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Response to the UN Working of experts on the protection of human rights of people of African descent on the need to recognize mass incarceration as a driver of systemic racism

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I. Introduction: Mass Incarceration is a Driver of Systemic Racism

The original World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa from August 31st to September 8th, 2001, addressed the overrepresentation of “certain groups” in detention or prison, but failed to identify the structures that upheld that disparity.¹ The Working Group of Experts on People of African Descent (the Working Group) has continued to identify the need for enhanced training of law enforcement, local authorities, and prison staff to combat the overrepresentation.² However, training is not an adequate response to such an entrenched and global problem. The systems of incarceration common in post-colonial societies were created to subdue populations of African descent and continue that legacy today. Scholars such as Angela Davis and Ruth Gilmore have spent the past decades highlighting the systemic racism within the American criminal justice and incarceration system, yet the issue of mass incarceration and discriminatory impact is not acknowledged by most international agreements. The violence perpetrated by the state through mass incarceration is completely absent from the Working Group’s most recent comprehensive Report of the Working Group of Experts on People of African Descent (the Report) on its twenty-first and twenty-second sessions, despite widespread evidence of the racism inherent in not just overrepresentation but structural design.³ The eradication of racism and discrimination against people of African descent cannot be realized without recognizing mass incarceration as a human rights violation and the origin of a second class of citizen in post-colonial societies. The continued export of American-style prisons has entrenched systemic racism across the globe, even as a global consciousness-raising has exposed its faults.

II. Mass Incarceration in the United States

American mass incarceration has its roots in the Jim Crow Era and has served to continue the subjugation of Black people in America following the abolition of slavery.⁴ In the aftermath of the Civil Rights Act, American incarceration rates, especially among Black men, skyrocketed. The increase was a reflection of the shifting strategies of American politicians looking to uphold white supremacy and maintain an antebellum status quo. Prisons continued to be built at an unprecedented rate, even as crime fell.⁵ The result was the over-incarceration of underrepresented communities in poor conditions:

Today African-Americans and Latinos are vastly overrepresented in these supermax prisons and control units, the first of which emerged when federal correctional authorities began to send prisoners housed throughout the system whom they deemed to be “dangerous” to the federal prison in Marion, Illinois.⁶

¹ See Clause 25 in “The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance” (2001).

² *Id.* at Clause 138.

³ “Report of the Working Group of Experts on People of African Descent on its twenty-first and twenty-second sessions” United Nations Human Rights Council (2018).

⁴ Angela Davis *Are Prisons Obsolete?* 34 (2003).

⁵ *Id.* at 17.

⁶ *Id.* at 49.

Supermax prisons are the logical outgrowth of a militant approach to punishment and incarceration. These federal prisons use cells to isolate prisoners for years at a time.⁷ Prisoners are not allowed any controlled movement or recreation.⁸ United States Penitentiary, Marion was opened in 1963, two years before CERD was proposed and signed, to house inmates from the recently shuttered Alcatraz Prison.⁹ There is no reference in the Report to the emergence of new prisons that violated the rights enshrined in the Covenant. Following the introduction of the Civil Rights Act of 1964, American politicians began shifting from blatantly racist rhetoric to a more general “law and order” discourse.¹⁰ This message was implicitly racialized, making it impossible to divorce racism from mass incarceration, as was the case in *Terry v. Ohio*, where the Supreme Court provided judicial justification for increased policing and incarceration.¹¹ Throughout the ‘60s and the ‘70s in America, incarceration became the proffered solution to so-called societal problems and provided a smokescreen for racial discrimination.

The reliance on mass incarceration as a coded form of racism has normalized systemic discrimination in the aftermath of the Reagan drug wars.¹² The drug wars are an oft-cited cause of the explosion of arrests and incarceration in the United States, but in reality these enforcement policies were the continuation of a national effort to disenfranchise Black Americans and other underrepresented communities. The War on Drugs presented an opportune movement where “the absence of explicitly racist rhetoric afforded the racial nature of [Reagan’s] coded appeals a certain plausible deniability.”¹³ The drug wars preyed on the insecurities of white Americans and caused them to believe they were at risk, despite little actual threat. The United States became a place where “we all have these ideas that somehow if you’ve committed a crime, then you need to be punished. So this is why we have tried to dis-articulate crime and punishment in a popular sense by thinking about the ‘prison-industrial complex.’”¹⁴ The prison-industrial complex is often used to describe the cottage industry that has cropped up around incarceration. The legacy of the War on Drugs has continued to today, as Heather McGee posits:

The woes that devastated communities of color are now visiting white America, and the costs of incarceration are coming due in suburban and rural areas, squeezing state budgets and competing with education. It’s not a comeuppance but a bitter cost of the white majority’s willingness to accept the suffering of others, a cost of racism itself.¹⁵

As white Americans were willing to turn away from the rising incarceration rates in Black communities, they also turned a blind eye to the way mass incarceration marches on, despite skin color. In the end, a system that subjugates one group eventually subjugates everyone.

