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## Locked Up and Locked Down in the Land of Free: A Look at the United States' Prisons and COVID-19's Disproportionate Effect on Black Americans' Right to Health

Zachary Parrish

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# **LOCKED UP AND LOCKED DOWN IN THE LAND OF THE FREE: A LOOK AT THE UNITED STATES’ PRISONS AND COVID-19’S DISPROPORTIONATE EFFECT ON BLACK AMERICANS’ RIGHT TO HEALTH**

ZACHARY PARRISH\*

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## I. INTRODUCTION

The United States is infamous for having a large percentage of its population in prison.<sup>1</sup> Each year since 2002, the United States has reported a higher incarceration rate than any other country in the world.<sup>2</sup> Another unfortunate but widely prevalent issue that the United States has is systemic racism.<sup>3</sup> The combination of the United States' struggles with systemic racism and mass incarceration makes for a disproportionately devastating impact on Black Americans.<sup>4</sup> As

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1. See Campbell Robertson, *Crime is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html>.

2. Paola Scommenga, *U.S. Has World's Highest Incarceration Rate*, PRB (Aug. 10, 2012), <https://www.prb.org/resources/u-s-has-worlds-highest-incarceration-rate/>; see *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited Feb. 12, 2021).

3. See Adam Taylor, *U.N. Human Rights Council to Turn Attention on 'Systemic' Racism in United States*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/world/2020/06/16/un-human-rights-council-turn-attention-systemic-racism-united-states/>; Statement on the Protests against Systemic Racism in the United States (June 5, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25927&LangID=E>; see also Brandi Blessett & Vanessa Littleton, *Examining the Impact of Institutional Racism in Black Residentially Segregated Communities*, 6 RALPH BUNCHE J. OF PUB. AFFAIRS 1, 1–4 (2014) (stating that a defining characteristic of systemic racism is its ability to bleed into many aspects of society and cause that society's worst issues to impact racial minorities much more than everyone else); Victoria Nichols et al., *Beyond the Protests: Sustaining Momentum Toward Racial Equity*, TIDES (July 27, 2020), <https://www.tides.org/priority-issues/equality-human-rights/racial-equity/sustaining-momentum-toward-racial-equity/>.

4. See Nicole Lindahl-Ruiz, *Prisons a Perfect Storm of COVID-19 and Systemic Racism*, SALEM STATESMAN J. (Jan 29, 2021), <https://www.statesmanjournal.com/story/opinion/2021/01/30/guest-opinion-prisons-perfect-storm-covid-19-and-systemic-racism/4285731001/>; Dana E. Fitchett, *Mass Incarceration, Systemic Racism, and COVID-19: Black Leaders See*

a result, Black Americans make up a disproportionate amount of the prisoners that fill American prisons.<sup>5</sup>

Nonetheless, the United States took several steps in the right direction for civil rights, including signing and ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention).<sup>6</sup> This Convention was created to “adopt all measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines.”<sup>7</sup> Among many rights arising from this treaty, Article 5 of the Convention includes the right to health.<sup>8</sup>

Although there is evidence that Black Americans are disproportionately impacted by health issues in prisons,<sup>9</sup> the Convention’s right to health became especially relevant with the outbreak of COVID-19, the highly infectious disease that caused a global pandemic in 2020.<sup>10</sup> According to health experts, COVID-19 is at its most lethal when people are gathered in large masses, especially for those without protections such as masks and adequate access to sanitizing equipment who are unable to maintain a distance of six feet between each other.<sup>11</sup> American prisons often did not

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*Opportunities for Change*, TIDES (Oct. 22, 2020), <https://www.tides.org/priority-issues/equality-human-rights/racial-equity/mass-incarceration-systemic-racism-and-covid-19/>.

5. See Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, PRISON POL’Y INITIATIVE (July 2015), <https://www.prisonpolicy.org/racialgeography/report.html>.

6. See *Status of Ratification Interactive Dashboard: International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. OFF. HUM. RTS., <https://indicators.ohchr.org/> (last visited Mar. 7, 2021) [hereinafter *Status of Ratification: ICERD*].

7. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, 660 U.N.T.S. 195 (1969) [hereinafter ICERD].

8. See *id.* art 5.

9. See Tawandra L. Rowell-Cunsolo et al., *Black Americans and Incarceration: A Neglected Public Health Opportunity for HIV Risk Reduction*, 27(1) J. HEALTH CARE POOR UNDERSERVED 1, 2 (Nov. 16, 2016).

10. See Benjamin Mason Meier, *Realizing the Right to Health Must Be the Foundation of the COVID-19 Response*, UNIVERSAL RTS. GRP. (May 6, 2020), <https://www.universal-rights.org/by-invitation/realizing-the-right-to-health-must-be-the-foundation-of-the-covid-19-response/>.

11. See *Transmission Package: Protect Yourself and Others from COVID-19*, WORLD HEALTH ORG., <https://www.who.int/teams/risk-communication/covid-19->

provide these protections to their inmates.<sup>12</sup> As such, the disproportionate mass incarceration of Black Americans, fueled in large part by systemic racism, exacerbated the impact of COVID-19 on imprisoned Black Americans in a deadly way.<sup>13</sup>

This Comment argues that the United States violated Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination through its institutionalized discriminatory practices, which have caused Black Americans to die at highly disproportionate rates within its prisons.<sup>14</sup> Part II of this Comment provides background information on the mass incarceration of and systemic racism against Black Americans, describes how COVID-19 has hit the Black American community the hardest within prisons, outlines the primary goals of the Convention and the right to health, examines cases where the right to health was violated, and explores the United States' history with human rights treaties.<sup>15</sup> Part III of this Comment argues that the United States is bound by the Convention and violated it in light of the COVID-19 pandemic and its disproportionate effect on Black American inmates.<sup>16</sup> Part IV recommends three actions that the United States should take in response to the COVID-19 pandemic to comply with the Convention, they are: (1) release prisoners of non-violent crimes that are considered at high-risk for COVID-19, (2) ensure adequate personal protective equipment for prisoners and staff, and (3) cease the use of solitary confinement as a means of social distancing. Part IV then suggests three actions the United States should take to stay in compliance with the Convention in anticipation of a future pandemic: (1) provide a consistent and accurate flow of information regarding safety precautions, (2) implement independent quality oversight in all prisons, and (3)

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transmission-package (last visited Apr. 3, 2021).

12. See Don Hummer, *United States Bureau of Prisons' Response to the COVID-19 Pandemic*, 15 VICTIMS & OFFENDERS 1262, 1265–66 (2020).

13. Ana Sandoiu, 'We Don't Have a Health System': Expert on Prisons, Race, and COVID-19, MED. NEWS TODAY (June 18, 2020), <https://www.medicalnewstoday.com/articles/we-dont-have-a-health-system-expert-on-prisons-race-and-covid-19#1>.

14. See *infra* Part I.

15. See *infra* Part II.

16. See *infra* Part III.

reform the criminal justice system.<sup>17</sup>

## II. BACKGROUND

### A. RACISM IN THE UNITED STATES: A BRIEF HISTORY

The United States has a long and abhorrent history with racial discrimination—especially as it pertains to Black Americans. Many of the issues adversely affecting modern-day Black Americans have their roots in slavery. Today, two of the most obstructive issues that Black Americans face are mass incarceration and systemic racism. This section will provide background on both issues respectively.

#### *i. Mass Incarceration*

Despite the abolition of slavery in 1865 with the addition of the 13<sup>th</sup> Amendment to the U.S. Constitution,<sup>18</sup> the racist and oppressive institution lives on through mass incarceration.<sup>19</sup> The 13th Amendment specifies that “[n]either slavery nor involuntary servitude, *except as a punishment for crime*, [shall] exist within the United States[.]”<sup>20</sup> This exception in the Constitution was the beginning of mass incarceration in America.<sup>21</sup> Because slavery and cotton were essential to southern America’s economy,<sup>22</sup> the

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17. See *infra* Part IV.

18. See U.S. CONST. amend. XIII, § 1.

19. See Samantha Pereira, *Mass Incarceration: Slavery Renamed*, 6 THEMIS: RSCH. J. JUST. STUD. & FORENSIC SCI. 42, 44 (2018); Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>.

20. U.S. CONST. amend. XIII, § 1 (emphasis added).

21. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 900, 933–34 (Aug. 19, 2019).

