

# **THE GLOBAL PRISON CRISIS: WILL THE U.S. TAKE ACCOUNTABILITY AND LEAD IN REFORM?**

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## **ABSTRACT**

Imagine being locked in a cell, with no proper food, no proper human interaction, having to work hard labor jobs with no pay, and being unable to care for your hygiene. Inhuman degrading treatments of prisoners are often justified globally because they keep “criminals” out of society. Places of detention such as prisons are the most vulnerable populations because the people in there are rarely thought of, and the issues they face in those detention centers are kept away from the outside world. Due to this, prison populations are at a risk of many ill forms of treatment. Their mistreatment is often justified through their criminal acts. However, crimes do not negate the fact that incarcerated individuals are human. Individuals who commit “crimes” are no less human than those who have not committed crimes and it is time that prisoners and their rights are both remembered and respected. This note recommends that the U.S. adopt and implement the Optional Protocol to the Convention against Torture as part of its program to address widely acknowledged problems with mass incarceration.

## **INTRODUCTION**

The world’s prison population holds over 11 million prisoners.<sup>1</sup> This is the highest level the global prison population has ever reached having increased between 2002 and 2020.<sup>2</sup> The United States historically and currently incarcerates a greater proportion of its population than any other country with over 2.1 million people in prison at a rate of 655 people per

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<sup>1</sup> Global Prison Trends 2020, PRISON INSIDER (June 18, 2020), *available at* <https://www.prison-insider.com/en/articles/global-prison-trends-2020> (last visited March 20, 2021).

<sup>2</sup> *Id.*

100,000 of the national population.<sup>3</sup> The World Prison Population List by the International Center for Prison Studies, reports the prison rate for countries worldwide, majority of which have a rate below 150 per 100,000 of their population.<sup>4</sup> China prison population falls 4 million less than the United States making them the second highest prison populated country.<sup>5</sup> France was one of the country's with a rate below 150 with 61,102 thousand individuals imprisoned at a rate of 90 prisoners per 100,000.<sup>6</sup> Lastly, the United Kingdom's three distinct legal systems each have a rate of prisoners below 150 per 100,000.<sup>7</sup>

There are many factors that contribute to the rise in the global prison population including countries and territories: mandatory minimum sentencing, mandatory pre-trial detention, police practices, over criminalization of drugs, the use of private prisons for economic purposes, and often not weighted, political influences.<sup>8</sup> Such factors present themselves differently in each country and territory.<sup>9</sup>

However, globally the use of imprisonment tends to be justified by protecting society against crimes.<sup>10</sup> Imprisonment however has many negative consequences including difficulty in family formation, dissolution and decrease in social networks, harmful psychological effects, and an increased rate of return. Thus it is counterproductive in

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<sup>3</sup> *Id.*

<sup>4</sup> Michelle Ye Hee Le, Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country. THE WASHINGTON POST (July 7, 2015), *available at* <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> (last visited March 20, 2021).

<sup>5</sup> *Supra* note 3.

<sup>6</sup> World Prison Brief Data: France, WPB, *available at* <https://prisonstudies.org/country/france>

<sup>7</sup> World Prison Brief Data: United Kingdom. WPB, *available at* <https://www.prisonstudies.org/country/united-kingdom-england-wales> (last visited March 20, 2021).

<sup>8</sup> Use & Over-use of Imprisonment Worldwide, PRISON INSIDER (March 23, 2017), *available at* <https://www.prison-insider.com/en/articles/use-and-over-use-of-imprisonment-worldwide> (last visited March 20, 2021); Overcrowding and Overuse of Imprisonment in the United States, ACLU (May 2015).

<sup>9</sup> Use & Over-use of Imprisonment Worldwide, PRISON INSIDER (March 23, 2017), *available at* <https://www.prison-insider.com/en/articles/use-and-over-use-of-imprisonment-worldwide> (last visited March 20, 2021);

<sup>10</sup> E4J University Module Series: Crime Prevention and Criminal Justice, Topic 1: Introducing the aims of punishment, imprisonment, and the concept of prison reform, UNODC, *available at* <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-6/key-issues/1--introducing-the-aims-of-punishment--imprisonment-and-the-concept-of-prison-reform.html> (last visited Feb. 11, 2022).

protecting society against crimes.<sup>11</sup> Over using prisons have led to overcrowded prisons, that are not properly maintained or supervised resulting in inhuman treatment, and deviates from the goal of rehabilitation.<sup>12</sup> Because of this, the more imprisonment may not even help protect societies against crimes.<sup>13</sup> According to the Institute for Criminal Policy Research Global Report, more imprisonment, “limits the capacity of prison systems to deal effectively with the small minority of prisoners who pose serious risks to public safety, and indeed increases the risks posed by prisoners (to themselves as well as to others inside and outside prison walls)”.<sup>14</sup>

Such prison conditions conflict with International Human Rights laws and other guidelines governing prisoners treatment that includes The International Covenant on Civil and Political Rights (“ICCPR”), the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”), the United Nations Standard Minimum Rules for the Treatment of Prisons (“SMRTP”), and the Optional Protocol to the Conventional against Torture (“OPCAT”).<sup>15</sup> These instruments safeguard fundamental human rights including the ban of torture or cruel, inhuman or degrading treatment. In specific, it requires participating nations to create mechanisms to prevent torture from occurring in detention centers, police stations, and prisons and it permits international experts to inspect those same facilities.<sup>16</sup> Unlike many countries, the United States is extremely dependent on judicial decrees, that sometimes involve private monitoring disallowing the ability to be held accountable for prison abuses by the international community.<sup>17</sup> Numerous countries have ratified OPCAT to ensure compliance for prisoners’ rights and in doing so have begun the process of reform.<sup>18</sup> The

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> Chapter 8 International Legal Standards for the protection of Persons Deprived of Their Liberty, U.N., *available at* <https://www.un.org/ruleoflaw/files/training9chapter8en.pdf> (last visited March 20, 2021).

<sup>16</sup> Preventing Torture Everywhere, NCRCAT, *available at* [http://www.ncrcat.org/storage/documents/opcat\\_video\\_discussion\\_guide.pdf](http://www.ncrcat.org/storage/documents/opcat_video_discussion_guide.pdf) (last visited March 20, 2021).

<sup>17</sup> Simon J. Penal monitoring in the United States: Lessons from the American experience and prospects for change. *Crime, Law and Social Change*. 2018;70(1):161-173. (last visited March 20, 2021).

<sup>18</sup> Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on Prevention of Torture, UNITED NATIONS HUMAN RIGHTS, *available at*

United States, as a world leading power that prides in its democracy and influence continued silence on regulating its prison population and incarceration rates is detrimental to what the nation stands for and thus regulation of OPCAT needs to be an important implementation.<sup>19</sup>

The failure of the United States to join with world leading powers France and UK in ratifying OPCAT and generally taking on international human rights legal obligations for prisoners' rights, limits its credibility and influence.<sup>20</sup> The focus of this note will be to establish why it is important for the United States to hold itself accountable in the regulation of prison reform. Part I will focus on birth of prison and the growth of mass incarceration in the United States. Part II will provide a summary of the body of international law that governs prisoner's treatment and discuss the United States failure to adopt the regime. Part III will discuss how and why restorative justice programs implemented in the United States can reduce prison populations and lead in shifting the worlds views by considering and implementing alternatives to prisons. Part IV will conclude that the United States prison practice behavior and attitude must change and without reform it is detrimental to the efforts the United States have taken in promoting democracy.

