

# A Missing Piece: Frameworks for Analyzing Carceral Attitudes in International Law

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## ABSTRACT

The purpose of this paper is to interrogate international human rights law through an “abolition lens.” The paper first defines an abolition lens in the international context by canvassing various sociological and criminological thought on the matter. It then argues that the use of this lens can provide important insight for academics and practitioners. Although international human rights law is not normally thought of as contributing to the carceral state, the paper posits that carceral attitudes are manifest in international human rights instruments, and that the wording of these instruments should be interrogated through an abolition lens to ensure that international human rights law contributes to liberation rather than carceralization. As examples, the *Convention Against Torture*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Human Rights Standards for Law Enforcement* are analyzed. Finally, the paper concludes with a call for other international law instruments to be interrogated in a similar fashion, to ensure that international human rights law fulfils its liberatory potential, and aids states and communities in avoiding carceral outcomes.

**Keywords:** Prison; Police; International Law; International Human Rights Law; International Criminal Law; Abolition; International Covenant on

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Economic, Social and Cultural Rights; ICESCR; Foucault; Dylan Rodriguez; Law Enforcement; Convention against Torture

## I. DEFINING AN “ABOLITION FRAMEWORK”

*You have to act as if it were possible to radically transform the world. And you have to do it all the time.*<sup>1</sup>

Often, international law is seen as aspirational. Although some international conventions are binding, others are framed as general plans to guide development.<sup>2</sup> If that is the case, and international law sets out ideals for which states should strive, then we need to be mindful of the ideals that it is projecting.

In this paper I first define an “abolition framework”, concluding that it is a critical assessment of the carceral state, including the economic, ecological, political, cultural, and spiritual conditions therein; focused on the liberation of all subjugated peoples. In defining this framework, I canvas several sociological interpretations to come to a definition that is appropriate for international law. I then describe why this lens is useful, and how it can rectify some of the issues in international human rights law. Finally, I use this lens to analyze the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”),<sup>3</sup> as well as the *International Human Rights Standards for Law Enforcement* (“IHRSLE”).<sup>4</sup> These international documents will serve as an example of how international human rights law can benefit from the incorporation of an abolition lens.

### A. Abolish What?

There are myriad definitions of abolition, or an abolition framework, within academia, not all of them appropriate for use in international law. To come to a useful definition of abolition it is first best to describe what is

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<sup>1</sup> Angela Davis, Distinguished Professor Emerita, University of California Santa Cruz, Lecture at Southern Illinois University Carbondale (Feb 13, 2014). Quoted in Dorothy E Roberts, “Foreword: Abolition Constitutionalism” at 2.

<sup>2</sup> See e.g. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS vol 993 (entered into force 3 January 1976) [ICESCR].

<sup>3</sup> ICESCR, *supra* note 2.

<sup>4</sup> *International Human Rights Standards for Law Enforcement*, United Nations High Commissioner for Human Rights Centre for Human Rights, online (pdf): <[www.ohchr.org/documents/publications/training5add1en.pdf](http://www.ohchr.org/documents/publications/training5add1en.pdf)> [perma.cc/MS6L-KX8B] [IHRSLE].

being abolished. On one level, abolition refers to the ending of prisons and imprisonment. However, this definition is too limited. Juvenile detention halls are carceral, and police officers detaining or arresting citizens outside of prison extend the carceral state to our city streets. Essentially, any state action meant to curtail or control groups or activities may be carceral. Dan Berger suggests “Carceral Power is, at its core, repressive social control, yet the places and means through which that control is expressed change over time.”<sup>5</sup> Michel Foucault famously described the carceral state as an “archipelago” – an interconnected chain of islands, each holding a different form of discipline, punishment, or confinement.<sup>6</sup> This “subtle, graduated carceral net, with compact institutions, but also separate and diffused methods” hangs over the entirety of a carceral society. Foucault notes that the carceral network extends well beyond prisons. Penal colonies and juvenile detention facilities are included. Even institutions such as orphanages and apprenticeships, convents, moral improvement associations, and charities that practice surveillance are part of the carceral archipelago.<sup>7</sup>

This broader definition is much more useful in defining carceralization as an issue, but it lacks two important elements. Foucault’s work focuses on the state and its carceral policies, but he does not meaningfully address the implications of corporations in carceral politics.<sup>8</sup> It also does little to address the fact that carceral systems disproportionately target certain populations.

Corporations can further the carceralization of a society in at least three discrete ways. Firstly, and most importantly, wage labourers are under constant scrutiny from their employers. For example, Amazon employees are “surveilled by computers to ensure productivity rates are met.”<sup>9</sup> When a

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<sup>5</sup> Dan Berger, “Finding and Defining the Carceral State” (2019) 47:2 *Revs in American History* 279 at 285.

<sup>6</sup> Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed translated by Alan Sheridan (Toronto: Random House, 1977) at 297.

<sup>7</sup> *Ibid* at 298.

<sup>8</sup> Since Foucault’s death in 1984, the role of corporations in incarceration and carceral politics has become increasingly difficult to ignore. The use of private prisons, private security forces, and the privatization of services within prisons such as phone services, food services, and religious services all attest to this growing collaboration.

<sup>9</sup> Michael Sainato, “I’m Not a Robot’: Amazon Workers Condemn Unsafe, Grueling Conditions at Warehouse” (5 February 2020), online: *The Guardian* <[www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse](http://www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse)> [perma.cc/2C43-VHV9].

labourer is “on the clock,” their actions, and their time, belong to someone else. Bob Black details:

The unofficial line is that we all have rights and live in a democracy. Other unfortunates who aren't free like we are have to live in police states. These victims obey orders or else, no matter how arbitrary. The authorities keep them under regular surveillance. State bureaucrats control even the smallest details of everyday life. The officials who push them around are answerable only to higher-ups, public or private. Either way, dissent or disobedience are punished. Informers report regularly to the authorities. All this is supposed to be a very bad thing. And so it is, although it is nothing but a description of the modern workplace...You find the same sort of hierarchy and discipline in an office or factory as you do in a prison or monastery. In fact, as Foucault and others have shown, prisons and factories came in at about the same time, and their operators consciously borrowed from each other's control techniques.<sup>10</sup>