22. See Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY, <https://www.history.com/news/slavery-profitable-southern-economy> (last updated Sept. 2, 2020) (describing how, in part because southern America produced 75% of the world’s cotton, if it was considered its own state, it would have been the fourth richest state in the world at the beginning of the Civil War); see also Ta-Nehisi Coates, *Slavery Made America*, ATLANTIC (June 24, 2014), <https://www.theatlantic.com/business/archive/2014/06/slavery-made-america/373288/> (stating that in 1860, “the nearly 4 million American slaves were

abolishment of slavery left a vacuum for cheap and forced labor, which prisons could now legally supply.<sup>23</sup> Prisons leased hundreds of thousands of convicts to state and private corporations to provide labor, where they were beaten, tortured, starved, and sexually violated; notably, because convicts were “leased,” corporations could work them far past their limits because they did not have to consider the workers’ longevity.<sup>24</sup> The aforementioned economic incentives, paired with the cultural belief that Black Americans were inferior, led to the creation of laws that criminalized petty offenses, like being unemployed.<sup>25</sup> These laws caused mass arrests of Black Americans, all of whom lost their newfound 13th Amendment protections and were forced into slavery once again through incarceration.<sup>26</sup>

In the modern United States, the number of Black Americans in prison significantly increased.<sup>27</sup> Starting in the 1970s, President Richard Nixon’s so-called “war on drugs,” which specifically targeted Black Americans, caused the first significant increase in the prison population.<sup>28</sup> In the 1970s, the use of bipartisan “thinly veiled racial rhetoric” kept the prison population rising.<sup>29</sup> By the 1980s when President Ronald Regan took office, the incarcerated population blew up from 329,000 to 627,000.<sup>30</sup> In 2019, Black Americans made up approximately twelve percent of the general

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worth some \$3.5 billion, making them the largest single financial asset in the entire U.S. economy, worth more than all manufacturing and railroads combined”).

23. See Kathy Roberts Forde & Bryan Bowman, *Exploiting Black Labor After the Abolition of Slavery*, CONVERSATION (Feb. 6, 2017), <https://theconversation.com/exploiting-black-labor-after-the-abolition-of-slavery-72482>.

24. *Id.*

25. See *id.*; see also *Black Codes*, HISTORY (Jan. 1, 2021), <https://www.history.com/topics/black-history/black-codes> (describing how in many states, Black Americans were forced to enter labor contracts which, when broken, subjected them to arrest, beating, and forced labor, and such laws were enforced by an all-white police force often composed of ex-Confederate soldiers).

26. See *Black Codes*, HISTORY (Jan. 1, 2021), <https://www.history.com/topics/black-history/black-codes>

27. See James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

28. *Id.*

29. *Id.*

30. *Id.*



population, yet studies show that they made up about one-third of the government-run prison population.<sup>31</sup> As of 2020, the imprisonment rate for Black Americans is nearly five times the rate of white Americans.<sup>32</sup> This statistic is worse among Black men: in 2018, there were 2,272 inmates per 100,000 Black Americans, compared to only 392 inmates per 100,000 white Americans.<sup>33</sup> In 2011, Black Americans were 3.7 times more likely to be arrested for marijuana possession than white Americans, although the two groups use marijuana at similar rates.<sup>34</sup> On average, Black American men also received 19.1 percent longer sentences than white American men for the same crimes.<sup>35</sup>

Incarceration rates within the United States remain so high that even the United Nations has taken note.<sup>36</sup> In fact, the United Nations

31. See Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, BRENNAN CTR. JUST. (Dec. 9, 2016), <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>; see generally Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

32. See Nellis, *supra* note 25; John Gramlich, *Black Imprisonment Rate in the U.S. has Fallen by A Third Since 2006*, PEW RSCH. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

33. See Gramlich, *supra* note 26.

34. See *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>; EZEKIEL EDWARDS ET AL., *THE WAR ON MARIJUANA IN BLACK AND WHITE*, 21 (2013) (reporting that in 2010, fourteen percent of Black Americans and twelve percent of white Americans reported using marijuana the previous year).

35. See United States Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, 30(3) FED. SENT'G REP. 2, 2 (Feb. 2018).

36. See Glenn C. Loury, *The New Untouchables Crime: Punishment and Race in America*, U.N., <https://www.un.org/en/chronicle/ArticleArticleArticleArticleArticle/new-untouchables-crime-punishment-and-race-america> (last visited Jan. 22, 2021); see Peter Wagner & Wanda Bertram, "What Percent of the U.S. is Incarcerated?" (*And Other Ways to Measure Mass Incarceration*), PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> (discussing how almost one out of every 100 people in the United States is in

described the United States' prison system as "a leviathan unmatched in human history."<sup>37</sup> Considering the United States' history with criminal justice and Black Americans, it is no surprise that they are disproportionately represented within the prison system.<sup>38</sup>

## ii. Systemic Racism

Systemic racism, or institutionalized racism, refers to the "system or structures that have procedures or processes that disadvantage [certain races]."<sup>39</sup> In the United States, systematic racism most prominently affects Black Americans, stemming from centuries of oppression against them, with such deep roots in American society that it affects their health, education, socioeconomic status, housing, and much more.<sup>40</sup>

## B. COVID-19

COVID-19 is an infectious disease that emerged and spread internationally in 2020, causing a global pandemic.<sup>41</sup> As of October 2021, there were 242 million confirmed cases, resulting in 4.9

prison or jail).

37. See Loury, *supra* note 30 (noting that the United States has the highest rate of incarceration in the world with twenty-five percent of the world's incarcerated population, and how U.S. rates are still about 40% higher than the runner up).

38. See Nellis, *supra* note 25; *Police Practices*, ACLU, <https://www.aclu.org/feature/police-practices> (last visited Mar. 12, 2021) (describing several police practices that have the tendencies to harm Black Americans more than the rest of the population, including evidence of racial profiling and a description of how stop-and-frisk perpetuates the practice).

39. Julian Glover & Ken Miguel, *What Are Structural, Institutional, and Systemic Racism?*, ABC 7 NEWS (July 9, 2020), <https://abc7news.com/systemic-racism-definition-structural-institutionalized-what-is/6292530/>; see Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020), <https://time.com/5851855/systemic-racism-america>.

40. See Shinobu Kitayama, *What is Systemic About Systemic Racism? A Tribute to James S. Jackson*, PSYCHOL. SCI. (Nov. 30, 2020), <https://www.psychologicalscience.org/observer/systemic-racism> (attributing some of these negative effects to modern-day segregation, a pervasive anti-Black sentiment, and leftover racist ideologies within policy, social interactions, and the criminal justice system).

41. See *Health Topics: Coronavirus*, WORLD HEALTH ORG., [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1) (last visited Feb. 10, 2021).

million deaths worldwide.<sup>42</sup> According to available evidence, COVID-19 primarily transmits through the air if there is insufficient distance between the infected and the uninfected.<sup>43</sup> COVID-19 can also infect those who touch a surface that the virus is on if they then touch their mouth or eyes before sanitizing.<sup>44</sup> The World Health Organization thereby recommends social distancing (keeping a distance of at least six feet from all people), avoiding being indoors with large groups, wearing masks covering nose and mouth, and frequent hand washing and sanitizing.<sup>45</sup>

*i. COVID-19's effect on Black Americans within prisons*

Due to COVID-19, the early 2020s remain a particularly deadly time to be in prison.<sup>46</sup> Prisoners are forced to stay indoors with large groups of people with less access to personal protective equipment (PPE) and COVID-19 testing<sup>47</sup> and receive lower quality medical care than the non-incarcerated population.<sup>48</sup> As of October 2021, there have been at least 431,240 reported cases of COVID-19, resulting in at least 2,620 deaths within American state and federal prisons.<sup>49</sup> In some prisons, infection rates have well-exceeded the majority; for example, in a rare instance of mass testing in a North

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42. See *COVID-19 Live Update*, WORLDOMETER, <https://www.worldometers.info/coronavirus/> (last visited Oct. 1, 2021).

43. See *Health Topics: Coronavirus*, *supra* note 35.

44. See *Transmission Package: Protect Yourself and Others from COVID-19*, *supra* note 11.

45. See *id.*

46. See *1 in 5 Prisoners in the United States Has Had COVID-19*, MARSHALL PROJECT (2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> (stating that “the mortality rate for COVID-19 among prisoners is 45 percent higher than the overall rate.”)

47. See Hummer, *supra* note 12.

48. See *id.* at 1265–66, 1271; Park et al., *Tracking the Spread of Coronavirus in Prisons*, MARSHALL PROJECT (Apr. 24, 2020), <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>; Bryn Nelson & David B. Kaminsky, *A COVID-19 Crisis in United States Jails and Prisons*, 128 *CANCER CYTOPATHOLOGY* 513, 513-14 (Aug. 3, 2020).

49. See *The COVID Prison Project*, COVID PRISON PROJECT, <https://covidprisonproject.com/> (last updated October 19, 2021) (adding that it is difficult to know the total number of prisoners because their movement in and out of prisons is not accounted for).