## **I. THE BIRTH OF PRISONS AND GROWTH OF MASS INCARCERATION IN THE U.S.**

### **A NEW METHOD OF PUNISHMENT**

Prisons were rarely used for criminal punishment.<sup>21</sup> The original purpose of jails was not to punish people but to simply hold them before

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<https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/RecentSignaturesRatification.s.aspx> (last visited March 20, 2021).

<sup>19</sup> United States Ratification of International Human Rights Treaties, HRW (July 24, 2009), *available at* <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (last visited March 20, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> Harry Elmer Barners, Historical Origin of the prison System in America, 12 J.A.M. INST. CRIM. L. & CRIMINOLOGY 35 (1921), *available at* <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1772&context=jclc> (last visited March 21, 2021).

trial and for the dispensation of corporal punishment.<sup>22</sup> One could expect to be released at the following court session during a “goal delivery,”<sup>23</sup> the delivery or clearing of a goal of the prisoners confined therein, by trying them.<sup>24</sup> It was rare for anyone to remain in prison and those who did were usually political and religious offenders, and debtors.<sup>25</sup> Although punishment was not the original purpose to confine a person, it became the outcome of prisons in the 19<sup>th</sup> century.<sup>26</sup> According to Foucault’s paradigm, the birth of prison as a form of punishment occurred between 1760 and 1840.<sup>27</sup> This period is referred to as the era of the Enlightenment and European/American revolutions, “when the rising middle class abolished public rituals of corporal punishment as incompatible with its new aspirations to build a modern liberal and industrial society.”<sup>28</sup> Each country’s history of punishment is distinctive from others and because they exhibit their own patterns of punishment today, a definitive global model of punishment has not emerged.<sup>29</sup>

The birth of prisons in the United States can help explain the how non-western countries adopted prisons for punishment.<sup>30</sup> The birth of the prisons is important because these beginnings help understand its relevancy to imprisonment histories of many countries around the world.<sup>31</sup>

### INCREASING NUMBERS OVER TIME

In the late eighteenth century after the American Revolution theories of reform changed the way punishment was originally carried

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<sup>22</sup> History of Imprisonment, CRIME MUSEUM, *available at* <https://www.crimemuseum.org/crime-library/famous-prisons-incarceration/history-of-imprisonment/> (last visited March 21, 2021).

<sup>23</sup> *Supra* note 12.

<sup>24</sup> The Law.com Dictionary, (2015), *available at* <https://dictionary.thelaw.com/gaol-delivery/> (last visited March 21, 2021).

<sup>25</sup> *Supra* note 12.

<sup>26</sup> *Supra* note 13.

<sup>27</sup> Mary Gibson, Global Perspectives on the Birth of the Prison, THE AMERICAN HISTORICAL REVIEW (Oct. 2011), Vol. 116, No.4, pp1040-1063, *available at* <https://www.jstor.org/stable/23307878> (last visited March 21, 2021).

<sup>28</sup> *Id.* at 1040.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Youmans, Ariana, Effective Prison Management: An International Collaboration, (2013) The Corinthian: Vol. 14 , Article 2., *available at* <https://kb.gcsu.edu/thecorinthian/vol14/iss1/2>.

out.<sup>32</sup> Independence, and a new justice system providing both protection and rights for its citizens was the result of the revolution.<sup>33</sup> Although the first several decades following the Revolution were an experimental period in criminal justice<sup>34</sup>, people in many parts of the world were seeking personal freedom and left their homes, immigrating to the United States.<sup>35</sup> Although people from many parts of the world were seeking personal freedom, most immigrants were from Germany, Ireland, and England, “the principle immigration before the Civil War”.<sup>36</sup> During this time, incarceration rates rose leading to overcrowded goals, which led to decay and corruption.<sup>37</sup> Due to this, in the early nineteenth century, widespread construction of penitentiaries began.<sup>38</sup> At the time confinement was seen as the only other alternative for punishment because massive reforms of corporal punishment were ongoing.<sup>39</sup>

During the mid-19<sup>th</sup> century, the Civil War led to “the emancipation of millions of African-American slaves in the South”.<sup>40</sup> Both African American families and immigrants arrived at American industrial cities looking for work.<sup>41</sup> During this time, the crime rate in America began to raise. In order to exert control, prisons were built to house inmates with the intentions to deter them from committing crimes.<sup>42</sup> In the South, prison population continued to rise as Black Prisoners quickly became a disproportionate number of the total prison population as they were targeted by law enforcement and given harsh

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<sup>32</sup> Mary Gibson, *supra* note 27 at 1044.

<sup>33</sup> The Early Years of American Law, *available at* <https://law.jrank.org/pages/11900/Early-Years-American-Law.html> (last visited March 21, 2021).

<sup>34</sup> *Id.*

<sup>35</sup> Immigration to the United States, 1851-1900, LIBRARY OF CONGRESS, *available at* <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/immigration-to-united-states-1851-1900/>

<sup>36</sup> *Id.*

<sup>37</sup> 19<sup>th</sup> century prison reform recollection, CORNELL UNIVERSITY LIBRARY (2020), *available at* <https://digital.library.cornell.edu/collections/prison-reform/> (last visited March 21, 2021).

<sup>38</sup> Talal Al-Khatib, Doing Time: A History of US Prisons, SEEKER (July 21, 2015), *available at* <https://www.seeker.com/doing-time-a-history-of-us-prisons-1770031128.html>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

sentences.<sup>43</sup> Similar to today, inmates were forced to do hard labor, live in harsh conditions, and were stripped of their personal freedoms. Authors often referred to this punishment as “slavery by another name.”<sup>44</sup>

Additionally, the world prison population increased dramatically between the years of 2000 and 2015.<sup>45</sup> This could be best understood by the global prison industrial complex, the interweaving of private business and government interests, known as the privatization of prisons.<sup>46</sup> During the 1990’s, private prisons began to catch on during the 1990s, due to overcrowding in many countries including the United States, where private prison corporations housed inmates for a cost.<sup>47</sup> In the United Kingdom, the private finance initiative (PFI), a government procurement policy aimed at creating public-private partnerships, helped institutionalize private prisons having announced that prisons will be both built and ran by private companies.<sup>48</sup> Governments were and continue to be attracted to private prisons because of cost savings and motivated corporations interest in profit maximization and accumulation of capital.<sup>49</sup> Privately owned prison corporations began to see a rise in state and local governments interest with building and operating prison facilities, many of which entered into lengthy contracts. Since these contracts prevent prison capacity from being changed or reduced, they effectively block criminal justice and immigration policy changes. Private corrections companies are heavily invested in keeping more than two million Americans behind bars.<sup>50</sup>

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<sup>43</sup> Delaney, Subramanian, Shames Turner, American History, Race, and Prison, Vera Reimagining Prison Web Report, *available at* <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> (last visited Feb. 13, 2022).

<sup>44</sup> Convict Leasing, EJI, (Nov. 1, 2013), *available at* <https://eji.org/news/history-racial-injustice-convict-leasing/>.

<sup>45</sup> The Growth of Incarceration in the United States: Consequences for Health and Mental Health, NAP (2014), *available at* <http://nap.edu/18613>.

<sup>46</sup> Journal for the Study of Peace & Conflict, (2016), *available at* <https://www.msf-crash.org/sites/default/files/2017-11/j16.pdf> (last visited March 21, 2021).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons, SENTENCING PROJECT (August 2, 2018), *available at* <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/#IV.%20Private%20Contractors%20and%20their%20Expanding%20R> each (last visited Feb. 13, 2022).

<sup>50</sup> Prison Conditions, EJI, *available at* <https://eji.org/issues/prison-conditions/> (last visited March 21, 2021).