The typical response to this argument is, of course, that a worker who does not like the conditions of their workplace can simply find a new job. Such is the blessing of the free market. However, trends “from the 1970s onwards has amounted to a process of the real subsumption of labor to finance capital...the lives of potential workers – from places of dwelling through healthcare to education – are incorporated into and dependent upon the operations of finance capital...to support life.”<sup>11</sup> When workers are dependent on debt while working precarious and insecure jobs to maintain a minimum standard of living there is little opportunity to leave a distasteful job without facing bankruptcy and homelessness.<sup>12</sup> There is also little motivation to search for new employment if the other available jobs are equally distasteful. This is the second way corporatization contributes to a carceral society. By gatekeeping access to vital resources such as food and housing, corporate or state-controlled marketplaces mandate participation. This monopoly on vital resources creates a coercive effect – if one does not submit to the authority of a workplace and boss, survival becomes impossible. This authority then manifests itself in the workplace in the carceral ways described above. Lastly, corporate and private ownership

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<sup>10</sup> Bob Black, “The Abolition of Work” ed by Bob Black *The Abolition of Work and Other Essays*, (Port Townsend, WA: Loompanics Unlimited 1985) 17 at 21.

<sup>11</sup> Lisa Adkins, “Essay Forum: Labor in Financialization” in Philip Mader, Daniel Mertens & Natascha van der Zwan, eds, *The Routledge International Handbook of Financialization*, (England, UK: Routledge, 2020) at page 1 of Chapter 27C.

<sup>12</sup> *Ibid.*

occupies significant amounts of space.<sup>13</sup> Residents and small businesses are routinely priced out of neighborhoods by high-paying renters or buyers. These residents and small businesses may then be driven into neighborhoods which are heavily policed.<sup>14</sup> Public space is becoming more rare, and more securitized.<sup>15</sup> When citizens cross over into the private sphere, they are subject to surveillance or expulsion by the owner. Any deviance can result in removal from private property, enforced by the state. As public space shrinks, areas outside of corporate surveillance and control also shrink.

The other important addition to Foucault's archipelago is an acknowledgment of who the carceral state affects. Carceral systems are designed to surveil and control deviance, but deviance is a social construct largely defined by those in power. Different groups are disproportionately targeted in different societies based on the ideologies of those in authority.

Therefore, we can come to a final definition of a carceral state for the purposes of this paper and a description of what this framework seeks to abolish. Carceral states include an interlocking network of public and private systems of control that act to surveil and control populations that have been designated deviant by the dominant group.

## B. An Abolition Framework

An abolition framework seeks to dismantle the carceral state and replace it with something else. Accepting such a wide definition of the carceral state may present challenges for abolition, but this is a worthwhile enlargement. It accomplishes little to abolish prisons if they are replaced with another institution.<sup>16</sup>

Dorothy E. Roberts offers the motivation behind an abolition framework: "the answer to persistent injustice in criminal law enforcement

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<sup>13</sup> Jeffrey Hou & Sabine Knierbein, eds, *City Unsilenced: Urban Resistance and Public Space in the Age of Shrinking Democracy* (England, UK: Routledge, 2017) at 8.

<sup>14</sup> *Ibid.*

<sup>15</sup> Neil Smith & Setha Low, ed, *The Politics of Public Space*, (New York: Routledge, 2006) at 1.

<sup>16</sup> See e.g. Dan Berger, *supra* note 5, (where he argues that the closing of asylums in the U.S. was a process of reinstitutionalization instead of deinstitutionalization: not emptying institutions but instead shifting their function towards even more punitive ends) at 279–280.

is not reform; it is prison abolition.”<sup>17</sup> Although helpful, this definition is not expansive enough – it properly identifies one problem with a carceral society but does nothing to suggest a solution. Nor does it address carceral systems outside of the prison. Later, Roberts accepts “three central tenets...of abolitionist philosophy.”<sup>18</sup> These are, firstly, that the carceral system can be traced back to slavery, secondly, that expanding criminal punishment functions to oppress Black people and other marginalized groups, and thirdly, that a more humane and democratic society is possible.<sup>19</sup> Although helpful in an American context, this definition is less applicable for use in the international context. The history of American slavery gives little analytical aid for instance in analyzing the carceral elements of Nigeria.<sup>20</sup> However, Roberts’ two other points are crucial to our definition: that expansion of criminal punishment further oppresses marginalized communities, and that humane and democratic alternatives are possible.

Eric A. Stanley adds depth to this definition, noting that incarceration enforces “gender conformity and heteronormativity ... along with white supremacy, ableism, and xenophobia, features of maintaining a carceral state.”<sup>21</sup>

Dylan Rodriguez offers the most developed definition for use in international law. He states: “Abolition is a dream toward futurity vested in insurgent, counter-Civilizational histories – genealogies of collective genius that perform liberation under conditions of duress.”<sup>22</sup> Rodriguez further clarifies:

“Abolition, in its radical totality, consists of constant, critical assessment of the economic, ecological, political, cultural, and spiritual conditions for the security and liberation of subjected peoples’ fullest collective being and posits that revolution of material, economic, and political systems compose the necessary but not definitive or completed conditions for abolitionist praxis.”<sup>23</sup>

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<sup>17</sup> Dorothy E Roberts, *supra* note 1 at 4.

<sup>18</sup> *Ibid* at 7.

<sup>19</sup> *Ibid*.

<sup>20</sup> See e.g. Viviane Saleh-Hanna, *Colonial Systems of Control: Criminal Justice in Nigeria* (Ottawa, ON: University of Ottawa Press, 2008).

<sup>21</sup> Eric A Stanley, “Queering Prison Abolition, Now?” (2012) 64:1 *American Q* 115 at 116.

<sup>22</sup> Dylan Rodriguez, “Abolition as Praxis of Human Being: A Foreword” (2019) 132:6 *Harvard L Rev* 1575 at 1575.

<sup>23</sup> *Ibid* at 1579.

Though Rodriguez offers a complete definition, a simpler roadmap is elucidated by Arthur Waskow:

[T]he only alternative [to prisons] is building the kind of society that does not need prisons. A decent redistribution of power and income so as to put out the hidden fire of burning envy that now flames up in crimes of property – both burglary by the poor and embezzlement by the affluent. And a decent sense of community that can support, reintegrate and truly rehabilitate those who suddenly become filled with fury or despair, and that can face them not as objects-‘criminals’-but as people who have committed illegal acts, as have almost all of us.<sup>24</sup>

An abolition framework, then, is a critical assessment of the carceral state, including the economic, ecological, political, cultural, and spiritual conditions therein, focused on the liberation of all subjugated peoples. This liberation will only be possible through a revolution in social relations such that the need for incarceration and surveillance becomes unnecessary.