Carolina prison, over 65% of inmates tested positive.<sup>50</sup> Cases have spread like wildfire partially because of the crowded conditions and poor access to health care, turning prisons into “infectious disease incubators.”<sup>51</sup> Prisons are not built to fight an infectious disease, especially when they are overcrowded.<sup>52</sup> To make matters worse, it is hard to know the full extent of the issue because nobody knows exactly how many inmates are infected.<sup>53</sup> Because of the low rate of testing in prisons, the numbers are almost certainly higher than what are reported.<sup>54</sup> However, COVID-19 has not affected all prisoners equally.<sup>55</sup>

Black American prisoners are disproportionately impacted by COVID-19.<sup>56</sup> Although many states have not reported their COVID-

50. See Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N. 602, 603 (July 8, 2020); Cary Aspenwall & Joseph Neff, *These Prisons Are Doing Mass Testing For COVID-19—And Finding Mass Infections*, MARSHALL PROJECT (Apr. 24, 2020), <https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections>.

51. Bill Chappell, *Crowded U.S. Jails Drove Millions of COVID-19 Cases, A New Study Says*, NPR (Sept. 2, 2021, 11:00 AM), <https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study> (text=Crowded%20U.S.%20Jails%20Drove%20Millions,A%20New%20Study%20Says%20%3A%20NPR&text=Short%20Wave-Crowded%20U.S.%20Jails%20Drove%20Millions%20Of%20COVID%2D19%20Cases%2C%20A,communities%2C%20according%20to%20the%20study).

52. See Katie Park et al., *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, MARSHALL PROJECT (June 30, 2021), <https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic>; see generally *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020), [https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#\\_Toc35446577](https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#_Toc35446577) (listing international human rights standards for the right to health during the COVID-19 pandemic).

53. See Beth Schwartzapfel et al., *1 in 5 Prisoners in the United States Has Had Covid-19, 1,700 Have Died*, ABC NEWS (Dec. 18, 2020), <https://abcnews.go.com/Health/wireStory/prisoners-us-covid-19-1700-died-74797059> (calling the number of infected inmates “a vast undercount,” and noting that even in some prisons, “not only are [inmates] not tested but they don’t receive care. So they get much sicker than need be[.]”).

54. *Id.*; Nelson & Kaminsky, *supra* note 42, at 513-14.

55. See Nelson & Kaminsky, *supra* note 42, at 513-14.

56. See Nelson & Kaminsky, *supra* note 42, at 513-14 (describing a project that surveyed United States prisons and found that “the incidence rate of cases and

19 cases by race, in the states that do report and publicize this information,<sup>57</sup> statistics show that Black Americans are hardest hit.<sup>58</sup> For example, in New York, Black American prisoners made up sixty percent of total COVID-19 deaths, despite making up only fifty percent of the prison population.<sup>59</sup> In Missouri, as of May 2020, about fifty-eight percent of positive COVID-19 tests came from Black American prisoners, despite being only one-third of the prison population.<sup>60</sup> In Vermont, as of May 2020, eighteen percent of positive tests belonged to Black American prisoners, even though they only made up nine percent of the prison population.<sup>61</sup>

The fact that COVID-19 affects Black Americans disproportionately should come as no surprise. Beyond simply representing a disproportionate amount of the prison population relative to the general population, Black Americans more likely suffer from pre-existing health conditions such as diabetes, hypertension, asthma, and heart disease, which increase their chance

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suspected cases for African Americans [was] two to four times higher than for white inmates”); Douglas Ankney, *Preliminary Studies: Black/Latino Populations Disproportionately Affected by COVID-19*, PRISON LEGAL NEWS (Jan. 1, 2021), <https://www.prisonlegalnews.org/news/2021/jan/1/preliminary-studies-blacklatino-populations-disproportionately-affected-covid-19/> (stating that a June 2020 report found that COVID-19 disproportionately affects Black and Latino prisoners); Kathryn M. Nowotny et al., *The Contribution of Prisons and Jails to US Racial Disparities During COVID-19*, 111 AM. PUB. HEALTH ASSOC. 197, 197 (Feb. 2021), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2020.306040> (explaining that Black Americans and some other minorities in prison will “certainly” be most affected by COVID-19 given how overrepresented they are).

57. See Maurice Chammah & Tom Meagher, *Is COVID-19 Falling Harder on Black Prisoners? Officials Won't Tell Us*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/28/is-covid-19-falling-harder-on-black-prisoners-officials-won-t-tell-us> (last updated May 28, 2020) (stating that it is impossible to know whether states are truly not tracking COVID-19 cases by race, or whether they are just refusing to release the information to the public).

58. *Id.*

59. See Nikki Zinzuwadia, *Racial Disparities in Jails and Prisons: COVID-19's Impact on the Black Community* ACLU (June 12, 2020), <https://www.acluww.org/en/news/racial-disparities-jails-and-prisons-covid-19s-impact-black-community>; see generally Nicole Godfrey & Laura Rovner, *COVID-19 in American Prisons: Solitary Confinement is Not the Solution*, 2 ARIZ. STATE L.J. 127, 133-35.

60. See Zinzuwadia, *supra* note 53.

61. *Id.*

of death by COVID-19.<sup>62</sup> These health conditions are, in part, yet another product of systemic racism because they are the result of “economic inequalities, less access to health care, distrust of the medical establishment, crowded housing conditions, and other structural disadvantages faced by the Black community.”<sup>63</sup>

However, pre-existing health conditions and systemic racism may not be the only reasons Black American prisoners are hit harder.<sup>64</sup> Marcella Alsan, MD, MPH, PhD, and public policy professor at Harvard Kennedy School, presents several possible explanations.<sup>65</sup> First, she believes it is possible that the difference in COVID-19 cases between races is the result of Black American prisoners receiving disparate treatment.<sup>66</sup> If this theory is true, it would be consistent with the reality that Black Americans receive disparate treatment in health care outside of prisons as well.<sup>67</sup> The second possibility Dr. Alsan describes is that prisons could be acting as “a mirror of the injustices that we see in the health system writ large.”<sup>68</sup> In other words, prisons may be reflecting the same systemic issues in health care that take place outside of prisons.<sup>69</sup> Dr. Alsan’s final theory is that the types of prisons that tend to have higher populations of Black Americans may be less likely to distribute testing, social distancing, and other control measures without

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62. *See id.*

63. *Id.*; *see* Nelson & Kaminsky, *supra* note 42 (reporting that “highly susceptible inmates are often interlinked with vulnerable and disadvantaged communities.”).

64. *See* Nelson & Kaminsky, *supra* note 42, at 513–14.

65. *See id.* at 513.

66. *See id.* at 513–14.

67. *See id.* at 513–14; Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, AM. BAR ASS’N, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care) (last visited Aug. 29, 2021) (describing the health care disparities in health care as both conscious and subconscious, reporting that providers are less likely to give people of color “effective treatments [when] compared to their white counterparts—even after controlling for characteristics[.] For example, one study of 400 hospitals in the United States showed that black patients with heart disease received older, cheaper, and more conservative treatments than their white counterparts.”).

68. Nelson & Kaminsky, *supra* note 42, at 513–14.

69. *See id.* at 513–14.

prejudice.<sup>70</sup> Regardless of the reason, COVID-19 has had a devastating impact on the health of Black American prisoners.<sup>71</sup>

The grim effects of COVID-19 on Black American prisoners are not limited to physical health.<sup>72</sup> Conditions are so bad that the United States has implemented solitary confinement as a means of social distancing prisoners.<sup>73</sup> Solitary confinement is defined as “the confinement of prisoners for [twenty-two] hours or more a day without meaningful human contact [for] a time period in excess of 15 consecutive days.”<sup>74</sup> The mental effects of solitary confinement are so serious that its use is considered a violation of human rights by the United Nations.<sup>75</sup> Consistent with the reality of most health issues in United States prisons, Black Americans are often disproportionately placed in solitary confinement.<sup>76</sup>

In 2016, a study showed that Black American inmates were almost four times more likely to be placed in solitary confinement compared to their white counterparts, and they were kept there for an average of 125 days, compared to the 90 days that white inmates received on average.<sup>77</sup> Studies have also shown that inmates who go through

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70. See *id.* at 513–14.

71. See *id.* at 513.

72. See Godfrey & Rovner, *supra* note 53, at 128–29.

73. See *COVID-19 in Correctional Facilities: Medical Isolation*, AMEND (2021), <https://amend.us/covid-19-in-correctional-facilities-medical-isolation>; see also Godfrey & Rovner, *supra* note 53, at 128–29.

74. *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, U.N., [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf).

75. See *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert*, U.N. HUM. RTS. (Feb. 28, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633#:~:text=The%20Mandela%20Rules%2C%20updated%20in,and%20%22prolonged%22%20solitary%20confinement%20of> (explaining how extended time in solitary confinement can lead to devastating effects on a prisoner’s mental and physical health—so much so that it is considered psychological torture).

76. Andrea Fenster, *Solitary Confinement Increases Risk of Premature Death After Release*, PRISON POL’Y INITIATIVE (Oct. 13, 2020), [https://www.prisonpolicy.org/blog/2020/10/13/solitary\\_mortality\\_risk/](https://www.prisonpolicy.org/blog/2020/10/13/solitary_mortality_risk/).