⁷ Stephen C. Richards *USP Marion: The First Federal Supermax* 88 *Prison Journal* 6, 8 (2008).

⁸ *Id.*

⁹ *Id.*

¹⁰ Michelle Alexander *The New Jim Crow* 59 (2010).

¹¹ *Terry v. Ohio* 88 S.Ct. 1868 (1968).

¹² See Beth Richie *Arrested Justice: Black Women, Violence, and America’s Prison Nation* 108 (2012): “Conservative scholars, religious leaders, and lawmakers began to argue that social problems (including violence) were based more on personal choices and immoral behavior than persistent lack of resources and structural arrangements.”

¹³ *Supra* note 5 at 61.

¹⁴ Angela Davis *Freedom is a Constant Struggle* 24 (2016).

¹⁵ Heather McGee *The Sum of Us* 47 (2021).

The 1990s did not mark a significant move away from the damaging rhetoric of the '80s. Instead, the Supreme Court began the decade with the decision in *Harmelin v. Michigan*, where they abdicated their discretionary power in favor of mass incarceration.¹⁶ In *Harmelin*, an incarcerated man challenged his sentence as cruel and unusual due to its disproportionate length relative to his crime. Justice Antonin Scalia drew on a long history of Western jurisprudence to deny that a prison sentence to life without the possibility of parole constituted an outsized punishment for possessing 650 grams of cocaine.¹⁷ Weaponizing Western culture against Black Americans is an effective means of subtly masking the racism underlying Scalia's decision. That theme continued throughout the '90s with the election of President Bill Clinton and the development of the "super predator" label.¹⁸

Clinton used the super predator label to vilify gang leaders—mainly adults—who got middle and high schoolers hooked on crack and then sent them out to commit violent crimes. However, Clinton's interpretation was to target the children as super predators, not the adults who supposedly caused their downfall.¹⁹ Clinton characterized these children as irredeemable and without conscience, effectively dooming them to a life inside prison walls. The super predator rhetoric opened the doors for police in schools, most commonly in predominantly Black or underrepresented communities.²⁰ The super predator designation became a self-fulfilling prophecy; as Angel Sanchez puts it "I started becoming the cold, apathetic 'superpredator' that they said I was. Rehabilitation and redemption were nowhere in sight, much less in my vocabulary."²¹

By effectively creating a second class of citizen in the United States, mass incarceration has imposed racism through a separate marginalized category: felon. The disenfranchisement of the formerly incarcerated should be a human rights violation notwithstanding the impermissibility of mass incarceration itself. Today, "over six million Americans are prohibited from voting as a by-product of the racist system of mass incarceration ... many felony disenfranchisement laws were enacted after the Civil War alongside new Black Codes to criminalize freedmen and women."²² Beyond disenfranchisement, the probation population in the United States has increased from 923,000 in 1976 to 4.96 million in 2010.²³ The probation population may not seem connected to the problem of mass incarceration, but it is integral to its maintenance. As stated above by Angela Davis, the prison industrial complex is much broader than just the act of incarcerating civilians. Probation has resulted in "these two forms of exclusion- making permanent outcasts of convicted criminals while stigmatizing other poor Blacks as potential threats- [which] have had devastating effects on low-income Black communities."²⁴ In the American carceral state, formerly incarcerated civilians are still labeled as felons even after the completion of their sentences. It is rare that civilians emerge from incarceration rehabilitated or better equipped to avoid recidivism. As noted by Angel Sanchez,

¹⁶ *Harmelin v. Michigan* 111 S.Ct. 2680 (1991).

¹⁷ *Id.* at 2691.

¹⁸ Angel Sanchez *In Spite of Prison* 132 Harv. L.Rev. 1650, 1660 (2019).

¹⁹ *Id.*

²⁰ *Id.* at 1655.

²¹ *Id.* at 1661.

²² *Supra* note 9 at 145.

²³ Jeremy Travis et al. *The Growth of Incarceration in the United States: Exploring Causes and Consequences* National Academies Press 40 (2014).