Some argue that the kind of social relations necessary for abolitionist transformation requires state action. As Berger argues, “genuine reform must provide a state response at the point of need rather than at the point of lawbreaking”.<sup>25</sup> However, considering this issue originates with the state, it may be wiser to rely on a grassroots or community response, supported by state resources. No matter how this transformation may come about, it is clear that further investment in carceral systems cannot bring about the bright future promised by abolition theory. Investment in communities and alternatives to carceral systems is the only way forward. The record of international law on this point has been mixed. Some aspirational conventions, such as the *ICESCR*, support investment in communities in a way that an abolition framework would support. However, these aspirational documents tend to have little in the way of enforcement mechanisms and often include significant caveats. These can be contrasted with other international documents, such as the *Convention Against Torture* or the International Human Rights Standards for Law Enforcement (*IHRSLE*), both written without caveats.<sup>26</sup> This attitude and approach in international human rights law contributes to the carceral framework on an international scale.

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<sup>24</sup> Arthur Waskow, resident, Institute for Policy Studies, *Saturday Review*, 8 January 1972, quoted in Angela Davis, “Are Prisons Obsolete” (New York: Seven Stories Press, 2003) at 105.

<sup>25</sup> Dan Berger, *supra* note 5.

<sup>26</sup> *IHRSLE*, *supra* note 4.

### C. Crime as a Social Phenomenon

Crime and deviance are social constructs that vary throughout societies and time.<sup>27</sup> What is a crime in one area may not be a crime in another. Various factors affect what is criminal, but it is often largely based upon relations of power in a given state.<sup>28</sup> This also applies in the international sphere. Powerful states are more influential in shaping international law than weak ones.<sup>29</sup> Non-state parties are only rarely allowed a role in international law at all. The rapidly shifting legality of recreational cannabis use worldwide is a clear example of this phenomenon. Cannabis did not become illegal in Canada until 1923, when without debate it was simply noted that “there is a new drug in the schedule”.<sup>30</sup> This was not a practical decision but was based on racial politics.<sup>31</sup> This was a somewhat puzzling prohibition – there was little recorded use of cannabis in Canada at the time, and none was seized until 1937.<sup>32</sup> However, the law can be explained by its links to “Chinese Exclusion”, and fears of Chinese opium traffickers.<sup>33</sup> It took until long after this moral panic had subsided for recreational cannabis to become legalized, but it was once again due to social factors. Similar links can be drawn to the “War on Drugs” in America.<sup>34</sup> Other states such as Mexico, South Africa, Uruguay, Malta, and Georgia have also done an about face on recreational cannabis laws following changing societal attitudes.<sup>35</sup> Indeed, there are few crimes that have enjoyed universal

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<sup>27</sup> William Little, *Introduction to Sociology* (2012) Chapter 7, online (pdf): <opentextbc.ca/introductiontosociology/chapter/chapter7-deviance-crime-and-social-control/#:~:text=Crime%20and%20deviance%20are%20social,of%20power%20that%20structure%20society> [perma.cc/2HVQ-BYP2].

<sup>28</sup> *Ibid.*

<sup>29</sup> See e.g. Jack L Goldsmith & Eric A Posner, *The Limits of International Law*, (Oxford: Oxford University Press, 2005) at 23.

<sup>30</sup> Nathan Ruston, ‘*There is a New Drug in the Schedule’: The Mysterious Origins of Criminalized Cannabis* (Bachelor of Arts in the Department of History, University of Victoria, 2018) at 28 [unpublished].

<sup>31</sup> Catherine Carstairs, ‘*Hop Heads’ and ‘Hypes’: Drug Use, Regulation and Resistance in Canada, 1920-1961* (PhD Graduate Department of History, University of Toronto, 2000) at 35 [unpublished].

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at 32.

<sup>34</sup> Angela Davis, *supra* note 24 at 109.

<sup>35</sup> Basit Aijaz, “From Canada to Uruguay, Here Are Some of the Countries Where Marijuana is Legal” (15 October 2021) online: *India Times* <[www.indiatimes.com/trending/social-relevance/countries-where-marijuana-is-legal-551710.html](http://www.indiatimes.com/trending/social-relevance/countries-where-marijuana-is-legal-551710.html)>



acceptance across time periods and societies. Examples like the rapidly changing legality of cannabis use demonstrate that little is inherently criminal – the definition of crime is influenced by the attitudes and power structures surrounding the issue.

## II. WHY THIS LENS IS USEFUL – ISSUES IN INTERNATIONAL HUMAN RIGHTS LAW

Understanding that crime is a social phenomenon can lead to radical responses to crime. In this section, I will first lay out what the nature of crime as a social phenomenon means for “fighting crime”. Next, I will address whether or not the carceral state has been an effective response to crime. Finally, I will address how an abolition framework could be useful to deconstruct the carceral elements inherent in modern international human rights law.

### A. “Fighting Crime” Through Carceral Means

Accepting an abolition framework requires a massive shift in international human rights law. Firstly, the social nature of crime must be accepted. We have identified “crime” as being defined by those in power, but we have not looked at how sociological trends can influence behaviours on a large scale. Sociological factors influence all of our actions. Offenders, and their offending actions, are no different. Making something illegal, whether in international or national law, does not stop that action from occurring if the material conditions under which those actions arise are not changed. Another approach must be taken if the goal is to stop these crimes before they happen, instead of reacting after they have occurred.

International human rights law can be seen as having a mixed record on incarceration. On the one hand, it sets standards for the amelioration of prison conditions, tries to ensure some guidelines are followed, and seeks to eliminate inhumane acts such as torture.<sup>36</sup> On the other hand, it

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[perma.cc/CP2M-FJNL]; Monir Ghaedi, “A Roundup of Countries That Permit Recreational Cannabis” (15 October 2021) online: *DW* <[www.dw.com/en/a-roundup-of-countries-that-permit-recreational-cannabis/a-59510115](http://www.dw.com/en/a-roundup-of-countries-that-permit-recreational-cannabis/a-59510115)> [perma.cc/RMP3-P62S].

<sup>36</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS 1465 (entered into force 10 December 1984) [*Convention Against Torture*].

uncritically accepts the legitimacy of prisons and police and adds islands to the carceral archipelago in every state where it is accepted.