### *Problems of Inhumane Treatment*

The occupancy rate of many prisons is recorded to have exceeded in more than 124 countries<sup>1</sup>. The effect of this is usually poor administration because of understaffing and allows prison monitoring protocols to be abused causing the individuals in such spaces to be more reluctant to abuse. In addition, assaults, uncontrolled violence subjected to higher rates of death in custody, gross mistreatment, a lack of healthcare provision and low rehabilitative opportunities occur due to the overuse of imprisonment.<sup>51</sup> Additionally, overcrowded prisons run a high risk of transmitting communicable diseases due to poor sanitary conditions. In reality prisons often do not meet basic human rights standards.<sup>52</sup> For example, the International Penal Reform reported that in the United States, corrupt prison officials often abusing their power, beat, stab, rape, and kill incarcerated people.<sup>53</sup> Inmates requiring special attention due to their disabilities, mental health, addiction treatment, and suicide prevention are often ignored and not given no treatment.<sup>54</sup> According to the American Civil Liberties Union and Human Rights Watch Report, Human Rights Violations in the United States, the United States is guilty of many human rights violations against prisoners.<sup>55</sup> These violations include overcrowding, lack of protection against violence creating fear for personal safety, issues pertaining to female prisoners, and disciplinary and confinement conditions in super maximum security (supermax) facilities.<sup>56</sup>

Harsh prison conditions, corruption, and correctional officers abuse of power run rampant with one another.<sup>57</sup> Both prison officials and state leaders tend not to be held accountable for corruption and abuse of power. Because of this, incarcerated people end up not receiving required

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<sup>51</sup> The Issue, PENAL REFORM, *available at* <https://www.penalreform.org/issues/prison-conditions/issue/> (last visited March 21, 2021); *Id.* <https://ejl.org/issues/prison-conditions/>

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Nan d. Miller, International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?, 26 CAL. W. INT'L L.J. 139, 140. (Fall, 1995).

<sup>56</sup> *Id.*

<sup>57</sup> *Supra* note 50.

protections.<sup>58</sup> Private non-profits have sought to increase accountability by investigating prison conditions and filing federal lawsuits and complaints seeking improvements. For example, the Equal Justice Initiative (“EJI”) has brought attention to extreme sexual abuse issues at Tutwiler Prison for Women assisting in the start of a federal investigation.<sup>59</sup> Additionally, EJI recorded the sexual abuse faced by men at the hand of correctional officers and other officials in several Alabama prisons.<sup>60</sup>

EJI along with many prison reform programs alarm our communities about the psychological risk and other consequences from inhuman and degrading treatment in prisons.<sup>61</sup> Many prisoners experience panic, anxiety, rage, depression, hallucinations, and drug abuse.<sup>62</sup> A survey by the Bureau of Justice Statistics found that more than half of all inmates had some kind of mental health problem and inmates particularly in the United States suffer from more serious mental health problems such as schizophrenia.<sup>63</sup> The survey has also found that contagious diseases such as tuberculosis, sexually transmitted diseases such as HIV, and chronic diseases such as hypertension, asthma, and diabetes constitute a growing percentage of correctional health care needs.<sup>64</sup> Inmates face a variety of challenges that affect their ability to become productive members of society and it is time that the problems of inhuman treatment are addressed on a national level.<sup>65</sup>

### ***Growing Recognition that the Prison System Needs Reform***

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Torture, PHR, *available at* <https://phr.org/issues/torture/> (last visited March 21, 2021).

<sup>62</sup> Incarceration Nation, APA (Oct. 2014), *available at* <https://www.apa.org/monitor/2014/10/incarceration> (last visited March 21, 2021).

<sup>63</sup> *Supra* Note 45.

<sup>64</sup> Int J Men’s Health. 2013 Fall; 12(3): 213–227.

doi: 10.3149/jmh.1203.213

(<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4217308/>)

<sup>65</sup> *Supra* note 62.

Currently the United States holds half of the worlds prison population.<sup>66</sup> The sad part of this realization is that, over a quarter of the world's prisoners held in detentions are not included in this calculation. This includes those held during the pre-sentence, and awaiting final sentence stages.<sup>67</sup> Over use of criminalization has become governments shield in ignoring social issues impacted by capitalism and globalization.<sup>68</sup> In the United States, criminal justice reform scholars, as well as attorneys, social workers and many more have spoken and continue to speak out about the needed change in the prison systems.<sup>69</sup> Scholars often highlight three main causes for the need to reform prisons—inhuman treatment, racial bias, and poor prison conditions' contribution to high rates of reincarceration for released prisoners.<sup>70</sup>

It is recognized that inhuman treatment and conditions for incarcerated individuals “render them less able to productively function and more likely to engage in criminogenic behaviors both inside and upon release from prison”.<sup>71</sup> Some American prosecutors have been compelled to speak out against the current departments of corrections prison systems.<sup>72</sup> Additionally, the rise in incarceration rates has been recognized to disproportionately affect minority populations because of severe laws, the war on drugs, and racial bias in case processing.<sup>73</sup> According to the American Psychological Association reports, Black people are more likely to be incarcerated before trial, more likely to receive the death penalty, be arrested and charged with drug crimes, and have worse plea agreements that might otherwise have kept them out of prison.<sup>74</sup> Another growing concern that scholars and advocates speak out

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<sup>66</sup> Andrew Coyle et al., Current Trends & Practices in the Use of Imprisonment, *International Review of the Red Cross*, Volume 98 Number 903 (December 1, 2016) pp. 761-781, (last visited March 21, 2021).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> America's Prison System is Flawed, PSU (March 4, 2019), *available at* <https://sites.psu.edu/aspsy/2019/03/04/americas-prison-system-is-flawed/comment-page-1/> (last visited Feb. 13, 2022).

<sup>70</sup> *Id.*

<sup>71</sup> Lucy Lang, Prosecutors Need to Take the Lead in Reforming Prisons, *THE ATLANTIC* (Aug. 27, 2019), *available at* <https://www.theatlantic.com/ideas/archive/2019/08/urgency-prison-reform-and-what-prosecutors-can-do-about-it/596884/> (last visited March 21, 2021).

<sup>72</sup> *Id.*

<sup>73</sup> Incarceration Nation, APA (Oct. 2014), *available at* <https://www.apa.org/monitor/2014/10/incarceration> (last visited March 21, 2021).

<sup>74</sup> *Id.*

about is the increased risk of incarceration.<sup>75</sup> Punishment should not do more harm than good, however in the United States most criminals released are often rearrested.<sup>76</sup> Each extra year in prison appears to raise the risk of reoffending and most studies show that an average 40% of people released from prison will likely reoffend.<sup>77</sup>

## II. THE INTERNATIONAL PRISON REGIME

### ABHORRENT PRACTICES MOTIVATING THE REGIME

By the end of the 1830's penitentiaries had taken hold into society allowing more and more states to replace various forms of physical punishment with imprisonment.<sup>78</sup> Penitentiaries inspired several ways of prison construction, culminating in the opening of the Pentonville penitentiary in 1842. The Pentonville Penitentiary is the internationally acclaimed model of the new disciplinary regime located in England.<sup>79</sup> The US plays a powerful role in non-western countries development because it actively influenced the international community to implement systemic incarceration and it presents the powerful role the United States plays in.<sup>80</sup> Prison construction was inspired and ultimately caught on because it was seen to be good for the economy because the inmates would work and produce goods far below the minimum wage.<sup>81</sup> The new parliamentary states did not guarantee the rights of humans, it instead dehumanized the lower classes in ways that manipulated their minds and body."<sup>82</sup> According to Ignatieff, the "class dimension of the transition in

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<sup>75</sup> *Id.*

<sup>76</sup> Matt Clarke, Long-Term Recidivism Studies Show High Arrest Rates, PLN (May 3, 2019), *available at* <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/> (last visited Feb. 13, 2022).