²⁴ James Forman Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow* 87 NYU L.Rev. 21, 32 (2012).

“success stories of people who thrive after prison are used to argue that prisons are not bad and are even effective. Our own amazement with those stories, however, shows that deep inside we are aware that prisons are not really expected to make people better.”²⁵ Even the portions of the carceral system that are meant to encourage rehabilitation have not been effective, as “parole boards have become increasingly reluctant to release lifers on parole, despite low recidivism rates among this population.”²⁶

The United States has begun to expand its carceral state beyond its borders, allowing the international community to import forms of incarceration that rely on racism.²⁷ The international adoption of the American style of incarceration has resulted in similar disparate treatment for Black people and underrepresented communities. Angela Davis explains that “the notion of a prison industrial complex also insists that the racialization of prison populations – and this is not only true of the United States, but of Europe, South America, and Australia as well – is not an incidental feature.”²⁸ In the US, private prisons make up a small percentage of the total number of prisons, but the companies are “becoming the primary mode of organizing punishment in many other countries.”²⁹ Various post-colonial countries have signed contracts with American private prison corporations to enact similarly punitive standards and systems of mass incarceration common in the United States.

III. Incarceration as a Driver of Systemic Racism in South Africa

In South Africa, the aftermath of apartheid has been complicated and colored by deeply entrenched racism. While facially racist policies are not common, the introduction of an American-style prison system has increased capacity for discrimination. South Africa has enacted progressive policies on issues such as LGBT+ rights and the death penalty, but has failed to see the oppressive impact of an expanding and more oppressive carceral system.³⁰ In South Africa:

The imprisonment rate for Coloured males is around 12 times the rates for Asian and White males (at 1932/100 000 of the population), and nearly double (1.9) times the rate for African males (1042/100 000 of the population). The rate for Coloured males mean, in effect, that one out of every 52 Coloured males in South Africa (or just more than 2%) between the ages of 18 and 66 years is imprisoned at any one time. Coloured men aged 18 to 65 years are 12 times more like to be imprisoned than their White and Indian counterparts. African men aged 15 to 65 years are also six times more likely to be imprisoned than White males.³¹

These numbers are troubling, but they also fall within the expected results of employing an American-style system of incarceration. There is a through line between post-colonialism and

²⁵ *Supra* note 12 at 1651.

²⁶ Katherine Becket *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration* Ann. Rev. Criminol. 235 (2018).

²⁷ *Supra* note 1 at 97.

²⁸ *Supra* note 1 at 85.

²⁹ *Id.* at 97.

³⁰ *Id.* at 102.

³¹ Lukas Muntingh *Race, Gender and Socio-Economic Status in Law Enforcement in South Africa – Are There Worrying Signs?* Community Law Centre, 14 (2013).

apartheid that created a perception of racialized threats posed by the Black population of South Africa.³² In a country with a similar, albeit more recent, history of segregation, an American system of incarceration has de-stabilized already perilous communities.³³ The result is generational trauma that continues to impede the path to equity in post-apartheid South Africa.

IV. Incarceration as a Driver of Systemic Racism in Australia

Australia's colonial history has played out in the past half-century at imported prisons following the American system of mass incarceration as a stop-gap for societal issues. As of 2016, Aboriginal and Torres Strait Islanders were 12.5 times more likely to be incarcerated than non-indigenous people.³⁴ In fact, Indigenous Australians are more likely to be incarcerated than Black Americans.³⁵ The legacy of colonialism and subjugation in Australia have produced trends similar to those in the American system. The Australian increase in prison population began in the 1980s, mirroring the United States.³⁶ Australia has contracts with many American private prison companies, extending the reach of a prison industrial complex proven to have racist impacts.³⁷ Private prisons are most quickly expanding into women's prisons, which were adopted by Australia in 1996.³⁸ These private companies provide health services to prisons across Australia, even publicly-owned ones.³⁹ The private sector's involvement in prison management and administration is confined to a profit-driven model; the usual goals of rehabilitation and public safety are not part of a capitalist system.

The increase in the Australian incarcerated population has been bolstered by the increasing reliance on juvenile detention as a means of controlling societal failures in Indigenous communities.⁴⁰ While making up 6% of Australia's youth population, Indigenous children are 65% of incarcerated youths aged ten to thirteen.⁴¹ The over-incarceration of Indigenous adults and children in Australia is not a secret; it has been described by the Attorney General as a national tragedy and by the Special Rapporteur on the rights of Indigenous peoples as a "major human rights concern."⁴² Post-colonial societies like Australia have still not fully reckoned with the ways that racism finds its way into core functions of government. This is because the prison industrial complex is increasingly becoming a profitable venture, even for companies with a tenuous connection to law enforcement and its subsidiaries.⁴³ These companies may be based in the United States, but a profit-driven model means they will continue to find post-colonial countries that are willing to outsource prison management.