77. See Michael Schwirtz et. al, *The Scourge of Racial Bias in New York State’s Prisons*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>.

solitary confinement have a much higher risk of premature death after release.<sup>78</sup> Those who go through only one solitary confinement placement are fifty-five percent more likely to commit suicide after release, and 129 percent more likely with two or more placements.<sup>79</sup> Although solitary confinement of prisoners was already an issue in the United States with about 60,000 placements, it has gotten much worse with the COVID-19 pandemic.<sup>80</sup> Since the pandemic began, as of June 2020, the use of confinements have increased by an alarming 500% in state and federal prisons.<sup>81</sup> Therefore, even though using solitary confinement may reduce the risk of others catching COVID-19, it still raises the inmate's chance of death.<sup>82</sup> In sum, Black Americans in prisons have the highest incarceration rates, COVID-19 mortality and infection rates, and solitary confinement placements, which can all be traced back to racial discrimination.

### C. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (THE CONVENTION)

The primary goal of the Convention is to fight racial discrimination around the world in all its forms and manifestations.<sup>83</sup> The Convention is an international treaty that was opened for signature and ratification by the United Nations General Assembly in 1965, and entered into force in 1969.<sup>84</sup> Some of the language and principles within the Convention represent those in the United Nations Charter,<sup>85</sup> the Universal Declaration of Human Rights,<sup>86</sup> and

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78. See Fenster, *supra* note 76.

79. See *id.* (finding that there is also a much higher risk of death by opioid overdose or homicide).

80. See *Solitary Confinement is Never the Answer: A Special Report on the COVID-19 Pandemic in Prisons and Jails, the Use of Solitary Confinement, and Best Practices for Saving the Lives of Incarcerated People and Correctional Staff*, UNLOCK THE BOX (June 2020), <https://static1.squarespace.com/static/5a9446a89d5abbfa67013da7/t/5ee7c4f1860e0d57d0ce8195/1592247570889/June2020Report.pdf>.

81. *Id.*

82. *Id.*

83. ICERD, *supra* note 7, art. 1.

84. ICERD, *supra* note 7, art. 5.

85. See U.N. Charter art. 1, ¶ 2 (“to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).



other key documents highlighting equality, dignity, and respect for all people.<sup>87</sup> The Convention provides a course of legal action to oppressed racial minorities targeted by their governments.<sup>88</sup> When there are disputes with respect to interpretation or application of the Convention, Article 22 says that State parties must be referred to the International Court of Justice (ICJ).<sup>89</sup> Only twelve out of 197 member States have not signed or ratified the Convention.<sup>90</sup> The Articles relevant to this Comment are 1, 2, and 5.<sup>91</sup> Article 1 lays out the primary goals and focuses of the Convention and defines racial discrimination; Article 2 discusses the responsibilities of state parties; and Article 5 articulates the right to health.<sup>92</sup> As discussed below, for a violation of Article 5, there must be (1) a violation of the right to health, and (2) that violation must be a direct or indirect result of racial discrimination.<sup>93</sup> Because racial discrimination is defined in Article 1, when running an Article 5 analysis, one must also run an Article 1 analysis to satisfy the second element.<sup>94</sup>

*i. Article 1: Primary Goals and Focuses*

In Article 1, the Convention defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race [or]

86. See Universal Declaration of Human Rights art. 2, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (“[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]”).

87. See generally, International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171 [hereinafter ICCPR] (“[recognizing] the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]”).

88. See *Frequently Asked Questions: Convention on the Elimination of All Forms of Racial Discrimination*, ACLU, [https://www.aclu.org/sites/default/files/field\\_document/CERD\\_faqs.pdf](https://www.aclu.org/sites/default/files/field_document/CERD_faqs.pdf) (last visited Mar. 6, 2021).

89. State parties may resolve these disputes in by another mode of settlement if they agree to it. See ICERD, *supra* note 7, art 22.

90. *Status of Ratification: ICERD*, *supra* note 6.

91. See ICERD, *supra* note 7, arts. 1, 2, 5.

92. *Id.*

93. ICERD, *supra* note 7, art. 5.

94. See *id.* arts. 1, 5.

ethnic origin . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>95</sup>

This definition is quite broad, reflecting how racism has a way of rearing its head into many aspects of one's life.<sup>96</sup>

In one of its reports, the Committee on the Elimination of Racial Discrimination (CERD), which is the body established to monitor the Convention, identified two kinds of discrimination: direct and indirect.<sup>97</sup> Direct discrimination is intentional, while indirect discrimination is unintentional and can be the result of seemingly neutral laws and policies.<sup>98</sup> In considering whether a State party's actions are discriminatory, the CERD refers to language from Article 1.<sup>99</sup> Article 1 states that discrimination is a distinction based on race or ethnic origin "which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights and fundamental freedoms[.]"<sup>100</sup> Relying on this language, the CERD explains that a State party to the Convention is responsible for prohibiting both forms of discrimination because both forms have the

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95. *Id.* art. 1.

96. See Jeff Nesbit, *Institutional Racism Is Our Way of Life*, U.S. NEWS (May 6, 2015), <https://www.usnews.com/news/blogs/at-the-edge/2015/05/06/institutional-racism-is-our-way-of-life> (describing how systemic racism permeates society starting early: it exists in grade school, where Black American children are three times more likely to be suspended than white children; it exists in the workplace, where people submitting job applications with names that "sound black" need to send out fifty percent more job applications than those with names that "sound white"; it is also present in the form of lower home ownership for Black Americans, higher frequency of traffic stops for Black Americans, and much more); see also Tom Bergeron, *Murphy: 'Systemic Racism Is a Crisis that has Infected Every Aspect of American Life'*, ROI (June 22, 2020), <https://www.roy-nj.com/2020/06/22/politics/murphy-systemic-racism-is-a-crisis-that-has-infected-every-aspect-of-american-life/>.

97. See Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Switzerland, U.N. Doc. CERD/C/CHE/CO/7-9, at 2, 5 (Mar. 12, 2014).

98. *Id.*

99. *Id.*

100. ICERD, *supra* note 7, art. 1 [emphasis added]; see Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Switzerland, *supra* note 87.

effect of racial discrimination.<sup>101</sup>

*ii. Article 2: The Responsibilities of State Parties*

Article 2 of the Convention lays out the responsibilities of all State parties.<sup>102</sup> State parties are required to do everything within their power to combat discrimination within their jurisdiction and should refrain from any practice of racial discrimination themselves.<sup>103</sup> In short, State parties are responsible for ensuring public institutions on the national and local levels are not participating in practices that result in discrimination.<sup>104</sup>

*iii. Article 5(e)(iv): The Right to Health*

Article 5 provides the right to health.<sup>105</sup> This means State parties must remove “racial discrimination in all its forms [and] guarantee the right of everyone [to] equality before the law[,] notably in the enjoyment of[:](e) [e]conomic, social and cultural rights, in particular[:] (iv) [t]he right to public health [and] medical care.”<sup>106</sup> In other words, for a state to violate Article 5(e)(iv), there must be (1) a violation of the right to health, and (2) that violation must be a direct or indirect result of racial discrimination.<sup>107</sup>

For the first prong of this two-part test (i.e., whether there has been a violation of the right to health), courts consider whether a State has insufficient: (1) availability of functioning public health and health care facilities, goods, and services; (2) accessibility to those facilities, goods, and services without discrimination; (3) appropriate quality of facilities, goods, and services; and (4)

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101. See Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Switzerland, *supra* note 91, ¶ 6.

102. See ICERD, *supra* note 7, art. 2.

103. *Id.*

104. *Id.*

105. *Id.* art. 5.

106. *Id.*; This does not include the right to healthcare. See *Health Care vs. Healthcare – What’s the Difference?*, ISI LANGUAGE SOLUTIONS (Oct. 15, 2019), <https://isilanguagesolutions.com/2019/10/15/health-care-vs-healthcare/#:~:text=Waldman%2C%20of%20the%20blog%20Medical,the%20health%20care%20they%20need.>

107. ICERD, *supra* note 7, art. 5.

acceptability of all cultures, races, genders, and backgrounds.<sup>108</sup> For the second prong, a violation is racially discriminatory when a distinction based on race or ethnic origin has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise of the rights delineated in the Convention.<sup>109</sup> These two prongs are often considered together, creating overlap in courts' discussions of past violations.<sup>110</sup>

#### iv. *Past Violations of the Right to Health*

The CERD has limited jurisprudence on Article 5(e)(iv) violations, but there are several international treaties that also delineate this right to health.<sup>111</sup> It is important to understand how courts interpret the similar international treaty provisions because the provisions reveal the standard for how such rights are applied.<sup>112</sup> Because the second element of the right to health includes the right to have services without discrimination, there is some overlap between the two conditions for an Article 5(e)(iv) violation in the legal analysis.<sup>113</sup>

#### I. *The First Prong: The Right to Health*

In *Poblete Vilches & Others v. Chile*, a case filed in 2018 pursuant to the American Convention on Human Rights, the Inter-American

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108. CESCR General Comment No. 14, U.N. Doc. E/C.12/2000/4 ¶ 12(a)–(d) (Aug. 11, 2000) [hereinafter CESCR General Comment No. 14].