<sup>77</sup> *Id.*

<sup>78</sup> Frank Dikotter, *The Promise of Repentance: The Prison in Modern China*, JSTOR (2007), *available at* <https://www.jstor.org/stable/10.7591/j.ctv2n7n8d.13> (last visited March 21, 2021).

<sup>79</sup> *Id.*

<sup>80</sup> Mary Gibson, *Supra* note 27.

<sup>81</sup> *Supra* note 33.

<sup>82</sup> Mary Gibson, *Supra* note 71.

punishment was the state disciplining” the new and “increasingly radical working classes through massive building program of new prisons”.<sup>83</sup>

Local practices and political structures accommodated European ideas and influence.<sup>84</sup> After 1920, the institutionalization and massive expansion of imprisonment became an important tool of domination by both the French and British.<sup>85</sup> The creation of prisons spread on to Africa where European colonies imposed prison systems on a massive scale after they secured control over people and territories.<sup>86</sup> Prisons were imposed as tools of social disorder by colonizers reflecting in a hierarchy system where rulers acquired political control.<sup>87</sup> According to Bernault, “economic motives were central to the prison project in many African colonies, where “prisoners provided a docile, cheap, and constantly available labor force for underpaid tasks, for private entrepreneurs and plantation owners as well as for the colonial administration”.<sup>88</sup> The creation of prisons also spread to Middle Eastern countries where they were consolidated under French and British mandatory administration.<sup>89</sup> The creation of prisons eventually reached China, where the first prison was built in Beijing with a model based on Pentonville Prison, the first prison in England.<sup>90</sup> Even in countries like India, where the prison system was prevalent, they were still influenced by the European.<sup>91</sup> Eventually, imprisonment vastly increased and especially in the post-war period.<sup>92</sup>

The creation of prisons was seen as a tool to advance civilization appearing to introduce a democracy of punishment for all citizens.<sup>93</sup> Statesmen and experts in nonwestern countries learned the Western penal code by reading and translating criminological textbooks and journals, touring Western prisons, and hiring foreign consultants.<sup>94</sup> Representatives from non-Western nations discussed their adaptation of

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<sup>83</sup> *Id.*

<sup>84</sup> Anthony Gorman, Regulation, Reform & Resistance in the Middle Eastern Prison, JSTOR (2007), available at <https://www.jstor.org/stable/10.7591/j.ctv2n7n8d.9> (last visited March 21, 2021).

<sup>85</sup> Mary Gibson, *Supra* note 27.

<sup>86</sup> The Shadow of Rule: Colonial Power and Modern Punishment in Africa, JSTOR (2007) pg. 55-94, available at <https://www.jstor.org/stable/10.7591/j.ctv2n7n8d.8> (last visited March 21, 2021).

<sup>87</sup> *Id.*

<sup>88</sup> Mary Gibson, *Supra* note 27.

<sup>89</sup> Anthony Gorman, *Supra* note 75.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Andrew Coyle et al., *Supra* note 59.

<sup>93</sup> Mary Gibson, *Supra* note 73.

<sup>94</sup> *Id.*

the Western penal code at the International Prison Congresses in Europe and the United States.<sup>95</sup> As you can see the nineteenth and early twentieth centuries saw the diffusion of the ideal of reforming prisons for punishment from Europe and the United States to the rest of the world through variety of means including: direct imposition by colonial administrations , indirect diplomatic pressure from imperialist powers, and active appropriation by modernizing nation-states.<sup>96</sup> Non-western rulers appropriated foreign penological theories reinventing them for their own purposes.<sup>97</sup>

### **BODY OF INTERNATIONAL LAW GOVERNING PRISONERS' TREATMENT**

Cruel, inhuman or degrading treatment has been recognized by the international community publicly and officially “as among the most brutal and unacceptable assaults on human dignity”.<sup>98</sup> Since the end of World War II, several bodies of international law was introduced to ensure the 1945 Charter of the United Nations entered to instill peace, economic efficiency, and democracy.<sup>99</sup> The Universal Declaration of Human Rights (“UDHR”) chartered in 1948 states in Article 5 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” which is restated in several human rights instruments.<sup>100</sup> The UDHR, provided a more secure anchor for international standard-setting on prison conditions providing a basis for specifying which conditions were unacceptable.<sup>101</sup> Although neither the U.N. Charter nor the Declaration are “legally binding in the sense that treaties or conventions bind parties under international law, it is generally accepted that the Universal Declaration of Human Rights has become part of customary international law as a result of subsequent state practice.”<sup>102</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> OPCAT Manual on Preventing Torture, APT, available at <https://www.apr.ch/sites/default/files/publications/opcat-manual-english-revised2010.pdf>.

<sup>99</sup> *Supra* note 52.

<sup>100</sup> *Id.*

<sup>101</sup> Anthony Groman, *Supra* note 75.

<sup>102</sup> *Supra* note 74.

Customary international law arises from the general and consistent practices of legal obligation.<sup>103</sup> According to Friedman,

“It is a declaration of ‘a common standard of achievement for all peoples and nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction’.”<sup>104</sup>

The Universal Declaration brought widespread attention to prison harsh experiences of torture and cruel, inhuman, and degrading punishment, which further began the process of protecting prison populations.<sup>105</sup>

There are two key international instruments of treaty status that contain important general principles applicable to prisoners' rights, the International Covenant on Civil and Political Rights (“ICCPR”) and the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”).<sup>106</sup> Focusing on the ICCPR, Article 7 of the ICCPR provides that, “it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”<sup>107</sup> The prohibition in article 7 “is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.”<sup>108</sup> The ICCPR is a legally binding treaty to signatory countries and thus obligates such countries to implement its

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<sup>103</sup> David Weissbrodt and Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 *LAW & INEQ.* 343 (2011), *available at* [https://scholarship.law.umn.edu/faculty\\_articles/366](https://scholarship.law.umn.edu/faculty_articles/366).

<sup>104</sup> Chapter 2c: Human Rights in UN Declarations & Resolutions, *LEGAL ANSWERS*, *available at* <https://legalanswers.sl.nsw.gov.au/hot-topics-human-rights/human-rights-un-declarations-and-resolutions> (last visited March 21, 2021).

<sup>105</sup> Louis-Philippe et al., *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*.

<sup>106</sup> Dirk Van Zyl Smit, *Regulation of Prison Conditions*, 39 *CRIME & JUST.* 503, 507 (2010).

<sup>107</sup> *Supra* note 15.

<sup>108</sup> *Id.*

provisions.<sup>109</sup> Signatory countries agreed to accept legislation similar to the rights in the ICCPR.<sup>110</sup> The ICCPR exerted its greatest impact at the national level.<sup>111</sup> The ICCPR has been adopted in some countries on the national level and others constitutionally.<sup>112</sup>

Now focusing on the CAT, it imposes specific obligation to prevent and enforce the prohibition against torture and cruel, inhuman, or degrading treatment.<sup>113</sup> Unlike other obligations, state parties who adopt the Convention against torture must ensure that “any statement which is established to have been made as a result of torture not be invoked as evidence in any proceedings.”<sup>114</sup> Additionally, it provides that the prohibition against torture is a non-derogable obligation that can’t be justified by a superior officer or public authority.<sup>115</sup> For those seeking a definition of torture, the CAT has been deemed the de facto “first port of call”.<sup>116</sup> Torture is defined in as:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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<sup>109</sup> Construction and Application of International Covenant on Civil and Political Rights, 11 A.L.R. Fed. 2d 751, 2

<sup>110</sup> *Id.*

<sup>111</sup> International Covenant on Civil and Political Rights, UN (Dec. 16, 1966), available at <https://legal.un.org/avl/ha/iccpr/iccpr.html> (last visited March 21, 2021).