Prisons, originally, were meant to be humane instruments of individual reform.<sup>37</sup> Based on Christian ideals, they were meant to mimic a monastic setting and give inmates a chance for religious self-reflection and self-reform.<sup>38</sup> However as we now know, carceral solitude is much more likely to produce significant mental and physical harm than reformation.<sup>39</sup> In fact, enforced confinement and solitude often leads to inmates struggling to reintegrate with society when released.<sup>40</sup> Social isolation is correlated with clinical depression and long-term impulse-control disorder.<sup>41</sup> Nor is this a new revelation. As early as 1890 the US Supreme Court recognized that:

A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.<sup>42</sup>

The World Health Organization has stated that “Prisons are bad for mental health”, and that mental disorders may be “further exacerbated by the stress of imprisonment...mental disorders may also develop during imprisonment itself as a consequence of prevailing conditions”.<sup>43</sup> Despite the hope that prisons would reform and rehabilitate those incarcerated within them, contemporary studies suggest that the opposite occurs. Former inmates often experience

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<sup>37</sup> Angela Davis, *supra* note 24 at 45-48.

<sup>38</sup> *Ibid* at 45, 46.

<sup>39</sup> Bruce A Arrigo & Jennifer Leslie Bullock, “The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change” (2008) 52:6 *Intl J Offender Therapy Comparative Criminology* 622 at 627.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Re Medley*, 134 US 160 (1890) at 168 (on solitary confinement).

<sup>43</sup> World Health Organization & the International Committee of the Red Cross, Information Sheet, “Mental Health and Prisons” (2005) online (pdf): WHO <[www.who.int/mental\\_health/policy/mh\\_in\\_prison.pdf](http://www.who.int/mental_health/policy/mh_in_prison.pdf)> [perma.cc/VYH7-EX7Q] at 1.

greater difficulties obtaining employment and maintaining social and personal relationships than those who have not been incarcerated.<sup>44</sup>

In some countries, rehabilitation is only a goal in name only. For example, Patrick Igbinoia posits that prisons established in Nigeria “were essentially custodial facilities created to protect British nationals against dangerous offenders”, without concern for the well-being of inmates.<sup>45</sup>

Although there may be various reasons for sentencing an offender to incarceration, rehabilitation is not one that is very well supported by evidence. It does not decrease the likelihood of future crimes and does nothing to address the social causes of crime.

## **B. Other Reasons for Incarceration**

At best, imprisonment can have two uses. The first is retributive, a punishing measure, meant to hurt those who have hurt others and meting out justice in the form of “an eye for an eye”. One could argue that such an approach is morally just, but in an attempt to avoid a moralistic argument it is enough to note the second part of this expression: that it “makes the whole world blind”. Punishing a criminal may make us feel good, but if it is not reducing the likelihood of future crime, it is but a fleeting feeling of relief. I argue the better approach is to ensure the fewest eyes possible are lost.

The other argument often used in favour of imprisonment is deterrence theory. Deterrence theory suggests that if strict punishments are associated with crimes, then citizens will act rationally to avoid punishment and therefore not commit crimes.<sup>46</sup> This argument does not appear supported empirically. Massive carceral networks which set out horrific punishments have failed to eliminate crime. Even the harshest punishments often have

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<sup>44</sup> José Cid, “Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions” 6:6 *Eur J Criminology* 459 at 462.

<sup>45</sup> Patrick Edobor Igbinoia, “The Chimera of Incarceration: Penal Institutionalization and its Alternatives in a Progressive Nigeria” (1984) 28:1 *Intl J Offender Therapy & Comparative Criminology* 22 at 23.

<sup>46</sup> Ihekwoaba D Onwudiwe, Jonathan Odo, & Emmanuel C Onyeozili, “Deterrence Theory” in Mary Bosworth, ed, *Encyclopedia of Prisons & Correctional Facilities* (California: Sage Publications Inc, 2005) 233 at 234.

no impact on crime rates.<sup>47</sup> If the threat of prison stopped one from committing a crime, prisons would be empty. The fact that they are not empty suggests that they have not had the deterrent effect advertised.<sup>48</sup> On the other hand, countries such as Iceland, Finland, the Netherlands, Sweden, and Denmark, often held up as models of rehabilitation, have seen declining prison populations.<sup>49</sup>

### C. How this Relates to International Law

International law generally avoids attempting to control how a state treats its own citizens. Rather, it is usually more concerned with how states interact with each other.<sup>50</sup> International human rights law is an exception to this rule.<sup>51</sup> International human rights laws provide some protections for citizens against their own state and prescribe some standards for how citizens should expect to be treated.

International human rights laws, and international laws in general, are more difficult to impose than national laws. With national law, most states have the power to ensure their enforcement. Police, courts, and if necessary, militaries, will ensure that national law is upheld through the use of force. Short of war, it is difficult to hold a state to their responsibilities under international law in a comparable way, as states nominally have a monopoly on the use of force within their borders. Instead, international law must rely

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<sup>47</sup> See e.g. Amnesty International, “Does the Death Penalty Deter Crime: Getting the Facts Straight” (1 June 2008), online (pdf): *Amnesty International* <[www.amnesty.org/en/wp-content/uploads/2021/06/act500062008en.pdf](http://www.amnesty.org/en/wp-content/uploads/2021/06/act500062008en.pdf)> [perma.cc/6FDN-XEKJ].

<sup>48</sup> For a more robust criticism of the deterrence hypothesis see David A Anderson “The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging” (2020) 4:2 *American L & Economics Rev* 295.

<sup>49</sup> Human Rights Channel “New Report Says Europe’s Prison Population is Shrinking” (2 April 2019), online: *Council of Europe* <[human-rights-channel.coe.int/asset-new-report-says-europe-s-prison-population-is-shrinking-en.html](http://human-rights-channel.coe.int/asset-new-report-says-europe-s-prison-population-is-shrinking-en.html)> [perma.cc/LAV5-GTJD]; See Peter Fransen, “The Rise of Open Prisons and the Breakthrough of the Principle of Normalisation from the 1930s Until Today” in Peter Scharff Smith & Thomas Ugelvik, eds, *Scandinavian Penal History, Culture and Prison Practice*, (United Kingdom: Palgrave Macmillan, 2017) 81 at 81ff (for a history of “open prisons” in Nordic countries) and at 88 – 92 (for a comparison to “closed prisons”, but note that the authors are critical of the Nordic model).

