ¶ 26.

¹³² *Id.* Similar allegations were made against CoreCivic in M. Gonzalez; Barrientos; and C. Gonzalez.

¹³³ *Defining Forced Labor* at 1222–29.

¹³⁴ *Menocal v. Geo Group*, 113 F. Supp. 3d 1125, 1128 (D. Colo. 2015).

The contractors have been held to have violated labour laws. In December 2021, in *Nwauzor v. GEO Group* (filed in a Washington federal court in September 2017), another case lawsuit by detainees against GEO Group for denial wages, the court decided against the contractor and ordered it to pay more than 10,000 migrant workers detained in its facilities over \$17 million in back pay and to return nearly \$6 million in profits to the state.¹³⁵ In addition to the jury award, the federal judge in that case issued an injunction requiring GEO Group to start paying the state’s minimum wage—\$13.69—to all detainees participating in the company’s Voluntary Worker Program.¹³⁶ In response to a related lawsuit filed in 2017 by Washington State Attorney General Bob Ferguson, the judge also ordered GEO Group to pay the Washington State \$5.9 million on the grounds that the company had enjoyed “unjust enrichment” through unfair labor practices.¹³⁷ The judgment was appealed, and the appeal remains ongoing.¹³⁸

Given the profuseness of these lawsuits and the widely reported rulings against the contractors, the Respondents knew, or should have known, about the contractors forced labour practices for years.

2.5 The relevance of applicable law and procedures, including court rulings

The OECD Guidelines and UNGPs constitute the most authoritative international standards on human rights due diligence, and the principles and standards contained within both instruments are applicable. The Complainants are not aware of any relevant domestic or international court rulings.

2.5.1 How similar issues have been, or are being, treated in other domestic or international proceedings

The 2023 OECD Guidelines provide that NCPs should consider whether parallel proceedings are ongoing in deciding whether to accept a complaint, and, nonetheless, evaluate “whether an

¹³⁵ *Federal Jury Orders GEO Group to Pay \$23 Million for Immigrant Detainee Slave Labor in Washington*, PRISON LEGAL NEWS (Dec. 1, 2021)

<https://www.prisonlegalnews.org/news/2021/dec/1/federal-jury-orders-geo-group-pay-23-million-immigrant-detainee-slave-labor-washington>.

¹³⁶ “*In a Warning Shot to Other States, Federal Judge Rules Immigrant Detainees in Washington Must Be Paid More Than \$1 a Day*,” TIME, COHEN MILSTEIN (Nov. 11, 2021),

<https://www.cohenmilstein.com/update/%E2%80%9C-warning-shot-other-states-federal-judge-rules-immigrant-detainees-washington-must-be-paid>.

¹³⁷ *Id.*

¹³⁸ Daniel Wiessner, *GEO Group Appeal Over \$1-a-day Detainee Pay Sent to Washington Top Court*, REUTERS (March 7, 2023), <https://www.reuters.com/legal/government/geo-group-appeal-over-1-a-day-detainee-pay-sent-wash-top-court-2023-03-07/>.

offer of good offices could make a positive contribution to the resolution of the issues raised and/or the implementation of the Guidelines going forward and would not create serious prejudice for either of the parties involved.”¹³⁹

Currently, there are pending human-rights-related court cases against the contractors to which the banks are linked.¹⁴⁰ However, the banks named in these complaints are not party to the lawsuits against the contractors; therefore, the issue of prejudice (or a “contempt of court situation,” another indicium to consider)¹⁴¹ should not be a limitation to NCP review. Indeed, in *Society for Threatened Peoples vs. Credit Suisse*, concerning risks arising from the North Dakota Access Pipeline (DAPL) in the US, the Swiss NCP stated that while it was aware of pending lawsuits “in relation with the DAPL,” since “those proceedings are not related to the parties of the present submission, they do not prevent the Swiss NCP to pursue this specific instance.”¹⁴²

2.5.2 Similar specific instances against the Respondents

Swiss National Bank: The Complainants are not aware of other relevant proceedings before the Swiss NCP against Swiss National Bank.