³² *Id.* at 18.

³³ *Id.* at 27.

³⁴ *Pathways to Justice- Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People* Australian Law Reform Commission Report 133 (2017).

³⁵ Andrew Leigh *The Second Convict Age* 12 (2020).

³⁶ *Id.* at 9.

³⁷ *Supra* note 1 at 97.

³⁸ *Id.*

³⁹ *Id.* at 98.

⁴⁰ Roxanne Moore *First Nations people cannot celebrate while Australia is locking up our children* The Guardian (2021) <https://www.theguardian.com/australia-news/commentisfree/2021/jan/26/first-nations-people-cannot-celebrate-while-australia-is-locking-up-their-children>

⁴¹ *Id.*

⁴² *Australian Compliance with ICERD* Australian NGO Coalition 20 (2017).

⁴³ *Supra* note 1 at 99.

V. Incarceration as a Driver of Systemic Racism in New Zealand

New Zealand, another former colony with a history of Indigenous subjugation, has likewise pursued a carceral campaign that has resulted in disproportionate representation of underrepresented communities. There has been widespread incarceration of Maori people; in 2017, Maori made up 51% of the total prison population, but were 15% of the total population.⁴⁴ New Zealand has contracts with American private prisons to provide beds, transportation, electric monitoring programs, and mental health services.⁴⁵ The same issues with profit maximization have driven up the rates of Maori incarceration, as well as flawed concepts of crime prevention originating in the United States. Even more troubling than the overall incarceration rate of Maori are the numbers representing how many Maori children are currently incarcerated. The number of Maori children in juvenile detention is quadruple that of non-Maori children.⁴⁶ The racialized nature of youth incarceration ensures that Maori will likely have multiple contacts with the criminal justice system throughout their lives, increasing the chances of recidivism.

As in the other post-colonial countries mentioned throughout this general comment, “the Maori experience of colonization is paralleled by struggles of Indigenous peoples in other settler states which have also been systematically brutalized and marginalized by state policies.”⁴⁷ New Zealand has addressed the problem of Maori overrepresentation by instituting a series of policies that at first claimed to be color-blind but then moved towards overt targeting.⁴⁸ The Risk, Needs, Responsivity (RNR) model was first developed in Canada and implemented in New Zealand in the late 80’s and early 90’s.⁴⁹ This model did not take race into account when used to address offender behavior. Because this provided an incomplete analysis of the prison population, the government developed specific models that addressed Maori culture as an element of criminality.⁵⁰ By tying offender behavior to an entire culture, especially a marginalized one, New Zealand linked criminality to the criminal justice system’s perception of Maori people. These models did not consider the increased policing and systemic discrimination that may contribute to contacts with the criminal justice system. New Zealand is an excellent example of policy making that leaves interested parties out of the process. Addressing mass incarceration in the post-colonial context requires stakeholder participation, not strictly governmental policy making.

VI. The Convention on the Elimination of All Forms of Racial Discrimination

The lack of a clear identification of mass incarceration as a function of systemic racism in CERD leaves underrepresented populations vulnerable to governmental authority. Within CERD, there are two provisions that address governmental harm against civilians- Articles 4(c)

⁴⁴ Paula Toko King, Donna Cormack, and Rawiri Keenan *COVID-19 and the mass incarceration of Indigenous peoples* 9 Journal of Indigenous Social Development 141, 142 (2020).

⁴⁵ *Supra* note 1 at 98.

⁴⁶ *Supra* note 37 at 143.

⁴⁷ Tracey McIntosh and Kim Workman *Maori and Prison in The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* Palgrave 727 (2017).

⁴⁸ *Id.* at 731.

⁴⁹ *Id.*

⁵⁰ *Id.*

and 5(b).⁵¹ Article 4(c) prohibits racial discrimination by public institutions, while 5(b) protects the right to security of person and protection from the state against violence or bodily harm. These provisions make no mention of prisons or systems of incarceration and how they might perpetuate the racism CERD seeks to eliminate. By not addressing this issue specifically, CERD has created space for governments to institute facially neutral yet effectively discriminatory systems that are entrenched in civil society.