<sup>50</sup> Frédéric Mégret, “Nature of Obligations” in Daniel Moeckli, Angeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) 86 at 86.

<sup>51</sup> *Ibid.*

on state volunteerism, or states voluntarily binding themselves to their obligations.<sup>52</sup> Human rights laws only have traction when a state has bound itself through an international law instrument, usually a treaty. It can be hard to convince states to bind themselves in this manner when they receive nothing tangible in return.<sup>53</sup>

This “special nature” of human rights law has significant consequences for its enforcement. Typical, “contractual” international law between state parties takes the form of binational or multinational agreements and can be enforced by infringing on the benefit that the other party received from the contract, or, if the agreement has contemplated it, through binding forms of dispute resolution such as arbitration or court. Obviously, these kinds of enforcement mechanisms do not work with international human rights law, where the benefit does not flow to another state but to individuals. Some human rights laws, such as the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>54</sup> can be brought before international courts.<sup>55</sup> In reality however, court adjudication has been rare.<sup>56</sup> More common is a state obligation to provide reports outlining how they have complied with their obligations, which can lead to bad press, sanctions, or criticisms from other states if they have failed to comply.<sup>57</sup> Some instruments have created a right of petition before international bodies.<sup>58</sup> Although these novel solutions create some accountability for states, in reality these remedies are often hard to access. Even greater challenges must be navigated to enforce aspirational treaty obligations such as those in the ICESCR.<sup>59</sup>

It is important to note the above when analyzing international human rights law through an abolition lens to understand its structure, and to understand how that structure can be changed. There are two main types of international human rights laws. Firstly, there are prescriptive (or

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<sup>52</sup> *Ibid* at 87.

<sup>53</sup> *Ibid* at 87 (or when a state has been bound through customary international law).

<sup>54</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

<sup>55</sup> *Ibid* at 105.

<sup>56</sup> *Ibid* at 106

<sup>57</sup> *Ibid* at 106.

<sup>58</sup> *Ibid* at 106.

<sup>59</sup> Cf Dinah L Shelton, *Advanced Introduction to International Human Rights Law*, 2nd ed (UK: Edward Elgar Publishing Limited, 2020) at 125, 194–197.

proscriptive) laws, and secondly, there are aspirational ones.<sup>60</sup> Prescriptive laws mandate or prohibit a kind of behaviour or action. There may be punishment if those behaviours or actions occur. One example would be the *Convention Against Torture*.<sup>61</sup> States and individuals are not permitted to perpetrate torture. If a state discovers that a person in their territory has committed torture or is alleged to have committed torture, they must take them into custody.<sup>62</sup> A response from the state is mandated and clearly delineated. On the other hand, an aspirational law is one which directs a state to strive for a certain standard. Aspirational laws set out goals for a state to try to achieve and may direct the state on what it should prioritize. An example of an aspirational law is the right to water. Adopted as a human right in General Comment 15 of the *ICESCR*, it states that “State parties have to adopt effective measures to realize, without discrimination, the right to water”.<sup>63</sup> This theoretically puts a positive obligation on the state to actively take steps to ensure that this right is upheld. However, it does not set out what effective measures the state must carry out. Nor does this section state that there will be any consequences for failing to adopt these measures. Additionally, the General Comment notes that “the Covenant...acknowledges the constraints due to the limits of available resources”, leaving wide latitude for states to ignore this right while spending resources on other priorities.<sup>64</sup> International aspirational laws such as the right to water are eviscerated by these qualifiers.

An abolition framework would emphasize substantive rights such as the right to water and set more robust standards for such rights to be fulfilled, transforming them from aspirational laws to prescriptive ones. It would also require meaningful complaint mechanisms against the state to ensure that this right is taken seriously. Investments in communities and assurance that basic needs will be met must be treated with more priority by international human rights law.

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Convention against Torture, supra* note 36.

<sup>62</sup> *Convention against Torture, supra* note 36 art 6.

<sup>63</sup> Committee on Economic, Social and Cultural Rights (UN), 29th Sess, General Comment No 15 (2002) art 11 & 12 (Right to Water), online (pdf): <[www2.ohchr.org/english/issues/water/docs/CESCR\\_GC\\_15.pdf](http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf)> [<https://perma.cc/U894-ETJU>].

<sup>64</sup> *Ibid* at para 17.

### III. CASE STUDY: *ICESCR*

The difference between prescriptive and aspirational laws is brought into stark relief through an abolitionist framework. Looking at a case study of an international law will provide a concrete example of the usefulness of this analytical approach. The language in an aspirational document, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, will be compared with the language of a prototypical prescriptive law, the *Convention Against Torture*.

The *ICESCR* is an aspirational document and sets out positive obligations that state signatories should follow. The rights contained within the *ICESCR* include the right to just and favourable conditions of work, the right to form trade unions, the right to social security, the right to an adequate standard of living, and the right to the continuous improvement of living conditions.<sup>65</sup> These are key rights which directly address the wellbeing of state citizens. However, this document, particularly Article 2, contains significant caveats. These caveats unfortunately undercut the potential of international human rights law. They also undercut the ability of international law to address crime through proactive meeting of needs. Providing these rights would ensure the health of communities. Healthy communities can respond to harm or deviance without relying on prisons or punishment.<sup>66</sup>

#### A. Articles 6, 7 and 9

The link between the fulfillment of human rights obligations and reduction in crime may not be immediately apparent. However, when crime is observed as a social phenomenon instead of an individual one, the natural conclusion is that a social response is possible instead of an individual one. When crime is observed as a legalistic response to activities designated deviant because of a society's power structures, the appropriate social response becomes apparent: eliminating these power structures in favour of a more egalitarian society. For instance, many crimes which do not cause

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<sup>65</sup> *ICESCR*, *supra* note 2.

<sup>66</sup> See e.g. Erica R Meiners & Maisha T Winn, "Resisting the School to Prison Pipeline: the Practice to Build Abolition Democracies" (2010) 13:3 *Race Ethnicity & Education* 271 at 273; see also Allegra M McLeod, "Prison Abolition and Grounded Justice (2015) 62:5 *UCLA L Rev* 1156 at 1163.

harm but are determined to be deviant, such as panhandling or sleeping in open spaces, could be immediately reduced or eliminated through the provision of affordable (or free) housing, and social insurance. This would be a significant step away from a carceral society without creating any risk. Likewise, meaningful articulation of Articles 6 and 7 of the ICESCR would have radical effects on criminal deviance.<sup>67</sup> Article 6 states that the “Parties...recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”<sup>68</sup> Part 2 continues:

The steps to be taken by a State Party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.