<sup>112</sup> *Id.*

<sup>113</sup> David Weissbrodt and Cheryl Heilman, *Supra* note 103.

<sup>114</sup> OHCHR art. 15

<sup>115</sup> Convention against torture as referenced in *supra* note 93; Chapter 2c: Human Rights in UN Declarations & Resolutions, LEGAL ANSWERS, available at <https://legalanswers.sl.nsw.gov.au/hot-topics-human-rights/human-rights-un-declarations-and-resolutions> (last visited March 21, 2021).

<sup>116</sup> *Supra* note 93

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.<sup>117</sup>

Additionally, the CAT prohibits cruel, in human, and degrading treatment.<sup>118</sup> Article 16 provides:

1. "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman, or degrading treatment or punishment."

2. "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."<sup>119</sup>

After the implementation of the ICCPR and CAT, the rise and trends in the world's prison population has caused a global prison crisis in serious need of strategic responses.<sup>120</sup> Recognizing the global prison crisis, the General Assembly of the United Nations adopted the Optional Protocol to the Convention against Torture ("OPCAT") and pursuant to the provisions of the treaty the Subcommittee on Prevention of Torture and other Cruel Inhuman or Degrading Treatment or Punishment ("SPT") was established.<sup>121</sup> The OPCAT provides both legal obligations and mandatory regulations for prison practices, with the purpose to incorporate prison visits conducted by international and national bodies independent of prisons.<sup>122</sup> The SPT is a recently implemented treaty in the United Nations and tackles each issue of torture and ill treatment with

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<sup>117</sup> G.A. Res. 39/46, at 85 (Dec. 10, 1984).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at art. 16.

<sup>120</sup> UNODC's Strategic Response to Global Prison Challenges, UN (Sept. 28, 2015), available at <https://www.unodc.org/unodc/en/frontpage/2015/September/unodcs-strategic-response-to-global-prison-challenges.html> (last visited March 21, 2021).

<sup>121</sup> *Supra* note 109.

<sup>122</sup> *Id.*; See also OPCAT

a forward way of looking and that it is true rehabilitation.<sup>123</sup> The ratification of OPCAT has been a slow process and as a result, non-governmental organizations (“NGO”) have been created to work globally to promote criminal justice systems that uphold human rights for all.<sup>124</sup>

### THE U.S. FAILURE TO IMPLEMENT THE INTERNATIONAL REGIME

The United States ratified the ICCPR and it became the “supreme law of the land” under the Supremacy Clause in the U.S. Constitution giving ratified treaty the status of federal law<sup>125</sup> however, such ratification and implementation did not seem to bind the U.S.<sup>126</sup> The federal courts have considered many cases that have construed or applied the ICCPR in which courts have held that a plaintiff lacked standing to sue for alleged violations.<sup>127</sup> Additionally, numerous cases have held that the ICCPR is not binding on the courts in the United States.<sup>128</sup> For example, in 2007, the Fifth Circuit Court of Appeals in the case *Roach v. Quarterman*, stated that the ICCPR is not U.S. Law.<sup>129</sup> One would think that a country priding in its democracy and influence would take all measures to protect its citizens, however following the U.S. ratification of ICCPR, it opted not to make the document self-executing within its domestic legal system, a measure that guarantees such rights to its citizens.<sup>130</sup> The U.S. instead set its own standard of guidance and that was to set the standard of cruel and unusual punishment that is prohibited by the Eighth Amendment.<sup>131</sup> According to Human Rights Watch and the ACLU, this reservation limits the protection provided to prisoners by Article 7 because than language of Article 7 is considered to be more expansive than its Eighth Amendment counterpart.<sup>132</sup> Additionally, it is stronger than the 8<sup>th</sup>

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<sup>123</sup> *Id.*; See also OPCAT.

<sup>124</sup> Human Rights Handbook, OHCHR (2016), available at <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf> (last visited March 21, 2021).

<sup>125</sup> U.S. Const. art VI, § 2.

<sup>126</sup> Kristina Ash, *US Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS, Volume 3 Spring 2005.

<sup>127</sup> See *Igartua v. U.S.*, *Beazley v. Johnson*, *U.S. v. Duarte Acero*.

<sup>128</sup> *Id.*

<sup>129</sup> *Roach v. Quarterman*, 220 Fed. Appx. 270, 272, 2007 U.S. App. LEXIS 422.

<sup>130</sup> *Id.*

<sup>131</sup> Nan D. Miller, *Supra* note 51.

<sup>132</sup> *Id.*

amendments interpretation which requires a prisoner to demonstrate that prison officials acted with deliberate indifference in subjecting him to abusive conditions of confinement.<sup>133</sup>

The United States opted out of numerous provisions under the CAT but reserved the right to agree, which it has not yet changed since ratifying the CAT in 1994.<sup>134</sup> Similar to the ratification of the ICCPR, the United States Senate's recommendations and approval was "based on the reservation that the United States considered itself bound to Article 16 to the extent that such cruel, unusual, and inhuman treatment or punishment was prohibited" by the U.S. Constitution.<sup>135</sup> Stating that, "the purpose of the U.S. reservation to CAT Article 16 was to more clearly define types of treatment that were cruel, inhuman, or degrading."<sup>136</sup> However, this is difficult to believe because the United States interposed a reservation to instead define cruel, inhuman, or degrading treatment or punishment as the standard governed by the Fifth, Eighth, and, Fourteenth Amendments, though none of these amendments directly define what constitutes cruel and unusual punishment.<sup>137</sup> Instead, such amendments ensure people are treated fairly in the criminal process but not while in prison, which allows for human right abuses to occur with impunity in prisons.<sup>138</sup>

The interpretation of cruel, inhuman, degrading treatment or punishment of prisoners has long been an issue because it is usually not clearly defined and thus brings significant challenges to acknowledging ill treatment.<sup>139</sup> Although this is the case, the international regime offers more protection for the treatment of prisoners than the U.S. Constitution because the Constitution's standard requires an Eighth Amendment violation claim which is often difficult to meet.<sup>140</sup> In turn, the U.S. tolerates things that the international regime does not, making it much more difficult for prisoners to establish or even prevail in an Eighth Amendment violation claim.<sup>141</sup> In the U.S., challenging the conditions of imprisonment under the Eighth Amendment require, a showing that the

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<sup>133</sup> *Id.*

<sup>134</sup> CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (Jan. 19, 2010).

<sup>135</sup> *Id.* at 6.

<sup>136</sup> *Id.* at 12.

<sup>137</sup> Weissbrodt & Heilman, *supra* note 103.