UBS: The Complainants are aware of another proceeding before the Swiss NCP against UBS. *Society for Threatened Peoples Switzerland v. UBS Group* concerns UBS’ ownership of shares in Hangzhou Hikvision Digital Technology, which provides surveillance technology used to commit human rights violations against the Uyghurs and other minorities in China. The Swiss NCP partially accepted the case, but after three sessions, the Complainants decided to end the mediation due to lack of willingness on UBS’ part to take responsibility regarding its passive investments.¹⁴³ The parties nonetheless agreed to engage in future meetings. UBS agreed it would take a leading role in advocating for ESG initiatives in the industry, including on issues related to passive index funds, and to strengthen collaboration within the industry regarding human rights.¹⁴⁴ It is unclear whether UBS continued honoring the commitments, or what follow up has occurred.

¹³⁹ 2023 OECD GUIDELINES at 70.

¹⁴⁰ As of July 2021, there were five class action lawsuits against GEO and CoreCivic under the Trafficking Victims Protection Act in US federal court. These cases have been pending for varying lengths of time, the first having been filed in 2014. *Defining Forced Labor* at 1223.

¹⁴¹ OECD GUIDELINES at 70.

¹⁴² SWITZERLAND NATIONAL CONTACT POINT.

¹⁴³ OECD WATCH, *Society for Threatened Peoples Switzerland vs. UBS Group*, <https://www.oecdwatch.org/complaint/society-for-threatened-peoples-switzerland-vs-ubs-group/>.

¹⁴⁴ *Id.*

UBS has also acquired Credit Suisse and is therefore responsible for its shares of CoreCivic and GEO Group. The Complainants are aware of two other relevant NCP complaints against Credit Suisse. In *Society for Threatened Peoples v. Credit Suisse*, concerning risks arising from the DAPL in the US, the Complainants claimed, among other things, that Credit Suisse, by holding managed shares in companies connected to the DAPL, breached its duty to carry out human rights due diligence and failed to actively encourage its investors to prevent or mitigate adverse impacts as stipulated in the OECD Guidelines. The Swiss NCP accepted the case and conducted mediation between the parties that concluded with an agreement for Credit Suisse to incorporate language into its policies regarding indigenous rights.¹⁴⁵ In April 2023, IUF, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations, filed a specific instance to the Swiss NCP alleging that Credit Suisse's investment in NagaCorp Ltd., which operates hotels in Phnom Penh, Cambodia and violates labor rights, constitutes a failure of due diligence relating to their investments.¹⁴⁶ The Swiss NCP is currently undergoing its initial assessment.

Barclays: The Complainants are not aware of any NCP cases against Barclays raising similar issues.

HSBC: The Complainants are not aware of any NCP cases against HSBC raising similar issues.

2.6 Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

Consideration of these complaints by the Swiss and UK NCPs would greatly contribute to the purposes and effectiveness of the OECD Guidelines. Facilitated dialogue by the NCPs between the parties to the complaint, with the aim of ensuring the banks' policies and operations comply with the principles and standards of the OECD Guidelines, would be especially useful for the resolution of the issues raised in this complaint. It could also elaborate on the responsibilities of MNEs where passive or nominee shareholding through mutual funds, including those that track index funds, are involved.

The Complainants respectfully request that the NCPs accept the complaints and offer their good offices for the purposes of mediation with the goal of finding a way forward with respect to the issues described herein. We make this request in good faith, believing that such dialogue can meaningfully assist to resolve the dispute and ensure the Respondents comply with the

¹⁴⁵ OECD WATCH, *Society for Threatened Peoples Switzerland vs. Credit Suisse*, <https://www.oecdwatch.org/complaint/society-for-threatened-peoples-vs-credit-suisse/>.