A. General Comments to CERD

Various general comments to CERD have failed to recognize mass incarceration as a significant driver of racism in the post-colonial world. There have been three general comments that specifically address incarceration and law enforcement, but they have not been explicit enough to draw a line between mass incarceration and racism. One submitted in 1993 addresses the training of law enforcement officials and dictates that law enforcement officers should receive “intensive training” in human rights to ensure they perform their duties in accordance with international human rights standards.⁵² This comment is half a page long and does not address the kind of training requested or specific goals related to decreasing racism within law enforcement. The lack of specific goals creates an international consensus without meaningful action. Additionally, the events of the past year are more than enough to demonstrate that law enforcement officers, 27 years after this general comment, the training suggested has not had an impact on the disproportionality of the criminal justice system in the United States and abroad. Moreover, treating the racialized impact of the prison industrial complex as a training issue ignores the structurally protected discrimination inherent in these systems.

B. General Recommendation No. 31

Another general comment, this one from 2005, addresses the prevention of racial discrimination in the administration and functioning of the criminal justice system and explicitly recognizes the impact that racism has on post-colonial carceral states.⁵³ This comment focused on information gathering as a means of demonstrating racism within penal systems in order to formulate solutions.⁵⁴ The comment does not, however, address the need for review of penal systems that already exist.

While suggesting that states in post-conflict reconstruction seek the help of the United Nations (UN) in building a legal system, the comment centers the carceral state as a solution to discriminatory practices despite the repeated examples of pervasive racism.⁵⁵ Reforming systems that were built by governmental actors, not stakeholders, does not eliminate the dynamics of authority or social issues leading to higher incarceration. Penal systems will continue to be “a

⁵¹ *International Convention on the Elimination of All Forms of Racial Discrimination* United Nations General Assembly (December 21, 1965) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁵² *General recommendation XIII on the training of law enforcement officials in the protection of human rights* 42 Committee on the Elimination of Racial Discrimination (1993).

⁵³ *General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system* 65 Committee on the Elimination of Racial Discrimination (2005).

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 4.

place to warehouse people who represent major social problems.”⁵⁶ While prison administration and functioning is a serious issue, reforming those aspects will not remove the utility of prisons. Without a comprehensive response to the actual needs of Black and underrepresented communities, the state will continue to criminalize poverty and lack of health care. A “nicer” system would still serve as a depository for those the government has failed to provide for. Because the main driver of crime is poverty, the overrepresentation of marginalized communities will continue despite anti-racism trainings or prison overhauls.⁵⁷

C. General Recommendation No. 36

The most recent general comment to CERD came in 2020 (the Comment) and again addressed racial profiling by law enforcement following a year when racial disparities, especially in the United States, became blindingly visible.⁵⁸ The Comment addressed police brutality and various instances of abuse of power by law enforcement in a wide scope of agencies. Over-policing and increased chances of contact with law enforcement are recognized as contributions to higher rates of arrests and incarceration.⁵⁹ Naming increased surveillance as a factor in systemic racism is crucial because it connects mass incarceration to racist policing. Clause 30 explicitly mentions disproportionate incarceration rates for groups protected under CERD as a result of racial profiling, which has been the reality in most post-colonial societies since at least the 1980s.⁶⁰ However, the Comment suffers from the same deficiencies as those mentioned above. By focusing exclusively on reforming systems that have been proven racist, the Comment fails to recognize that structural racism requires an entirely new premise to divest from its origins.

Current policing and carceral systems have their origins in population and movement control, not an interest in rehabilitation or social welfare. The Comment relies on human rights education and training as a solution to racial profiling, which does not solve over-policing or the increased surveillance of underrepresented communities. The Comment is missing the recognition that the problem of systemic racism does not start with individual police or correctional officers; it begins with the infrastructure that granted that person authority. The Comment recommends training police officers to recognize that algorithms used for surveillance are implicitly biased, which relies heavily on individual responsibility.⁶¹ Shifting the onus of anti-racism to individual and local actors is once again addressing an outgrowth, as opposed to the root, of the problem. The comments to CERD regarding policing and incarceration fail to question whether these systems are necessary or societally useful in the first place.

VII. Other UN Treaties & Frameworks

A. The ICCPR

⁵⁶ *Supra* note 8 at 25.

⁵⁷ Erika Harrell and Lynn Langton *Household Poverty and Nonfatal Violent Victimization, 2008-2012* Bureau of Justice Statistics (2014).