<sup>138</sup> *Id.*

<sup>139</sup> Miller, *supra* note 119.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

conditions, “either involve the wanton and unnecessary infliction of pain, that they are grossly disproportionate to the severity of the crime, or that they entail serious deprivation of basic human needs.”<sup>142</sup> Such claim objectively looks to whether the conditions extremely deprives basic human needs and, and subjectively considers whether prison officials acted with the intent to deprive any basic needs referred to as deliberate indifference. A finding of deliberate indifference requires a showing that the defendant “knows of and disregards an excessive risk to inmate health or safety.”<sup>143</sup>

In *Matthews v. Wiley*, Norman Matthews, an inmate at the United States Penitentiary, Administrative Maximum in Florence, Colorado, alleged violation of his Eighth Amendment rights “based on the conditions of [his] confinement.”<sup>144</sup> Mr. Matthew alleged that the defendants had “subjected [him] to harsh and inhumane conditions of confinement and deprivation of the minimal civilized measures of life's necessities.”<sup>145</sup> The plaintiff listed the conditions imposed on him including: “long-term and indefinite solitary confinement, noise, sleep deprivation, lack of proper medical and mental health care, lack of daily access to fresh air and sunlight, limited opportunity to communicate with others, severe restrictions on property rights, visits, telephone and movements, strip searches, reduced environmental stimuli, lack of vocational training and congregational religious services”.<sup>146</sup> The court dismissed the case on grounds that Mr. Matthews did not allege that the prison officials imprisoned him with “deliberate indifference to a risk of harm”.<sup>147</sup> In the U.S., the burden is on the prisoner to establish cruel, inhuman, or degrading treatment whereas in the international regime, the totality of conditions standard is often used. For instance, in *Soering v. United Kingdom*, the European Court of Human Rights (ECtHR) discovered a violation in Article 3 of the European Convention for Protection of Human Rights based on the exposure to the “death row phenomenon.”<sup>148</sup> The ECtHR adopted the “totality of conditions” meaning the analysis of the court’s decision is based on the situation in its entirety, , rather than any one factor.<sup>149</sup> The ECtHR utilizes a totality of conditions test in evaluating possible cruel, inhuman or degrading

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<sup>142</sup> *Matthews v. Wiley*, 744 F. Supp. 2d 1159, 1175 (D. Colo. 2010).

<sup>143</sup> *Id.* at 1176 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

<sup>144</sup> *Id.* at 1166.

<sup>145</sup> *Id.* at 1175.

<sup>146</sup> *Id.*

<sup>147</sup> *Matthews*, *supra* note 142.

<sup>148</sup> *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

<sup>149</sup> *Id.* at ¶ 102.

treatment, which enables the ECtHR to extend its evaluation to both physical conditions and psychological effects.<sup>150</sup>

Additionally, there is no clear definition of cruel, inhuman, or degrading treatment. OPCAT defines the deprivation of liberty and uses that to determine what constitutes cruel, inhuman degrading treatment or punishment of prisoners.<sup>151</sup> Recognizing this, the World Conference on Human Rights called for the adoption of OPCAT and firmly declared that efforts to expunge ill treatment be focused first on preventing the issues.<sup>152</sup> The United States should have been one of the first countries to sign and ratify OPCAT, however they have yet to sign OPCAT, let alone ratify it.<sup>153</sup> As mentioned earlier, the U.S. relies on judicial decrees, that sometimes involve private monitoring but that disallow the ability to be held accountable for prison abuses by the international community because litigation subject tends to be enforced by prison systems themselves.<sup>154</sup> Adopting OPCAT, alleviates the burdens of proving ill treatment in court, and directly holds the state accountable for current prison conditions.<sup>155</sup>

Other countries including France and the United Kingdom have ratified the OPCAT.<sup>156</sup> Such ratification has allowed them to begin reforming crime prevention policies and the overall prison system to

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<sup>150</sup> *Supra* note 129.

<sup>151</sup> OPCAT at art. 4(2) (defining “deprivation of liberty” as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”); *see also* Alice Edwards, *The Optional Protocol to the Convention against Torture and the Detention of Refugees*, 57 INT’L & COMP. L. Q. 789 (Oct. 2008).

<sup>152</sup> Optional Protocol, Treaty Series No. 21 (2006) at 3. Available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewj9uNDi8f31AhUekokEHfsGamsQFnoECAyQAQ&url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment\\_data%2Ffile%2F273293%2F6913.pdf&usg=AOvVaw0yE3EYIKh2dTZ9paeTiRcR](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewj9uNDi8f31AhUekokEHfsGamsQFnoECAyQAQ&url=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F273293%2F6913.pdf&usg=AOvVaw0yE3EYIKh2dTZ9paeTiRcR)

<sup>153</sup> OPCAT Subcomm. on Prevention of Torture, *Recent Signatures and Ratifications*, OFF. HIGH COMM’R HUM. RTS. (n.d.), available at <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/RecentSignaturesRatifications.aspx> (last visited Feb. 10, 2022).

<sup>154</sup> *See* Jonathan Simon, *Penal monitoring in the United States: lessons from the American experience and prospects for change*, 70 CRIME, L. & SOC. CHANGE 161 (2018).

<sup>155</sup> G.A. Res. 57/199, at 85 (June 22, 2006).

<sup>156</sup> *Supra* note 22.

conform with international human rights law.<sup>157</sup> Those prison practices include, rebuilding and structuring prisons that really promote the reintegration process through the use of smaller facilities that allow for individual inmate concentration, and changing penal law to reflect noncustodial alternatives to detention.<sup>158</sup> For example, France aims to move away from systemic incarceration and to better combat recidivism, a reform model that combats the effects of the overuse of prisons by focusing on reintegrating inmates into society rather than solely punishing them for the crime.<sup>159</sup>

Noncustodial alternatives to prison sentences along with restructuring facilities to include individual focus are good prison practices because they reduce re-offending rates more effectively than prison sentences.<sup>160</sup> Such positive prison practices have reduced the prison population and has lowered the re-offense rates.<sup>161</sup> In 2019, “an international review found that recidivism rates are typically lower for have served a community sentence, compared to that reported among people who had served prison time.”<sup>162</sup> The U.S. should take the same efforts France is taking in order to lower its recidivism rates and overall protect prisoners right of rehabilitation.

### III. WHY THE U.S. SHOULD MAKE ADOPTION AND IMPLEMENTATION OF THE INTERNATIONAL

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<sup>157</sup> Nick Hardwick & Rachel Murray, *Regularity of OPCAT visits by NPMs in Europe*, 25 AUSTL. J. HUM. RTS. 66 (2019).

<sup>158</sup> *Correctional reform in France: more prison places, less incarcerations*, JUST. TRENDS (Aug. 28, 2018), available at <https://justice-trends.press/correctional-reform-in-france-more-prison-places-less-incarcerations/> (last visited Feb. 9, 2022).

<sup>159</sup> *Id.*

<sup>160</sup> *Key Facts*, PENAL REFORM INT’L (n.d.), available at <https://www.penalreform.org/issues/alternatives-to-imprisonment/key-facts-2/> (last visited Feb. 9, 2022).

<sup>161</sup> Hardwick & Murray, *supra* note 140.

<sup>162</sup> *Key Facts*, *supra* note 143; see also Denis Yukhnenko et al., *Recidivism rates in individuals receiving community sentences: A systematic review*, 14 PLOS ONE 1 (2019); Denis Yukhnenko et al., *A systematic review of criminal recidivism rates worldwide: 3-year update*, WELLCOME OPEN RSCH. (Feb. 1, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6743246/pdf/wellcomeopenres-4-17992.pdf> (last visited Feb. 10, 2022).

## STANDARDS PART OF ITS REFORM EFFORT

### THE REFORMS IMPLICATED BY THE TREATY REGIME WOULD MAKE THE U.S. BETTER

Transparency and accountability in prison practices have been linked to better prison conditions that directly protect prisoners' rights.<sup>163</sup> Scholars point out that prison oversight is critical to ensuring transparency, accountability, and safety in prisons.<sup>164</sup> This can be reached by effectively serving the following four distinguishing features of prison oversight. First, effective oversight involves a consistent schedule of inspections for every prison institution. Second, effective oversight involves external scrutiny, and the regulation and oversights of individuals without any connection to the prison institution. Third, effective oversight focuses on the prison conditions and how they impact prisoners. Fourth, effective oversight is advisory in nature.<sup>165</sup> The United States prison oversight mechanisms are not effective practices to protecting prisoners' rights. In the U.S., prison oversight is conducted by federal courts, public agencies, and civilians through public agencies.<sup>166</sup> All three prison oversight mechanisms are linked to a lack of transparency and accountability in poor prison conditions.<sup>167</sup>

First, the issue with judicial intervention as prison oversight is that they do not prevent violations, they simply remedy them.<sup>168</sup> Thus, judicial intrusion is only to the extent of redressing the violation and not the oversight of preventing it from occurring. Although this seems to be a good remedy to hold institutions accountable, there are several huge

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<sup>163</sup> See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455 (2011).