109. ICERD, *supra* note 7, art. 1.

110. CESCR General Comment No. 14, *supra* note 102, ¶ 12(a)–(d).

111. *See, e.g.*, UDHR, *supra* note 80, art. 25(1); International Covenant on Economic, Social, and Cultural Rights art. 12, Jan 3, 1976, 993 U.N.T.S. 14531 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination Against Women arts. 12, 14, Oct. 6, 1999, 2131 U.N.T.S. 83 [hereinafter CEDAW]; *see generally* Alicia Yamin, *The Right to Health Under International Law and its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1156–61 (2005) (discussing the right to health in international law and its relevance to the United States).

112. *See* CESCR General Comment No. 14, *supra* note 102, ¶ 12(a)–(d); *see generally* Yamin, *supra* note 105, at 1158–59 (discussing how the United Nations committee charged with monitoring CERD enforcement in the United States “specifically noted its concern with respect to ‘persistent disparities in the enjoyment of, in particular, . . . access to public and private health care’”).

113. *See* CESCR General Comment No. 14, *supra* note 102, ¶ 12(a)–(d).

Court of Human Rights (IACtHR) found that Chile did not take sufficient action to ensure that medical services were accessible, acceptable, and of quality.<sup>114</sup> Petitioners argued that a public Chilean hospital provided alarmingly inadequate health care to Poblete Vilches, an elderly man suffering from severe breathing issues, and that the hospital's inadequate health care led to his untimely death.<sup>115</sup> One of the many inadequacies found was that the hospital did not have enough intensive care unit beds or artificial respirators to treat Vilches' pneumonia.<sup>116</sup> The IACtHR found that when an individual is deprived of adequate health services and necessary medical equipment and dies as a result, there is a violation of the right to health.<sup>117</sup>

Another example of a right to health analysis can be found in the European Court of Human Rights (ECtHR).<sup>118</sup> In *Cyprus v. Turkey*, relying on the European Convention on Human Rights, the ECtHR considered whether Turkey took sufficient action to ensure its health services were adequate when it systematically gave Cypriots low-quality and limited access to health care; it decided that there was no violation, in large part because Cypriots were not dying as a result of their limited access and they could get health care elsewhere.<sup>119</sup> However, the analysis did not stem from explicit, right to health

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114. See *Poblete Vilches & Family v. Chile*, Case 12,695, Inter-Am. Comm'n H.R., Report No. 1/16, OEA/Ser.L/V/II.157. doc. 5 rev. ¶ 122 (2016) [hereinafter *Poblete Vilches v. Chile*]; Pedro Villarreal, *The Direct Justiciability of the Right to Health at the IACtHR*, VOLKERRECHTSBLOG (Oct. 22, 2018), <https://voelkerrechtsblog.org/de/the-direct-justiciability-of-the-right-to-health-at-the-iacthr/> (explaining that the IACtHR found there was a violation because "in so far as the conditions of the public hospital in question were subpar (para. 138), Mr. Poblete Vilches' demise was seen as the result, among other things, of an unresponsive healthcare system (para. 142).").

115. *Poblete Vilches v. Chile*, *supra* note 108, ¶¶ 2, 4.

116. *Id.* ¶¶ 124, 133.

117. *Id.* ¶ 171.

118. Lewis Graham, *The European Court of Human Rights and the Emerging Right to Health*, OXFORD H.R. HUB (May 11, 2017), <https://ohrh.law.ox.ac.uk/the-european-court-of-human-rights-and-the-emerging-right-to-health/> (explaining that in *Cyprus v. Turkey*, the ECtHR essentially applied a right to health through its right to life provisions).

119. *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001); see Graham, *supra* note 112 (reiterating that *Cyprus v. Turkey* essentially applied a right to health through its right to life provisions).

language.<sup>120</sup> The Court instead inferred a right to health from a right to life provided in Article 2 of the European Convention on Human Rights.<sup>121</sup>

In *Shchebetov v. Russia*, the ECtHR expands on how the right to life encompasses what is quite similar to the Article 5 right to health in the Convention within the scope of prisons.<sup>122</sup> The court explains that for the “particularly vulnerable” population of incarcerated people, State parties are obligated “to protect the health and physical well-being of persons deprived of their liberty, for example by adopting appropriate measures for the protection of their lives and providing them with the requisite medical assistance.”<sup>123</sup> In discussing the principles to apply, the court stated that “[a]bsent or inadequate medical treatment, particularly when the disease has been contracted in detention, is [certainly of] Court’s concern. It is therefore bound to assess the *quality* of medical services the applicant was provided with [and] to determine whether he was deprived of *adequate* medical assistance.”<sup>124</sup>

In the facts of this case, the petitioner, Shchebetov, alleged that the Russian government failed its treaty obligations because the medical care of one of its prisons was negligent and inadequate, resulting in him contracting infectious diseases.<sup>125</sup> The ECtHR found that the prison’s medical care was adequate, describing conditions that starkly differ from those discussed in the cases above: Russian authorities successfully tested and diagnosed Shchebetov, put him on

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120. The European Convention on Human Rights art. 2, Dec. 10 1948 [hereinafter ECHR] (guaranteeing a right to life); *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001); *see also* Graham, *supra* note 112 (reiterating that *Cyprus v. Turkey* essentially applied a right to health through its right to life provisions).

121. *See* Graham, *supra* note 112 (reiterating that *Cyprus v. Turkey*, essentially applied a right to health through its right to life provisions).

122. *See* *Shchebetov v. Russia*, App. No. 21731/02, ¶ 44 (Apr. 10, 2012).

123. *Id.* ¶ 44.

124. *Id.* ¶ 71 (emphasis added).

125. *Id.* ¶ 36 (claiming that he contracted HIV in part because of the negligence of a medical assistant who drew his blood, and in part because he may have used an infected syringe to inject himself with drugs, so the prison failed “to exercise effective control over inmates and prevent drug use”; further claiming that he contracted tuberculosis because the administration placed him in holding with infected inmates, despite his protests).

an intensive regimen to fight the diseases, gave him all the medication, clinical assessments, and monitoring that were necessary, and designed a comprehensive therapeutic strategy to prevent a relapse.<sup>126</sup> Further, Shchebetov could not prove that he contracted the diseases within the prison or that he contracted them at the fault of the prison.<sup>127</sup> *Shchebetov v. Russia* provides both insight into international standards for adequate health in prisons and a compelling contrast to the cases above. Although the ECtHR does not apply the exact four elements that the IACtHR applied in *Poblete Vilches*, both courts take the same information into account.

Regarding the duty providing adequate health care in prisons, under international law, when a State hires a private entity to provide a public function that the State is inherently responsible for (e.g., privately run hospitals), the State retains any treaty obligations it had to oversee that public function.<sup>128</sup> In this context, a State would be responsible for state,<sup>129</sup> private, and federal prisons, because prisons are functions the State is inherently responsible for.<sup>130</sup>

## 2. *The Second Prong: Relationship to Racial Discrimination*

Without showing the prong of racial discrimination, there can be no Article 5(e)(iv) violation, even when a petitioner is in fact denied

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126. *Id.* ¶ 73.

127. *Id.* ¶ 70 (holding that Shchebetov's stories for how he contracted HIV were inconsistent with themselves and with medical documentation; further holding that tuberculosis can be dormant in one's body, which raises the possibility that the tests simply did not detect it upon his entry).

128. *See* Cuscul Pivarel et al. v. Guatemala, Inter-Am. Ct. H.R., ¶ 106 (Aug. 23, 2018) (holding that states are responsible for regulating the provision of both public and private services as they pertain to the right to health and hospitals); *see also* Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R., ¶ 87 (July 4, 2006) (explaining that acts made by private entities that are empowered to act in a state capacity "may be deemed to be acts for which the State is directly liable, as it happens when services are rendered on behalf of the State").

129. *See* Yamin, *supra* note 105, at 1158 (elaborating that "even under devolution or decentralization schemes, the ultimate accountability for state and local law and policy resides with the federal government under international law. Thus, when state or local governments fail to eliminate health disparities, the federal government cannot divest itself of final responsibility").