⁵⁸ *General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials* Committee on the Elimination of Racial Discrimination (2020).

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 9.

The International Covenant on Civil and Political Rights contains two provisions that relate to mass incarceration, but do not examine how racism drives carceral systems.⁶² Articles Six through Twenty-Seven discuss international standards for incarceration and punishment that focus on prisoner safety and the fair execution of the criminal justice system. The ICCPR was signed in 1966 and entered into force in 1976; it was originally proposed one year after CERD. The ICCPR, as with CERD, does not mention the role of colonial authority or imperialism in the commission of human rights violations. As a result, the treaties address the visible effects of racism and human rights violations, which are often an escalation of smaller, more persistent inequities. Article Six of the ICCPR creates the right to life and standards for death penalties. The contradiction in Article Six is that it states that the right to life should be protected by law, but then goes on to illustrate how and when the death penalty can be imposed. By allowing room for the death penalty, despite taking a stance against it, the ICCPR loses the weight of its enforcement power.

The ICCPR does not specifically refer to conditions in prison or the discrimination that gave rise to mass incarceration, despite its provision against torture. Article Seven bans the use of torture and cruel, inhuman, or degrading treatment or punishment, mirroring the 8th Amendment of the Constitution of the United States.⁶³ The invoking of the same standard as the United States suggests that the ICCPR could fall prey to the same interpretation posed by Justice Scalia in *Harmelin v. Michigan*.⁶⁴ Article Seven is short and vague, making it vulnerable to many different interpretations. Additionally, because the ICCPR sets standards for prisons in Article Ten, it suggests that imprisonment is the correct way to tackle crime and therefore is not a cruel or unusual punishment. The ICCPR normalizes imprisonment as a natural function of society instead of asking member states to question whether their system of incarceration is improving public safety or recidivism rates.

B. The Convention Against Torture

The Convention Against Torture (CAT) contains some provisions that address how public institutions should be run, but stops short of connecting inhumane treatment at prisons with racism.⁶⁵ Article One of CAT defines torture as an act meant to obtain information, coerce, or wrongfully punish someone, but does not extend that to pain or suffering inherent in or incidental to lawful sanctions. This essentially gives member states the discretion to define what lawful sanctions inherently produce pain and suffering. Each state party is obligated under Article Ten Section One to educate law enforcement personnel on the responsible treatment of those in custody, while Article Eleven requires systemic review. Mass incarceration would not qualify as torture under CAT because the pain and suffering it causes are part of a lawful sanction against a convicted civilian. The education and training provided to officers is, again, a start, but it treats the symptoms of structural racism, not the cause. Angela Davis speaks to how narrowing the focus to the ways police and law enforcement officers respond to a threat should

⁶² *International Covenant on Civil and Political Rights* General Assembly Resolution 2200A (1966).

⁶³ U.S. Const. amend. VIII, §1.

⁶⁴ *Supra* note 10.

⁶⁵ *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* General Assembly resolution 39 (1984).

be a sign of deeper, institutionalized violence.⁶⁶ Without an intersectional approach to policing that acknowledges its origins in racism, torture and inhumane treatment will continue.

C. The United Nations Standard Minimum Rules for the Treatment of Prisoners

The official UN Standard Minimum Rules for the Treatment of Prisoners set international norms for carceral systems by addressing the physical conditions of imprisonment, not the underlying systemic issues.⁶⁷ Rule Six states that, in the context of detention and incarceration, discrimination should not occur based on race, color, sex, religion, or political opinion, or social origin, property, birth, or other status. Rule Six prioritizes the individual needs of prisoners, especially those from vulnerable demographics. The intention is to treat all prisoners as bringing a specific set of experiences and needs, to recognize and name those needs, and then to address them. This differing treatment is not seen as discrimination and is similar to the RNR system implemented in New Zealand to address the overincarceration of Maori, which only exacerbated existing problems.

The purpose of imprisonment is public safety, according to Rule 58, with the ultimate goal being successful reintegration into civil society. The intention is to release formerly incarcerated people so “they can lead a law-abiding and self-supporting life.”⁶⁸ By definition, modern carceral systems do not meet this standard. In *Harmelin v. Michigan*, Justice Scalia sets a precedent for allowing life sentences to be handed to first time, non-violent, drug offenders.⁶⁹ Mandatory minimum sentencing laws, which led to the result in *Harmelin*, are a feature of American mass incarceration and a direct violation of Rule 58 of the Standard Minimum Rules.⁷⁰ Both the 8th Amendment and the Standard Minimum Rules follow the cruel and unusual punishment standard, yet the American Supreme Court has interpreted that standard in direct opposition to the Standard Minimum Rules. This contradiction exists because there is no internationally agreed upon definition of mass incarceration or cruel and unusual punishment. By attempting to work within the prison industrial complex’s framework, the Standard Minimum Rules fail to name mass incarceration as a driver of discrimination and the poor treatment of incarcerated people.