<sup>164</sup> See, e.g., Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 101, 103-6 (2010).

<sup>165</sup> Michele Deitch, *Effective Prison Oversight*, COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS (Feb. 8, 2006), available at [http://www.davidshopeaz.org/resources/Effective\\_Prison\\_Oversight.pdf](http://www.davidshopeaz.org/resources/Effective_Prison_Oversight.pdf) (last visited Feb. 9, 2022).

<sup>166</sup> See Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383 (2010).

<sup>167</sup> *Id.*

<sup>168</sup> See Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT'G REP. 236 (Apr. 2012).

obstacles to bringing these cases to court,<sup>169</sup> such as the burden of proof falling on the prisoner to establish poor prison practices.<sup>170</sup> Adopting the OPCAT alleviates the issues with judicial intervention because it focuses on domestic implementation to inhuman and degrading prison treatment and conditions.<sup>171</sup> Unlike judicial intervention, OPCAT is intended to be ongoing.<sup>172</sup> Adopting the OPCAT allows for places of detention to be opened up to the outside world through visits allowed for by independent monitoring mechanisms.<sup>173</sup> This places the burden of proving poor prison conditions on independent monitoring mechanisms instead of prisoners, which in return prevent violations from occurring.<sup>174</sup>

Second, the issue with public agencies as a prison oversight mechanism is that their ability to determine the scope of monitoring presents a conflict of interest for furthering the goals of effective monitoring.<sup>175</sup> For instance, public agencies often contract with private prisons and thus it limits prison monitoring to ensure compliance with contractual agreements.<sup>176</sup> Most contracts fail to contain stipulations discussing how prisoners are treated or the quality of conditions in the facility.<sup>177</sup> Additionally, public agencies are run by civilians which allow for data to be aggregated falsifying denials of treatment and services.<sup>178</sup>

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<sup>169</sup> See *Commission on Safety and Abuse in America's Prisons: Litigation as Oversight transcript* [hereinafter *Litigation as Oversight transcript*], VERA INST. OF JUST. (Feb. 9, 2006), available at <https://storage.googleapis.com/vera-web-assets/inline-downloads/Hearing-4-litigation-as-oversight.pdf> (last visited Feb. 9, 2022).

<sup>170</sup> See Mushlin & Deitch, *supra* note 164.

<sup>171</sup> Glob. F. on the OPCAT, *Preventing Torture, Upholding Dignity: From Pledges to Actions Outcome Report*, ASS'N PREVENTION OF TORTURE (2012), available at [https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/803\\_aptg\\_lobalforum\\_/803\\_aptglobalforum\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/803_aptg_lobalforum_/803_aptglobalforum_en.pdf) (last visited Feb. 8, 2022).

<sup>172</sup> *Litigation as Oversight transcript*, *supra* note 150.

<sup>173</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter OPCAT], art. 4(1), Dec. 18, 2002, 2375 U.N.T.S. 237.

<sup>174</sup> See Mushlin & Deitch, *supra* note 164, at 122.

<sup>175</sup> See, e.g., Douglas McDonald & Carl Patten, *Governments' Management of Private Prisons*, ABT ASSOCIATES INC. (Sept. 15, 2003), available at <https://www.ojp.gov/pdffiles1/nij/grants/203968.pdf> (last visited Feb. 8, 2022).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Supra* Note 50.

External scrutiny plays a key part in transparency and accountability.<sup>179</sup> Adopting the OPCAT would be effective in prison oversight because the OPCAT arranges unrestricted visits to places of detention that are not disclosed to the institutions, conducted by independent national and international monitoring bodies.<sup>180</sup> OPCAT requires the state to create or designate a detention monitoring body known as national preventive mechanisms (NPM).<sup>181</sup> This type of monitoring proactively examines operations from the prisoners' standpoint because it allows prison officials to receive feedback from a committee unfamiliar to the prison, helping avoid complacency. Additionally, the routine and regular inspection process ensures that this form of oversight applies equally to all correctional facilities. This type of external scrutiny helps reassure citizens that prison conditions are appropriate and consistent with constitutional and international requirements furthering the goals of public transparency.<sup>182</sup>

Adopting OPCAT will ensure positive work towards making prisons more transparent and accountable. Further, adopting OPCAT makes the United States better because it will help in truly implementing the ICCPR to international standards. Additionally, it gives credence to the U.S.'s commitments to good governance and human rights. Furthermore, it enhances the U.S. reputation as a moral and accountable state which in turn strengthens the U.S. position in the international treaty system.<sup>183</sup>

### GIVING CREDENCE TO U.S. DEMOCRACY REFORM EFFORTS

The U.S. is a beacon of democracy. In American democracy, there were, and continue to be, hard-fought struggles to expand citizenship,

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<sup>179</sup> See Michele Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207 (2020).

<sup>180</sup> OPCAT, *supra* note 156, at art. 1.

<sup>181</sup> *Id.* at art. 17; see also OSCE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., THE FIGHT AGAINST TORTURE 32 (OSCE/ODIHR 2009), available at <https://www.osce.org/files/f/documents/8/2/37968.pdf> (last visited Feb. 8, 2022).

<sup>182</sup> Mushlin & Deitch, *supra* note 164, at 104-106.

<sup>183</sup> *National Conference on the Benefits and Challenges of Signing and Implementing OPCAT for Palestine*, GENEVA CTR. FOR SEC. SECTOR GOVERNANCE (Oct. 2015), available at [https://www.dcaf.ch/sites/default/files/publications/documents/Rep\\_WP\\_OPCAT\\_EN.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/Rep_WP_OPCAT_EN.pdf) (last visited Feb. 8, 2022).

civil rights, women rights, immigrants' rights, and the rights of the LGBTQIA+ community. The U.S. domestic cohesion underpins a strong, and generally principled, federal state that includes relatively uncontested institutional authority. Democrats from all around the world for many years viewed the U.S. as a source of inspiration.<sup>184</sup> However, in less than four years, U.S. influence and credibility on the world stage has been diminished under the Trump Administration.<sup>185</sup>

President Trump has damaged America's standing, influence, and power in the world by weakening the system of alliances and partnerships that took the U.S. many decades to construct.<sup>186</sup> During his time in office, President Trump "abandoned multiple treaties and agreements, undermined the credibility of U.S. defense guarantees, bullied and belittled allies . . . ,"<sup>187</sup> was indifferent to the rule of law,<sup>188</sup> and "left allies [abroad] wondering if they can count on the United States . . . ."<sup>189</sup> In addition, Trump's impeachment trials,<sup>190</sup> failure to build an international alliance to fight against the COVID-19 pandemic,<sup>191</sup> response to Black Lives Matter protests, and refusal to concede as President and the resulting pro-Trump mob attack on the Capitol,<sup>192</sup> undermined the U.S.'s

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<sup>184</sup> Tyson Barker, *US Global Credibility and Capacity to Act After the Capitol Siege*, GER. COUNCIL ON FOREIGN REL. (Jan. 8, 2021), available at <https://dgap.org/en/research/publications/us-global-credibility-and-capacity-act-after-capitol-siege> (last visited Feb. 9, 2022).