Article 7 recognizes the right of everyone to “just and favourable” conditions of work, fair wages, a decent living, safe and healthy working conditions, and rest.<sup>69</sup> Several studies have shown a relationship between employment and lowered crime rates.<sup>70</sup> Putting mechanisms in place to ensure these rights are protected in meaningful ways would not only increase the economic well-being of individuals, but also make everyone less likely to be at risk from the harmful behaviour of others. The UN has acknowledged that employment contributes to a person’s “development and recognition within the community”, also noting its importance for social inclusion.<sup>71</sup> A prescriptive right to fair wages and a decent living

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<sup>67</sup> See Steven Raphael & Rudolf Winter-Ebmer, “Identifying the Effect of Unemployment on Crime” (2001) 44:1 *JL & Econ* at 271; see also Fredrik Lundqvist “Unemployment and Crime” (Economics, Södertörn University, 2018) at 17–20 (for “weak but significant evidence”) or at 4 for a literature review of other studies finding a connection.

<sup>68</sup> ICESCR, *supra* note 2 art 6.

<sup>69</sup> *Ibid* at art 7.

<sup>70</sup> Raphael & Winter-Ebmer, *supra* note 67 at 271; Lundqvist, *supra* note 67 at 4, 17–20.

<sup>71</sup> Committee on Economic, Social and Cultural Rights (UN), 35th Sess, General Comment No 18 (2006) art 6 (The Right to Work) at para 1, online: <[docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfUKxXVsd7Dae%2FCu%2B13J25Nha7l9NlwYZ%2FTmK57O%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BikX8AGQrVylc](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfUKxXVsd7Dae%2FCu%2B13J25Nha7l9NlwYZ%2FTmK57O%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BikX8AGQrVylc)> [perma.cc/URR8-NB72].



would radically reduce crimes of poverty, and shift power structures towards less carceral systems.

The international labour market does not reflect these ideals. There are “major gaps in access to work”, and access to work does not ensure good working conditions.<sup>72</sup> Worldwide, more than 630 million workers (or one in five) do not earn enough to avoid moderate or extreme poverty.<sup>73</sup> Labour underutilization affects over 470 million people worldwide, while 188 million are unemployed.<sup>74</sup> Furthermore, labour markets are “not adequately distributing the fruits of economic growth”, undermining the value of Articles 6 and 7.<sup>75</sup> Fully implementing these articles would ameliorate these conditions, while addressing criminal deviance through the alleviation of negative social conditions.

## **B. Article 10**

Meaningful interpretation of Article 10 of the ICESCR could also impact crime and social behaviour. Article 10 states that:

1. The widest possible protection and assistance should be accorded to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Social bonds are consistently shown to be related to criminal behaviour.<sup>76</sup> Especially important are family bonds. Families, as the ICESCR points out, are the “fundamental group unit of society”, and play a tremendous role in the deviance or conformity of members.<sup>77</sup> Stronger bonds and healthier families indicate less likelihood of crime.<sup>78</sup> Article 10

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<sup>72</sup> International Labour Organization, “World Employment and Social Outlook: Trends 2020” (2020), online (pdf): <[www.ilo.org/wcmsp5/groups/public/-/dgreports/-/dcomm/-/publ/documents/publication/wcms\\_734455.pdf](http://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/dcomm/-/publ/documents/publication/wcms_734455.pdf)> [perma.cc/9WBT-D7WA] at 3.

<sup>73</sup> *Ibid* at 12.

<sup>74</sup> *Ibid* at 12.

<sup>75</sup> *Ibid* at 11.

<sup>76</sup> See e.g. Bradley R Entner Wright et al., “Low Self-Control, Social Bonds, and Crime: Social Causation, Social Selection, or Both?” (1999) 37:3 *Criminology* 479 at 502.

<sup>77</sup> See Thomas J Mowen & Christy A Visher, “Drug Use and Crime After Incarceration: The Role of Family Support and Family Conflict” (2015) 32:2 *Justice Q* 337 at 354 (on the rates of drug use and crime during family conflict).

<sup>78</sup> *Ibid*.

of the ICESCR has tremendous potential to address crime. Meaningful implementation of this article would help protect family bonds, strengthen social cohesion, and limit harmful deviance. It can also be concluded that Article 10 would have a disproportionate effect on the rates of domestic violence.<sup>79</sup>

### C. Article 11

A similar analysis can be drawn with Article 11 of the ICESCR. Article 11 states that:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
  - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>80</sup>

Article 11 could be radically transformative. The potential promises within Article 11, an adequate standard of living, food, clothing, and housing, would require the complete restructuring of the economic and social relations in some states. What is “adequate” is debatable and circumstantial, but it is largely agreed that this standard requires that “[n]o one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of basic freedoms, such as

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<sup>79</sup> Forced marriage itself can be seen as a form of domestic violence – see e.g. Geetanjali Gangoli, Amina Razak & Melanie McCarry, “Forced Marriage and Domestic Violence Among South Asian Communities in North East England” (2006) 23:6 School Policy Studies U Bristol 1 at 32.

<sup>80</sup> ICESCR, *supra* note 2 art 11.

through begging, prostitution, or bonded labour...[it] implies a living above the poverty line”.<sup>81</sup> Obviously, in many societies across the world all of these actions occur, whether the ICESCR is ratified there or not. In some countries, begging and prostitution are illegal, and crimes of desperation based on sub-standard living conditions occur everywhere.<sup>82</sup> Amelioration of living conditions would eliminate this category of crime, while improving the lives of everyone and affirming important economic rights.

The standards set out in Article 11 have clearly not been met. Many developing countries struggle to provide proper housing, and homelessness and inadequate housing in developed countries is growing as well – the opposite of the promised “continuous improvement in living conditions”.<sup>83</sup> There are over 100 million homeless persons worldwide, with 1.6 billion facing inadequate housing.<sup>84</sup>

#### D. Article 13, 14, and others

The right to education, enshrined within Articles 13 and 14, contains a similar promise for the elimination of crime without the use of carceral methods.<sup>85</sup> Increases in educational attainment significantly reduce all categories of crime.<sup>86</sup> Unfortunately, 60 million children worldwide still do

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<sup>81</sup> Claudia Martin et al., *The International Dimension of Human Rights: A Guide for Application in Domestic Law* (Washington, D.C.: Inter-American Development Bank, 2001) at 577–578; see also Asbjørn Eide, “Adequate Standard of Living” in Daniel Moeckli, Angeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) 186 at 194.