VIII. Comparative Lessons in International Law

A. The European Convention for the Protection of Human Rights

In the European Convention for the Protection of Human Rights (ECHR), the Right to Liberty and Security provides a list of when detention is proper and what the member state must consider when depriving someone of their liberty.⁷¹ A recognized right to security is included in the ICCPR, and CERD reaffirms the need for personal security, but the level of detail in the ECHR is not included in these UN treaties. There are some basic clauses in the ICCPR that

⁶⁶ *Supra* note 8 at 32.

⁶⁷ *Standard Minimum Rules for the Treatment of Prisoners* United Nations Congress on the Prevention of Crime and the Treatment of Offenders Resolution XXIV, 1 (1977).

⁶⁸ *Id.* at 9.

⁶⁹ *Supra* note 5 at 113.

⁷⁰ *Id.*

⁷¹ *European Convention on Human Rights* Art. 5 §1.

provide for special treatment for minors, but beyond these provisions there is no mention of prison norms.⁷² The ECHR allows for arrest and detention for conviction in a court of law or for non-compliance with an order of a court of law, so long as procedure is followed.⁷³ The ECHR sets a standard of reasonable suspicion for the arrest and detention of civilians with the purpose of bringing them before a court of law.⁷⁴ By articulating a clear standard for appearance in court, the ECHR sets a higher bar than the ICCPR. This norm has resulted in prison rates far lower than those of the United States and post-colonial nations.⁷⁵

There are many factors that explain why European states have consistently shorter sentences and lower crime rates than the post-colonial world, but the norms set by the ECHR at the very least provide a framework for member states. The ECHR allows for juvenile detention and the detention of persons for the prevention of infectious disease spread, the first of which is fairly standard in international agreements.⁷⁶ The spread of infectious disease is not as common, especially as it is coupled with the detention of people of “unsound mind, alcoholics or drug addicts or vagrants.”⁷⁷ This clause is troubling, as it signals a willingness to use prisons and detention as a means of population behavior control. The utility of prisons is a consistent theme throughout international criminal justice systems and may explain why private prisons have contracts in some European countries.⁷⁸ The commitment to using prisons as public welfare, in place of medical care or social services, is especially worrying when considering the racial biases inherent in justice systems.

The final category of persons who can be detained under the ECHR are unauthorized migrants and those under extradition or deportation orders.⁷⁹ Allowing the detention of unauthorized migrants who have committed no other crime stigmatizes foreigners and justifies xenophobia, especially when considering that the majority of unauthorized migrants in Europe hail from Southeastern Asia.⁸⁰ The ECHR relies on law enforcement and incarceration as an effective governmental tool without realizing the discrimination these systems were built on. Despite its strengths, the ECHR falls into the same trap as carceral systems in post-colonial countries and other treaties.

B. The American Convention on Human Rights

The provisions in the American Convention on Human Rights (ACHR) creates an obligation to respect rights without discrimination, yet does not recognize discrimination embedded within public institutions.⁸¹ The clauses in the ACHR are similar to those in the ICCPR and focus mainly on governmental respect of individual rights. Article Five addresses the

⁷² *Supra* note 55 at Art. 10 §§2(b)-3.

⁷³ *Supra* note 64 at Art. 5 §1(b)-(c)

⁷⁴ *Supra* note 64 at Art. 5 §1(c).

⁷⁵ *Supra* note 5 at 113.

⁷⁶ *Supra* note 64 at Art. 5 §1(d).

⁷⁷ *Supra* note 64 at Art. 5 §1(e).

⁷⁸ *Supra* note 1 at 97.

⁷⁹ *Supra* note 64 at Art. 5 §1(f).

⁸⁰ Phillip Connor and Jeffrey S Passel *Europe’s Unauthorized Immigrant Population Peaks in 2016, Then Levels Off* Pew Research Center (2019). <https://www.pewresearch.org/global/2019/11/13/the-origins-time-in-country-and-demographics-of-unauthorized-immigrants-in-europe/>

⁸¹ *American Convention on Human Rights “Pact of San Jose, Costa Rica”* Organization of American States Art. 1 §1 (1969).