130. *See* Cuscul Pivarel et al. v. Guatemala, Inter-Am. Ct. H.R., ¶ 106 (Aug. 23, 2018); *see also* Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R., ¶ 87 (July 4, 2006).

the right to health.<sup>131</sup> To make this determination, the CERD applies the Article 1 language: an action is racially discriminatory when (1) a distinction based on race or ethnic origin (2) has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of the rights delineated in the Convention.<sup>132</sup> An example of this is *Murat Er v. Denmark*, where the CERD decided that when a Danish technical school only offered traineeships to Danish non-Pakistani and non-Turkish students, this was the result of ethnic discrimination.<sup>133</sup> The Danish government denied the petitioner—a Turkish carpentry student—any form of recourse after he faced discrimination upon discovering and complaining about the school’s discriminatory practices.<sup>134</sup> Applying the two elements: instructors were specifically told not to offer traineeships to students from Pakistan or Turkey, and that distinction based on the petitioner’s ethnicity had the effect of impairing his right to education and training.<sup>135</sup> Although *Murat Er v. Denmark* relates to ethnic origin instead of race, the test is the same since “ethnic origin” is included as part of Article 1’s definition of “racial discrimination.”<sup>136</sup>

Additionally, although racial discrimination was not in dispute in *Poblete Vilches*,<sup>137</sup> the court did find that the violation of Vilches’ right to health was a result of age discrimination.<sup>138</sup> The IACtHR also mentions that the principles of availability, accessibility, and quality of medical services satisfy the principles described by the Committee on Economic, Social and Cultural Rights in its General Comment No. 14, which states that “health facilities, goods and services have to be accessible to everyone without discrimination[.]”<sup>139</sup>

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131. See ICERD, *supra* note 7, art. 5 (identifying the obligation to eliminate racial discrimination in the right to health).

132. See *id.* art. 1 (defining racial discrimination).

133. *Murat Er v. Denmark*, Comm. Elimination of Racial Discrimination, U.N. Doc. CERD/C/71/D/40/2007, ¶ 3.2 (Aug. 8, 2007).

134. *Id.* ¶ 2.1.

135. ICERD, *supra* note 7, art. 5(e)(v); *Murat Er v. Denmark*, (2007) ¶ 7.3.

136. See ICERD, *supra* note 7, art. 1 (defining racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” (emphasis added)).

137. *Poblete Vilches v. Chile*, *supra* note 108, ¶ 142.

138. *Id.*

139. See CESCR General Comment No. 14, *supra* note 102, ¶ 12(a)–(d); *Poblete Vilches v. Chile*, *supra* note 108, ¶ 104.



v. *The United States and the International Convention on the Elimination of All Forms of Racial Discrimination*

The United States has a reputation in the international community for being hesitant to commit to human rights treaties.<sup>140</sup> This reputation emerged for several reasons. The United States only ratified three of the nine main human rights treaties,<sup>141</sup> and when it has ratified them in the past, they were typically qualified with reservations, which have allowed it to avoid commitment to certain provisions.<sup>142</sup> The United States also refuses to recognize the jurisdiction of international courts.<sup>143</sup> The United States used similar methods when committing itself to the Convention.<sup>144</sup> For example, the United States signed the Convention, but then took over thirty years to ratify it.<sup>145</sup> When the United States ultimately ratified the Convention, it included several reservations that limit the Convention's effectiveness.<sup>146</sup> The relationship between the

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140. See *United States Ratification of International Human Rights Treaties*, HUM. RTS. WATCH (July 24, 2009), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (noting that the United States is extremely slow to ratify or sign human rights treaties).

141. See *Status of Ratification Interactive Dashboard: Ratification of 18 International Human Rights Treaties*, U.N. OFF. HUM. RTS., <https://indicators.ohchr.org/> (last visited Feb. 13, 2021) (showing how the United States has only ratified three of the nine core international human rights treaties); see also *Core International Instruments*, U.N. OFF. HUM. RTS., <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (last visited Feb. 13, 2022) (stating that there are nine core international human rights instruments).

142. See Dag Hammarskjöld, *What Are Reservations to Treaties and Where Can I Find Them?*, U.N. (Oct. 24, 2019), <https://ask.un.org/faq/139887> (defining reservations).

143. See *International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Comm. on Foreign Rel.*, 103d Cong., 2d Sess. (1994) (not recognizing the authority of international courts) [hereinafter *Hearing Before the Comm. on Foreign Rel.*]; Maya K. Watson, *The United States' Hollow Commitment to Eradicating Global Racial Discrimination*, A.B.A. (Jan. 6, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racial/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racial/).

144. Watson, *supra* note 134.

145. *Id.*

146. *Id.*

Convention and the United States is, therefore, complicated at best.<sup>147</sup>

*vi. The United States' Signing*

Despite the United States' inconsistent record with international human rights treaties, President Lyndon B. Johnson signed the Convention in 1966, and it was eventually ratified in 1994 by President Bill Clinton.<sup>148</sup> When a State signs a treaty, it intends to be bound by that treaty and can then continue to the ratification process.<sup>149</sup> When a State ratifies a treaty, it formally commits to being bound by the treaty and gives the State time to pass domestic legislation to implement the laws expressed therein.<sup>150</sup> When a State signs a treaty, it can make reservations, which “purport to exclude or modify the legal effect of certain provisions of the treaty in its application to the State.”<sup>151</sup> A State can also make declarations, which are similar to reservations but are made to clarify the interpretation or meaning of the treaty or certain treaty provisions.<sup>152</sup> The Human Rights Committee has expressed that if a state makes a declaration that purports to exclude or modify a treaty's legal effect,

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147. See Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. SOC. JUS. 1, 17–18 (Jan. 2016) (referring to the U.S. signing as “a symbolic gesture” and nothing more, since it did not intend to be bound by its provisions, denies its remedies domestically, and even rejects the Convention's definition of “racial discrimination”).

148. See *Hearing Before the Comm. on Foreign Rel.*, *supra* note 134 (ratifying the International Convention on the Elimination of All Forms of Racial Discrimination in 1994).

149. See Hammar skjold, *supra* note 133 (identifying when reservations are used); *About Treaties*, UNITED STATES SENATE <https://www.senate.gov/about/powers-procedures/treaties.htm> (last visited March 6, 2021) (explaining the ratification process).

150. See *About Treaties*, UNITED STATES SENATE <https://www.senate.gov/about/powers-procedures/treaties.htm> (last visited March 6, 2021) (explaining the ratification process).

151. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 18232; see Hammar skjold, *supra* note 133 (identifying when reservations are used).

152. See H.R.C., CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) [hereinafter CCPR General Comment No. 24] (defining declarations).

such a declaration actually constitutes a reservation, despite the State's labeling.<sup>153</sup> Because the United States did not ratify the main international human rights treaties and created reservations for those it has ratified, the United States is only bound by international human rights obligations to a minor degree.<sup>154</sup>

### *vii. The United States' Reservations*

As described above, the United States' eventual ratification of the Convention added many reservations,<sup>155</sup> which make enforcement of the Convention particularly difficult.<sup>156</sup> The U.S. Senate calls the non-self-executing reservation a declaration,<sup>157</sup> but as will be discussed below, this "declaration" purports to exclude or modify the Convention's legal effect, and so it constitutes a reservation nonetheless.<sup>158</sup>

#### *I. The Convention is Not Self-Executing*

When the Convention was ratified, the U.S. Senate made the Convention a non-self-executing treaty, despite objections from human rights organizations.<sup>159</sup> If a treaty is self-executing, the

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153. See *id.* (defining declarations).

154. See *United States Ratification of International Human Rights Treaties*, *supra* note 131; Daniel, *supra* note 138, at 273 (referring to the U.S. signing as "a symbolic gesture" and nothing more, since it did not intend to be bound by its provisions, denies its remedies domestically, and even rejects the Convention's definition of "racial discrimination").

155. See U.S. Reservations, Declarations, & Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

156. See Daniel, *supra* note 138, at 19 (describing the U.S. signing as "a symbolic gesture" and nothing more, since it did not intend to be bound by its provisions, denies its remedies domestically, and even rejects the Convention's definition of "racial discrimination").

157. U.S. Reservations, Declarations, & Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 155.

158. See CCPR General Comment No. 24, *supra* note 144 (defining declarations).

159. See U.S. Reservations, Declarations, & Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 155 (stating that the Convention is not self-executing); Daniel, *supra* note 138 (referring to the U.S. signing as "a symbolic gesture" and nothing more, since it

agreed-upon provisions of a treaty are automatically available to the public as forms of redress in domestic courts.<sup>160</sup> The reservation to keep the Convention from being self-executing means that, in practice, those within United States' jurisdiction and who wish to bring a claim against the United States government first have to go through existing domestic legislation implementing the Convention's delineated rights.<sup>161</sup>

## 2. *The CERD Cannot Receive Complaints from Individuals or Organizations*

A second reservation by the United States prevents people who suffer from racial discrimination from officially complaining to the body that oversees the Convention, the CERD.<sup>162</sup> This provision blocks yet another path for those within United States jurisdiction to seek remedies for violations of the Convention.<sup>163</sup>

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did not intend to be bound by its provisions, denies its remedies domestically, and even rejects the Convention's definition of "racial discrimination").