<sup>185</sup> Justin Chapman, *Rhodes: U.S. is Losing Influence, Credibility on World Stage*, PAC. COUNCIL ON INT'L POL'Y (May 28, 2019), available at <https://www.pacificcouncil.org/newsroom/rhodes-us-losing-influence-credibility-world-stage> (last visited Feb. 9, 2022).

<sup>186</sup> See Richard Wike, *The Trump era has seen a decline in America's global reputation*, PEW RSCH. CTR. (Nov. 19, 2020), available at <https://www.pewresearch.org/fact-tank/2020/11/19/the-trump-era-has-seen-a-decline-in-americas-global-reputation/> (last visited Feb. 9, 2022).

<sup>187</sup> Pete Buttigieg & Philip H. Gordon, *Present at the Destruction of U.S. Power and Influence*, FOREIGN POL'Y (July 14, 2020), available at <https://foreignpolicy.com/2020/07/14/trump-biden-foreign-policy-alliances/> (last visited Feb. 9, 2022).

<sup>188</sup> Peter Beinart, *Trump's Indifference to the Constitution*, THE ATLANTIC (Oct. 10, 2016), available at <https://www.theatlantic.com/politics/archive/2016/10/trump-constitution/503540/> (last visited Feb. 9, 2022).

<sup>189</sup> Buttigieg & Gordon, *supra* note 169.

<sup>190</sup> See Lucy Handley, *The US is the world's top 'soft' power – but Trump has damaged its reputation, survey says*, CNBC (Feb. 25, 2020), available at <https://www.cnn.com/2020/02/25/the-us-is-the-worlds-top-soft-power-but-trump-has-damaged-its-reputation.html> (last visited Feb. 9, 2022).

<sup>191</sup> See Buttigieg & Gordon, *supra* note 169.

<sup>192</sup> Barker, *supra* note 166.

reputation, governance, and political stability.<sup>193</sup> Since the U.S. views as global hegemonic power, and utilizes such power to enforce its will, or in other words, is in the business of intruding on sovereignty and asking other countries to fix particular issues, the new administration must convince the world that the United States can again act with real consistency.<sup>194</sup> It will be easier to get acceptance if the U.S. is ratifying, adopting, and implementing the treaties that it asks the rest of the world to sign-on to. Specifically, if the U.S. adopts OPCAT it will lead in the efforts of prison reform by renewing its commitment to the implementation of measures that can effectively protect persons deprived of their liberty.<sup>195</sup>

During President Joe Biden's 2020 presidential campaign, he "promised to end private prisons, cash bail, mandatory-minimum sentencing, and the death penalty."<sup>196</sup> He stated that "the U.S. could reduce its prison population by more than half."<sup>197</sup> As President, Biden has launched the Biden Plan for Strengthening America's Commitment to Justice stating that, "[t]o build safe and healthy communities, we need to rethink who were sending to jail, how we treat those in jail, and how we help them get the health care, education, jobs, and housing they need to successfully rejoin society after they serve time."<sup>198</sup> In addition, Biden signed a series of executive orders that focused on nondiscrimination policy, public housing, and prison reform.<sup>199</sup> More specifically, he signed an executive order that prohibits the U.S. Department of Justice from

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<sup>193</sup> See Handley, *supra* note 172.

<sup>194</sup> Danielle L. Lupton, Biden Has a Narrow Window to Restore U.S. Credibility, FOREIGN AFFAIRS (Feb. 8, 2021), available at <https://www.foreignaffairs.com/articles/united-states/2021-02-08/biden-has-narrow-window-restore-us-credibility> (last visited Feb. 23, 2022).

<sup>195</sup> *OPCAT 10 years later: a renewed commitment to the prevention of torture*, INT'L DETENTION COAL. (June 22, 2016), available at <https://idcoalition.org/news/opcat-10-years-later-a-renewed-commitment-to-the-prevention-of-torture/>. (last visited Feb. 9, 2022).

<sup>196</sup> Marshall Project Staff, *What Biden's Win Means for the Future of Criminal Justice*, MARSHALL PROJECT (Nov. 8, 2020), available at <https://www.themarshallproject.org/2020/11/08/what-biden-s-win-means-for-the-future-of-criminal-justice> (last visited Feb. 9, 2022).

<sup>197</sup> *Id.*

<sup>198</sup> *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS (n.d.), available at <https://joebiden.com/justice/> (last visited Feb. 9, 2022).

<sup>199</sup> See Maegan Vazquez, 'It's time to act': Biden moves to address racial inequity, CNN (Jan. 26, 2021), available at <https://www.cnn.com/2021/01/26/politics/executive-orders-equity-joe-biden/index.html> (last visited Feb. 9, 2022).

entering into new, and from renewing contracts, with private prison companies.<sup>200</sup> In calling out U.S. actions, Biden stated that the U.S. “never fully lived up to the founding principles of this nation, to state the obvious, that all people are created equally and have a right to be treated equally throughout their lives.”<sup>201</sup> By launching the Biden Plan, and signing ending contractual agreements with private prisons, Biden has not only begun the fight towards penal reform but has taken a step-in restoring U.S. credibility.<sup>202</sup>

#### IV. CONCLUSION

In conclusion, mass incarceration, the treatment of prisoners, and monitoring of prisons in the United States does not meet the standards articulated through international law, and thus it is important for the United States to hold itself accountable in the regulation of prison reform by adopting the OPCAT. Although, the United States adopted the ICCPR and CAT, it has not truly implemented the standards demanded by international law because the United States Senate recommendations to these treaties were dependent and limited to only treatment covered under the U.S. Constitution. Reserving cruel, inhuman, and degrading treatment to that prohibited under the U.S. Constitution does not fully protect the rights of prisoners because it allows the U.S. to define, on its own, what constitutes cruel, inhuman, and degrading treatment. Due to this, it is difficult for the international community to hold the U.S. accountable for prison abuses.

The United States’ current prison monitoring is ineffective because it is focused on remedies for those who have been treated unjustly instead of directly focusing on the treatment of prisoners. Additionally, it is ineffective because it places the burden to establish an

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<sup>200</sup> See Ed Chung, 3 *Under-the-Radar Executive Actions for the Biden Administration’s Criminal Justice Reform Agenda*, CTR. FOR AM. PROGRESS (Feb. 11, 2021), available at <https://www.americanprogress.org/issues/criminal-justice/news/2021/02/11/495598/3-radar-executive-actions-biden-administrations-criminal-justice-reform-agenda/> (last visited Feb. 9, 2022).

<sup>201</sup> Remarks by President Biden at Signing of an Executive Order on Racial Equity, THE WHITE HOUSE (Jan. 26, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/> (last visited Feb. 13, 2022).

<sup>202</sup> Vazquez, *supra* note 181.

Eighth Amendment violation on the prisoners which result in most cases being dismissed. Adopting OPCAT will help the United States prison conditions because it requires adopting countries to both develop and implement reliable systems that prevent torture. Such mechanisms require a neutral independent body to efficiently oversee prison practices. The importance of having a neutral independent body is that it allows for more transparency and accountability, the key elements to positive prison practices. Adopting the OPCAT is of benefit to the U.S. because it focuses on the life and experience of prisoners and how prison conditions affect them, which in turn makes the transition to good prison practices possible. Lastly, adopting OPCAT gives credence to the United States' commitment to good governance and human rights. The current prison practices in the United States are detrimental to the efforts of rehabilitation and is counterproductive in protecting society against crimes. It is time the world's most vulnerable population is heard.