Right to Humane Treatment, which is not specifically targeted to prisons or carceral systems.⁸² The clause contains the same cruel, inhuman, or degrading punishment standard as many other treaties and the same requirements for juveniles.⁸³ While the ECHR contained a list of acceptable reasons for detention, the ACHR is more focused on the treatment of detainees after arrest has taken place. The lack of that additional layer of protection leaves civilians vulnerable to arbitrary detention, self-defined by each jurisdiction. The ECHR has the advantage of spelling out exactly what is expected when detention takes place, giving less room for discretion. Members of the Organization of American States (OAS) only become responsible for the Right to Humane Treatment once detention has taken place, not before as in the ECHR. The states of the OAS are overwhelmingly former colonies with complicated racial histories and that context is completely lost in the ACHR.

The Right to Equal Protection enshrined in Article 24 of the ACHR created a negative right that ignores all racial nuance.⁸⁴ Article 24 is two sentences long, and guarantees equal protection of the law without discrimination. Without a more comprehensive definition of preventing discrimination, it is unlikely that a clause so clearly based off of the 14th Amendment to the United States Constitution would yield results different from those in the US.⁸⁵ As discussed above, the United States built a carceral system on racial discrimination despite an ostensible constitutional commitment to equal treatment under the 14th Amendment. The ACHR does not acknowledge that history of discrimination or the inadequacy of structures that were built for subjugation.

C. The Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance

Undertaking an effective campaign against racial discrimination has proven to be difficult in the context of international agreements, especially in post-colonial countries where recognition of the impact of imperialism has not been widespread. The Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance (IACR) was an attempt to condemn racial discrimination and require member states to take preventative measures against disproportionate treatment.⁸⁶ There is no mention of prisons or carceral systems in the document, despite its relatively recent publication; the issues of mass incarceration and its oppressive impacts were well known in 2013.⁸⁷ The first Black president in the United States had completed a full term and issues of racial discrimination were making the rounds in national and international news due to recent police killings. The increased visibility of mass incarceration did not result in a comprehensive response from the OAS. The organization enacted a document that contained many of the same provisions as the ACHR, including the right to equal protection.⁸⁸ There are no mentions of police or law enforcement in the IACR, which has allowed the discretion requisite for discrimination to continue. As the issue of mass incarceration has come to the fore in the Americas, it has not been reflected in the policies of the OAS. The lack of

⁸² *Id.* at Art. 5.

⁸³ *Id.* at Art. 5 §§1, 5.

⁸⁴ *Id.* at Art. 24.

⁸⁵ U.S. Const. amend. XIV.

⁸⁶ *The Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance* Organization of American States (2013).

⁸⁷ *Supra* note 8 at 77.

⁸⁸ *Supra* note 79 at Art. 2.

movement implies that the utility of the prison industrial complex outweighs the human rights abuses perpetuated by those systems.

IX. Recommendations

The solutions to mass incarceration will not come with color-blind approaches and vague suggestions to reform public institutions. Mass incarceration has been so pervasive because we, as a global community, have refused to see the way societal inequities produced a carceral system where Black people and underrepresented communities are so targeted.⁸⁹ The current global approach to combatting racial discrimination relies on treating more visible, racialized issues without a comprehensive approach to systemic inequities. The results of the RNR in New Zealand, post-apartheid reconstruction in South Africa, and the War on Drugs in the United States have shown that stakeholders must be involved in the restoration of their communities or we risk creating more systems of injustice that perpetuate already existing racial stereotypes and profiling. The current international treaties that address prisons or racial discrimination do not take the intersectional approach needed to actively combat mass incarceration. Defining when detention can take place, as in the European Convention for the Protection of Human Rights, should be adopted globally to ensure arbitrary arrests are not disproportionately affecting those of African descent. Additionally, the use of private prisons and profit models within a state's system of incarceration should be discontinued. Moving away from imprisonment as a solution to crime will require a higher standard of public services, such as health care and housing. Providing social services like mental health care will prevent the use of prisons as a catch-all for societal problems. Without the recognition that mass incarceration is an issue to be explicitly named and combatted, the Working Group will not have the impact needed to eliminate racial discrimination. This is an especially urgent time for the Working Group as the implicit biases within governmental systems are becoming common knowledge and action is demanded. The Working Group should strive to define mass incarceration as a function of racism and work to dismantle the prison industrial complex that drives it.

⁸⁹ *Supra* note 5 at 299.