160. See *Self Executing Treaty*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/self\\_executing\\_treaty#:~:text=A%20self%2Dexecuting%20treaty%20is,through%20the%20implementation%20of%20legislation](https://www.law.cornell.edu/wex/self_executing_treaty#:~:text=A%20self%2Dexecuting%20treaty%20is,through%20the%20implementation%20of%20legislation) (last visited Feb. 14, 2021) (defining "self-executing treaty"); Carlos Vasquez, *The Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law*, UNIV. OXFORD (May 10, 2018), <https://www.law.ox.ac.uk/events/distinction-between-self-executing-and-non-self-executing-treaties-international-law>.

161. See Vasquez, *supra* note 152.

162. See U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151 (creating the reservation preventing people suffering from racial discrimination from officially complaining to CERD); Daniel, *supra* note 138 (referring to the U.S. signing as "a symbolic gesture" and nothing more, since it did not intend to be bound by its provisions, denies its remedies domestically, and even rejects the Convention's definition of "racial discrimination"); *Advice & Consent*, UNITED STATES SENATE [https://www.senate.gov/general/Features/Treaties\\_display.htm#:~:text=The%20Constitution%20gives%20to%20the,Senate%20does%20not%20ratify%20treaties.&text=Another%20130%20years%20would%20pass,a%20treaty%20to%20the%20Senate](https://www.senate.gov/general/Features/Treaties_display.htm#:~:text=The%20Constitution%20gives%20to%20the,Senate%20does%20not%20ratify%20treaties.&text=Another%20130%20years%20would%20pass,a%20treaty%20to%20the%20Senate) (last visited Mar. 7, 2021) (defining advice and consent).

163. See Daniel, *supra* note 138 (explaining how the U.S. denies Convention remedies domestically, and even rejects the Convention's definition of "racial discrimination").

### 3. *The United States Does Not Consent to the Jurisdiction of the International Court of Justice*

The United States also has a reservation to Article 22 of the Convention.<sup>164</sup> This means that the United States can decline a case brought against it by another State meant to be settled in the International Court of Justice (ICJ).<sup>165</sup> Consequently, other States cannot challenge the U.S. interpretation of the Convention before the ICJ, a move which could help to hold the United States accountable to a stricter standard.<sup>166</sup>

## III. ANALYSIS

### A. THE UNITED STATES VIOLATED THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The United States' commitment to eliminate racial discrimination was put to test during the spread of COVID-19, and unfortunately, with respect to the right to health, it failed. Black Americans in prison are dying from COVID-19 at disproportionate rates due to an inherently racist system whose effects were exacerbated by the global pandemic.<sup>167</sup> The United States' handling of prisons during the COVID-19 pandemic was contrary to the primary goals and focuses of the Convention.<sup>168</sup> As explained, the United States violated its

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164. See ICERD, *supra* note 7, art. 22 (establishing the right of a state to bring action against another state for violations of the Convention); U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151 (creating the reservation allowing the United States to decline a case brought by another state).

165. See ICERD, *supra* note 7, art. 22 (establishing the right of a state to bring action against another state for violations of the Convention); U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151 (creating the reservation allowing the United States to decline a case brought by another state).

166. See Daniel, *supra* note 138 (explaining how the U.S. denies Convention remedies domestically, and even rejects the Convention's definition of "racial discrimination").

167. See Sandoiu, *supra* note 13.

168. See Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, PRISON POL'Y (June 25, 2020), [https://www.prisonpolicy.org/reports/failing\\_grades.html](https://www.prisonpolicy.org/reports/failing_grades.html) (demonstrating failures

responsibilities as a State party under Article 2, and it violated the right to health under Article 5(e)(iv).

*i. The United States' conduct was contrary to the primary goals and focuses of the Convention*

The primary goal of CERD is for State parties to do everything in their power to rid their own societies of racial discrimination.<sup>169</sup> The United States, being one of the State parties, engaged in conduct resulting in Black Americans imprisoned at disproportionately higher rates compared to other Americans.<sup>170</sup> Beginning in 2019, COVID-19 made this situation because the United States was wholly unprepared.<sup>171</sup> Black Americans felt the effects of COVID-19 the most, so their right to health was essentially nullified.<sup>172</sup> This can be seen in prisons across the United States, such as in New York, where Black American prisoners were fifty percent of the population but still made up sixty percent of total COVID-19 deaths.<sup>173</sup> Missouri is another example where Black American prisoners were one third of the population yet accounted for twenty-five out of forty-three

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to provide adequate care to inmates during the COVID-19 pandemic).

169. See ICERD, *supra* note 7, art. 1 (establishing the scope of CERD); *supra* Part II, section A(a); see also *Frequently Asked Questions: Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 82; see generally Glover & Miguel, *supra* note 33 (defining structural racism in a society as the “system of structures that have procedures or processes that disadvantage African Americans”).

170. See ICERD, *supra* note 7, art. 1 (establishing the scope of CERD); see also Gramlich, *supra* note 26 (explaining how although the racial disparity has gone down in recent years, rates of Black American imprisonment are still over five times higher than the rates of white imprisonment); Nellis, *supra* note 25 (adding that the rate of imprisonment has reached up to ten times the rate of white people in certain states).

171. See Widra & Hayre, *supra* note 168 (demonstrating failures to provide adequate care to inmates during the COVID-19 pandemic).

172. See Noah Goldberg, *NY Prisons See Sharp Spike in Deaths Since Coronavirus Outbreak, Blacks Hit Hardest Behind Bars*, N.Y. DAILY NEWS (May 14, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-prison-deaths-blacks-disproportionate-20200514-xjk4v5wowrhrfpil5gevbgyui-story.html> (highlighting the disparate impact of coronavirus deaths on black inmates).

173. See Godfrey & Rovner, *supra* note 53 (providing statistics indicating that black inmates in New York represented an outsized proportion of COVID-19 deaths).

positive COVID-19 test.<sup>174</sup> Similarly, in Vermont, Black Americans made up nine percent of the population but accounted for eighteen percent of positive COVID-19 tests.<sup>175</sup> These examples are clear demonstrations of how the United States is failing to meet the goal of the Convention.<sup>176</sup>

*ii. The United States violated Article 2 of the Convention because it did not take action to ensure institutions were not using discriminatory practices*

The United States is failing to meet the Convention's expectations of State parties, as described in Article 2.<sup>177</sup> The main responsibility of State parties under Article 2 is to eliminate racial discrimination by ridding every field of public life of "any distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms."<sup>178</sup> This definition covers Black Americans' inadequate access to proper health care in prisons because Black American prisoners cannot enjoy the right to health on equal footing without access to health care.<sup>179</sup>

Due to the United States' problem with mass incarceration, spending time in prison is unfortunately an aspect of public life for many of its citizens.<sup>180</sup> There is a large,<sup>181</sup> historically based,<sup>182</sup>

174. Chammah & Meagher, *supra* note 51.

175. *Id.*

176. See ICERD, *supra* note 7, art. 1; Widra & Hayre, *supra* note 163.

177. ICERD, *supra* note 7, art. 2; *Status of Ratification: ICERD*, *supra* note 6.

178. ICERD, *supra* note 7, art. 2.

179. See Jeff Nesbit, *supra* note 90 (describing the many different ways racism exists within American society); see also Bergeron, *supra* note 90 (quoting New Jersey Governor Phil Murphy saying "systemic racism is a crisis that has infected every aspect of American life"); *Covid-19's Impact on People in Prison, EQUAL JUST. INITIATIVE*, <https://eji.org/news/covid-19s-impact-on-people-in-prison/> (last updated Jan. 7, 2021) (describing how COVID-19 has had a disproportionately high impact on Black Americans in prison).

180. See Peter Wagner & Wanda Bertram, *supra* note 30 (discussing how almost one out of every 100 people in the United States is in prison or jail).

181. See *id.*; see also Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> (explaining how large the problem of mass

racially motivated distinction for this.<sup>183</sup> This distinction is apparent by the fact that Black Americans are imprisoned at rates over five times higher than white Americans.<sup>184</sup> Therefore, by definition, Black Americans have been distinguished based on their race.<sup>185</sup> That distinction based on their race has had the effect of nullifying the enjoyment or exercise of their fundamental freedoms.<sup>186</sup> By signing the Convention, the United States committed itself to exercise practices that lead to such alarming differences.<sup>187</sup> Practices that unjustly target and imprison Black Americans, and *keep* them in prison, are still quite prevalent.<sup>188</sup> The United States has not taken sufficient action to ensure its institutions are not taking part in discriminatory practices.<sup>189</sup>

*1. The United States violated Article 5 because it violated Black American prisoners' right to health*

A violation of the Article 5(e)(iv) right to health exists when (1) there is a violation of the right to health, and (2) the violation was the

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incarceration is compared to several other countries with significantly higher populations).