<sup>82</sup> For an explanation of crimes of desperation see e.g. Teresa Gowan “The Nexus: Homelessness and Incarceration in Two American Cities” (2002) 3:4 *Ethnography* 500 at 517.

<sup>83</sup> Asbjørn Eide, *supra* note 81 at 195.

<sup>84</sup> United Nations Human Settlements Programme (UN-Habitat), “UN Stats” (2020), online (pdf): <[unstats.un.org/sdgs/metadata/files/Metadata-11-01-01.pdf](https://unstats.un.org/sdgs/metadata/files/Metadata-11-01-01.pdf)> [perma.cc/V965-A9NF]; see also Committee on Economic, Social and Cultural Rights (UN), 6<sup>th</sup> Sess, General Comment No 4, art 11 (The Right to Adequate Housing), adopted 1991 UN Doc E/1992/23 online: <[www.escr-net.org/resources/general-comment4](https://www.escr-net.org/resources/general-comment4)> [perma.cc/C69F-DF9B].

<sup>85</sup> ICESCR, *supra* note 2 art 13.

<sup>86</sup> Lance Lochner, “Education and Crime” (2007) National Bureau Economic Research Working Paper No 15894 at 1.

not have access to primary education.<sup>87</sup> Most of the rights contained within the ICESCR follow the same pattern – tremendous potential for the strengthening of communities, with a corresponding predictable reduction in crime. The fact that these rights are not meaningfully enforced betrays the potentially liberatory nature of the covenant.

## E. Article 2

The potential benefits that could flow from the ICESCR are obvious. Equally obvious is the fact that the standards set out therein are not always met. Moreover, they do not have to be. The caveats inherent in the ICESCR eviscerate the radical potential of the convention. Article 2 states:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.<sup>88</sup>

The significant promises outlined in the rest of the ICESCR lose meaning in the face of Article 2. There are several caveats outlined in this text. Firstly, each state is only expected to “take steps” to fulfil the outlined rights. The rights, therefore, are not guaranteed. The only guarantee is that a state must appear to be moving in a direction to eventually fulfil the covenant. Furthermore, the state is only expected to take these steps “to the maximum of its available resources”.<sup>89</sup> A state party may be expected to demonstrate it has made efforts to satisfy the minimum core of this right,

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<sup>87</sup> Fons Coomans, “Education and Work” in Daniel Moeckli, Angeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2018) 232 at 233.

<sup>88</sup> ICESCR, *supra* note 2 art 2.

<sup>89</sup> ICESCR, *supra* note 2 art 2(1).

but the covenant does not specify what this minimum core is.<sup>90</sup> For example, Brodie, Pastore, and Rosser argue that mere bricks and mortar are not enough to provide adequate housing.<sup>91</sup> A dwelling, land, services such as water and plumbing, and the financing of such are necessary.<sup>92</sup> However, the covenant does not guarantee these, leaving states some latitude to avoid obligations. Lastly, the Article uses the language “achieving progressively the full realization of rights”.<sup>93</sup> This articulation provides no actual impetus for achieving said full realization. No actual rights need be granted. Only a slow trend toward them is required. This hardly makes them rights at all, but mere pipe dreams floating in the unforeseeable and likely distant future.

## F. Standards in Other International Legal Instruments

These half-hearted promises are not the norm for international legal instruments. While the ICESCR requires states to take amorphous “steps”, to the “maximum of its available resources”, other treaties like the *Convention Against Torture* make direct demands.<sup>94</sup> The *Convention Against Torture* directs states to “take effective legislation, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>95</sup> It also notes that “No exceptional circumstances whatsoever” can justify torture.<sup>96</sup> State parties are directed to enshrine the right against torture within national criminal law.<sup>97</sup> The language in these two documents is drastically different. The ICESCR allows for exceptions and slow improvement. The *Convention Against Torture* requires swift and precise action for its fulfillment.

## G. Abolitionist Possibilities Within the ICESCR

An abolition framework, as defined earlier in this paper, is a critical assessment of the carceral state, including the economic, ecological, political, cultural, and spiritual conditions therein, focused on the

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<sup>90</sup> Juliet M Brodie, Clare Pastore, & Ezra Rosser, *Poverty Law Policy and Practice*, 2<sup>nd</sup> ed (Toronto: Wolters Kluwer Law & Business, 2020) at 793.

<sup>91</sup> *Ibid* at 794.

<sup>92</sup> *Ibid*.

<sup>93</sup> ICESCR, *supra* note 2 art 2(1).

<sup>94</sup> ICESCR, *supra* note 2 art 2(1); *Convention against Torture*, *supra* note 36.

<sup>95</sup> ICESCR, *supra* note 2 art 2(1).

<sup>96</sup> *Ibid* art 2(2).

<sup>97</sup> *Ibid* art 4.

liberation of subjugated peoples. This liberation will only be possible through a revolution in social relations such that the need for incarceration and surveillance becomes unnecessary.

Many of the promises of the *ICESCR* relate directly to the promises of abolition. The revolution of social relations necessary to make surveillance and incarceration obsolete might not solely be possible through the *ICESCR*, but a meaningful interpretation of the rights in this document would certainly lay the groundwork for such a revolution. A guarantee of meaningful work with favourable conditions, social security, family protections, and an adequate standard of living would revitalize and strengthen communities. These investments in communities would no doubt have a stabilizing effect. Instead of investing in communities, states are allowed to, and regularly do, invest in carceral policies which marginalize individuals and break down community bonds. The caveats laid out in Article 2 minimize the potential good of the *ICESCR*, limit the possibilities of international human rights law, and lead to an impoverished view of economic, political, and cultural rights.