¹⁴⁶ ORG. FOR ECON. CO-OPERATION AND DEV., *International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) & Credit Suisse* (Apr. 5, 2023), <http://mneguidelines.oecd.org/database/instances/ch0027.htm>.

standards in the Guidelines. The Complainants are prepared to participate in such mediated dialogue at any reasonable time and location and will fully adhere to both NCPs' requirements with respect to confidentiality and other matters. If the NCPs decide that the issues raised merit further examination and offer their good offices to the parties, the types of solutions the Complainants would seek through this process (and through a mediated agreement) would include:

1. **Disclosure and transparency:** For the banks to share information on their ownership of shares in CoreCivic and GEO Group, including proprietary and nominee ownership that is active and passive, or any other business relationship with the contractors, including loan financing, bond underwriting, and investment banking.
2. **Due diligence:** For the banks to conduct comprehensive risk-based human rights due diligence on their relationships with the contractors and publish or provide the Complainants related reports from this or any previous due diligence it had conducted, if any, on CoreCivic and GEO Group, within time limits.
3. **Exercise leverage to mitigate impacts:** For the banks to seek to exercise their shareholder leverage, individually and together, to address human rights impacts caused by CoreCivic and GEO Group in a manner sufficient to meet the OECD Guidelines, for example through urgent and public engagement backed with the threat of divestment. Among other efforts, the banks should advise their clients of the contractors' human rights records and seek ways to put pressure on the contractors through participation in collective discussion and endeavors with peers and by publicly expressing support for robust government responses to the ongoing human rights violations.
4. **Divestment:** If, after a time limit, mitigation efforts have proven unsuccessful or insufficient to effect the change necessary, for the banks to end all their business relationships with CoreCivic and GEO Group, including, among other things, divesting all shares held on a proprietary or nominee basis and preventing future investment until such a time as the impacts are satisfactorily addressed. In the case of passive ownership through index funds, for the banks to first ask the index managers to remove CoreCivic and GEO Group, with time limits, and divest from any investment in index funds that continue to include CoreCivic and GEO Group. Additionally, for the banks to end non-investment business relationships, including, but not limited to, trading, direct lending, bond underwriting, investment banking and other advisory services, and corporate research.
5. **Policies and procedures:** For the banks to develop human rights due diligence and disengagement processes and policies regarding similar companies violating the human rights, including the human rights of detained persons, policies that explicitly:
 - a) Recognize the direct link that passive and active shareholding and other business relationships have to human rights impacts;

- b) Ensure that all business lines are covered by their human rights due diligence processes and policies to pre-empt any future involvement in adverse human rights impacts, with special attention given to passive, index, and nominee investments;
- c) Incorporate clear exit clauses in any business contracts that allow the bank to withdraw from any business relationship at any time that is found to have a direct link to adverse human rights impacts;
- d) Publicly and regularly report on the ways in which they are addressing business relationships with direct links to human rights impacts;
- e) Provide particular oversight regarding business links with private security companies involved in imprisonment, detention, and/or transportation of detained persons, including companies that own or manage immigration detention facilities, given the high risk of rights impacts; and
- f) Establish or participate in effective, operational-level grievance or accountability mechanisms, through which individuals and communities who may be adversely impacted by their activities, including their finance, can raise concerns and seek appropriate redress and/or remedy.

In conclusion, the Complainants contend that the banks have failed to uphold their responsibilities under the OECD Guidelines, conducting inadequate human rights due diligence, and failing to use their leverage to ensure the companies in which they hold or manage shares take appropriate action to address and remediate adverse human rights impacts.

If the NCPs determine that the issues raised merit further examination, the NCPs are encouraged to offer good offices to the parties with a view to the resolution of the issues raised in the complaint. If the banks decline the NCPs' offer of good offices, or alternatively if good offices between the parties fail to reach a mutually agreeable solution, the Complainants encourage the NCPs to conduct their own fact-finding (potentially involving a third-party examination of the issues raised) and/or develop Terms of Reference for a fact-finding report in dialogue with the parties to the complaint.