Healthy communities reduce crime and harmful behaviour, and human rights laws have an important role to play in ensuring the health of communities. Unfortunately, the human rights laws which might lead to healthy communities, such as the *ICESCR*, come with significant caveats which undermine their promise. Other international laws, such as the *Convention Against Torture*, have no such limitations. Crafting international laws in a meaningful way, utilizing an abolition framework, would require more fulsome guarantees of economic and cultural rights. These rights would help create stable and strong communities which could exercise social control over their own members, and not require a carceral state to punish harmful deviance. Instead, these empowered communities would be able to respond to crimes in a way appropriate for their community and their culture. Crafting the *ICESCR* under an abolition framework would require it to be a prescriptive law, with specific goals, no caveats, and a meaningful enforcement mechanism. Done in such a way, the *ICESCR* would contribute to the abolition of the carceral state through a shift in the economic, ecological, political, cultural, and spiritual conditions of the societies where it is embraced.

### *1. International Human Rights Standards for Law Enforcement*

Analyzing other international documents demonstrates how impoverished the ICESCR is. Although its limitations become clear when contrasted with the Convention against Torture, this is merely an expression of a larger carceral attitude within international human rights law. The *International Human Rights Standards for Law Enforcement* (“IHRSL”) provides some insight. The mere existence of this document legitimizes the existence of law enforcement personnel, and therefore the existence of the carceral state. Much of the language in this document also espouses carceral thinking. In general, the document sets out standards for the way that law enforcement officers (LEOs) must treat civilians, and the rights of individuals that LEOs must not violate. LEOs are expected to “respect and protect human dignity and maintain and uphold the human rights of all persons” and remember that “[e]veryone has the right to security of person”.<sup>98</sup> Needless to say, these standards are not always upheld.<sup>99</sup> More to the point, they are directly contradictory to the role of LEOs in a carceral society. Carceral states contain an interlocking network of public and private systems of control that act to surveil and control populations that have been designated deviant by the dominant group. LEOs are one of the key ways of enacting that surveillance and control. Security of the person is strongly related to liberty, and nothing could be less liberating than a powerful carceral state. Furthermore, respecting and protecting human dignity and upholding rights are not natural functions of law enforcement. Rather, LEOs are a key part of a surveillance and control system – directly in contrast to liberty rights and security of the person, especially for marginalized groups.<sup>100</sup>

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<sup>98</sup> IHRSL, *supra* note 4 at 4.

<sup>99</sup> See e.g. Kristen Williams, *Our Enemies in Blue*, (Cambridge, Massachusetts: South End Press, 2007); Alex S Vitale, *The End of Policing*, (Brooklyn, NY: Verso Books, 2017); The Lagos Judicial Panel of Inquiry, “Lagos State Judicial Panel of Inquiry on Restitution for Victims of SARS Related Abuses and Other Matters”, *Report of Lekki Incident Investigation of 20<sup>th</sup> October 2020* (19 July 2021) (The Honourable Justice Doris Okuwobi); Asian Forum for Human Rights and Development, News Release, “Thailand: End Police Brutality and Use of Violence Against the Democracy Movement (18 November 2020) online (pdf): <[www.forum-asia.org/uploads/wp/2020/11/FORUM-ASIA-Statement-Thailand-peaceful-protest-crackdown.pdf](http://www.forum-asia.org/uploads/wp/2020/11/FORUM-ASIA-Statement-Thailand-peaceful-protest-crackdown.pdf)> [[perma.cc/B3WP-CZD5](https://perma.cc/B3WP-CZD5)].

<sup>100</sup> Kristen Williams, *supra* note 99; Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas*, (Cambridge, MA: Harvard University Press, 2001) at 33-37; William Lewis, “The Cops: Racists and Strike Breakers” (May 29, 2020) online: *Left*

Perhaps the fundamental confusion in this document comes from the idea that LEOs are in the business of “protecting all persons against illegal acts”.<sup>101</sup> Coming from an abolition framework, we can clearly see that protecting persons against illegal acts is not a function of law enforcement officials.<sup>102</sup> This is not the fault of LEOs. They are not actually equipped to protect individuals from illegal acts. Rather, they have the powers to arrest and investigate illegal acts after the fact. After the fact, however, is too late to protect a victim. To actually protect persons against illegal acts would require healthy communities producing fewer criminals and fewer illegal acts.

The *IHRSLE* also sets out that all police action should respect the principles of non-discrimination. However, this statement neglects the fact that carceral states are necessarily discriminatory – crime is prohibited deviance, and deviance is defined by the elite of a society.<sup>103</sup> Conduct of marginalized groups is categorically more likely to be defined as deviance, and therefore crime.<sup>104</sup> The proper response to this, if the goal is non-discrimination, is to empower communities, decentralize elite power and the ability to define deviance and crime. This can only be achieved through political, economic, cultural, and social rights, such as those enclosed within the *ICESCR*.

#### IV. CONCLUSION

When utilized, an abolition framework offers unique insight. It emphasizes how state and corporate actions influence the economic, ecological, political, cultural, and spiritual conditions of citizens within any given society. It is also a liberatory framework, seeking an abolition of the carceral state for the emancipation of subjugated peoples through a revolution in social relations. This is not a framework which is commonly applied to international human rights law. This paper fills a niche in the literature by critically analyzing the ways that international human rights law may inadvertently contribute to the carceralization of societies. To prove

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Voice <[www.leftvoice.org/the-cops-racists-and-strike-breakers](http://www.leftvoice.org/the-cops-racists-and-strike-breakers)> [perma.cc/BK7M-FCEE].

<sup>101</sup> *IHRSLE*, *supra* note 4 at 3.

<sup>102</sup> See generally Kristian Williams, *supra* note 99; Alex S Vitale, *supra* note 99 at 31.

<sup>103</sup> Alex Vitale, *supra* note 99 at 131–133.

<sup>104</sup> *Ibid.*



the use of this framework, different international instruments are analyzed. The ICESCR, a convention with strong liberatory potential which could instigate significant investment in community and address the social causes of crime is written to have no hard commitments. States can avoid granting the rights in this document based on caveats and the aspirational nature of the convention. It was not necessary to structure the document this way. Other international instruments are written to be binding and create meaningful duties which must be met by the state. An abolition framework posits that international law should champion investment into and empowerment of communities. To do so would require equipping documents such as the ICESCR with meaningful enforcement mechanisms, instead of hollowing them out with caveats. That this is not the case is not surprising. Carceral attitudes seem to be prevalent throughout international human rights law – the necessity of LEOs and prisons are assumed. Further use of the abolition framework in international law is necessary to deconstruct these attitudes, and foster liberatory dialogue within international human rights organizations and treaty bodies.