182. See Forde & Bowman, *supra* note 21 (elaborating on how America went from slavery to mass incarceration because of the exploitation of Black Americans after slavery's abolition); see also Pereira *supra* note 17 (walking through the process of how the thirteenth amendment gave those in power a loophole for the legal new kind of slavery: mass incarceration).

183. Nellis, *supra* note 25.

184. See Gramlich, *supra* note 26.

185. See *id.*

186. See ICERD, *supra* note 7, art. 1; see also UDHR, *supra* note 80.

187. See ICERD, *supra* note 7, art. 1; U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151; see also Ashley Nellis, *supra* note 25.

188. See *Police Practices*, *supra* note 32.

189. ICERD, *supra* note 7, art. 2; see also *United States Ratification of International Human Rights Treaties*, *supra* note 131 (laying out the United States' reluctance to conform to its international human rights treaty obligations in the past); Doug Cassel, *The United States and Human Rights Treaties: Can We Meet Our Commitments?*, A.B.A. (Apr. 1, 2015), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2015--vol--41--vol--41--no--2---human-rights-at-home/the-united-states-and-human-rights-treaties--can-we-meet-our-com/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015--vol--41--vol--41--no--2---human-rights-at-home/the-united-states-and-human-rights-treaties--can-we-meet-our-com/) (providing further background for the United States' spotty conformity to human rights treaties).



result of racial discrimination.<sup>190</sup> Courts consider whether a government provided health care that is available, accessible without discrimination, of appropriate quality, and accepting of all backgrounds.<sup>191</sup> The same elements that the courts considered to be violations of the right to health in prior cases are also found in United States' prisons.<sup>192</sup>

In *Poblete Vilches*, the IACtHR found that when a public Chilean hospital knowingly failed to provide proper care to Vilches, there was a violation.<sup>193</sup> The hospital gave him grossly inadequate health care,<sup>194</sup> then sent him home before he could safely leave,<sup>195</sup> resulting in his death.<sup>196</sup> There are several clear parallels between Vilches' health care and the health care that Black Americans have received in prison.<sup>197</sup> One parallel is the nature of Vilches' illness. Pneumonia is quite similar to COVID-19 in that COVID-19 can spread to the lungs and cause pneumonia, often resulting in death.<sup>198</sup> Another parallel is the fact that the Chilean hospitals did not provide adequate

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190. ICERD, *supra* note 7, art. 5.

191. See CESCR General Comment No. 14, *supra* note 108, ¶ 12 (abbreviating each of the four elements as availability, accessibility, acceptability, and quality, but emphasizing that accessibility must be accessible to everyone without discrimination within the jurisdiction of the state party).

192. See *Poblete Vilches v. Chile*, *supra* note 108, ¶ 171; see also *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001).

193. See *Poblete Vilches v. Chile*, *supra* note 108, ¶ 122 (2016); see also Villarreal, *supra* note 108; *supra* Section II.

194. See *Poblete Vilches v. Chile*, *supra* note 108, ¶ 171 (stating that the public hospital's treatment of Vilches also resulted in a violation of the right to life and humane treatment).

195. See *id.* ¶ 16 (describing Vilches as being in post-operational septic shock, with open drainage, having a high temperature, and being in a semi-conscious state, none of which compelled the hospital to continue providing medical care).

196. See *id.* ¶¶ 16–19 (describing how the hospital's multiple instances of gross negligence led to the death of Vilches).

197. See *id.*; see also *Covid-19's Impact on People in Prison*, *supra* note 171 (describing how COVID-19 has had a disproportionately high impact on Black Americans in prison).

198. See Zawn Villines, *What is the Relationship Between Pneumonia and COVID-19?*, MED. NEWS TODAY (Apr. 15, 2020), <https://www.medicalnewstoday.com/Articles/pneumonia-and-covid-19> (stating that COVID-19 can spread to the lungs, causing inflammation, causing a hindrance on a patient's ability to take in oxygen, which can cause pneumonia).

access to artificial ventilation machines.<sup>199</sup> COVID-19 causes respiratory issues that, in serious cases, require artificial ventilation machines.<sup>200</sup> Due in large part to the nationwide deficit for these ventilation machines,<sup>201</sup> health care centers in American prisons grossly lack the tools necessary to provide adequate access to life-saving treatments.<sup>202</sup>

An additional parallel is the ultimate death of Vilches because he did not have access to proper health care, similar to Black American prisoners.<sup>203</sup> The final parallel is that, in both cases, it is the State's responsibility to provide proper health care and failed to do so.<sup>204</sup> *Poblete Vilches* shows that a violation of the right to health exists when an individual within a State party's jurisdiction dies as a result of the deprivation of adequate health services and medical equipment.<sup>205</sup> As such, because Black American prisoners died from COVID-19 at a disproportionate rate as a result of the deprivation of adequate health services and medical equipment, the United States violated their right to health.

In *Cyprus*, the ECtHR held in part that, because the Turkish

199. See *Poblete Vilches v. Chile*, *supra* note 108, ¶ 41 (describing how there were no artificial ventilation machines in the Surgical Intensive Care Unit, but there was one available in the Medical Intensive Care Unit, which Vilches was still not given access to).

200. See Villines, *supra* note 190.

201. Sarah Kliff et al., *There Aren't Enough Ventilators to Cope with the Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html> (describing how the United States was incredibly slow in developing a national strategy for ventilators, so there were not enough to keep up with the number of COVID-19 patients that needed the machines to survive).

202. Danielle Ivory, *'We Are Not a Hospital': A Prison Braces for the Coronavirus*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html> (stating that the one doctor available to prisoners was out sick himself, the prisons did not have any ventilators, and that there are not enough masks, soap, or hand sanitizer for prisoners or correctional staff, so prisons have had to rely on limited access to hospitals).

203. See *id.*

204. See *id.*; *Poblete Vilches v. Chile*, *supra* note 108.

205. See *Poblete Vilches v. Chile*, *supra* note 108; see also Villarreal, *supra* note 108; ECHR, *supra* note 114, art. 2.; Graham, *supra* note 112 (stating that case law in the European Court of Human Rights has been carving out the right to health under international human rights law).

hospital which denied a minority group the same access and quality of health care that it offers to other ethnic groups did not result in death and there were other alternatives, there was no violation of the right to health.<sup>206</sup> Although there have been no published cases of Black Americans being denied treatment, Black Americans are a minority group that have been affected by COVID-19 at a disproportionate rate as a result of racial discrimination, they have no alternative options given their lack of agency in where they receive health care, and many are dying as a result.<sup>207</sup>

Additionally, there is a clear distinction between the adequacy of health care found in *Shchebetov v. Russia* and the health care in U.S. prisons.<sup>208</sup> In that case, the medical professionals successfully tested Shchebetov to identify and treat his infectious diseases, unlike U.S. prisons, where mass testing is not easily accessible.<sup>209</sup> The prison in *Shchebetov v. Russia* also placed him on an intensive regimen to fight the diseases, then provided him with medicine, actively monitored his condition, and adopted measures to prevent a relapse.<sup>210</sup> In the U.S., inmates do not have adequate access to health care basics like soap, masks, hand sanitizer, or even a medical exam from a doctor to keep inmates healthy.<sup>211</sup> Finally, seeing as prison facilities are “infectious disease incubators” where correctional staff represent the majority of movement in and out, most prisoners contracted COVID-19 while incarcerated.<sup>212</sup>

Although courts whose jurisdiction the United States does not recognize upheld *Cyprus*, *Shchebetov*, and *Poblete Vilches*, international treaties such as those in question often apply similar tests and considerations to analyze violations.<sup>213</sup> The IACtHR

206. See *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001).

207. Goldberg, *supra* note 164.

208. See *Shchebetov v. Russia*, App. No. 21731/02, ¶ 44 (Apr. 10, 2012).

209. See *id.*; see also Schwartzapfel et al., *supra* note 47.

210. See *Shchebetov v. Russia*, App. No. 21731/02, ¶ 73 (Apr. 10, 2012).

211. See Ivory, *supra* note 194.

212. See *id.*; see also Park et al., *supra* note 42.

213. See *International Standards on the Right to Physical and Mental Health*, U.N. HUMAN RIGHTS COMMISSION, <https://www.ohchr.org/en/issues/health/pages/internationalstandards.aspx> (last visited Mar. 7, 2021) (laying out the international standards for the right to health for different treaties); cf. *Poblete Vilches v. Chile*, *supra* note 108; cf. *Shchebetov*

formally applies the four elements of availability, accessibility, acceptability, and quality in *Poblete Vilches*, while the ECtHR considered them less formally and in slightly different terms. In *Schebetov*, the ECtHR stated that “[a]bsent or inadequate medical treatment, particularly when the disease has been contracted in detention, is [certainly of] Court’s concern. It is therefore bound to assess the *quality* of medical services the applicant was provided with [and] to determine whether he was deprived of *adequate* medical assistance.”<sup>214</sup> Despite the ECtHR not explicitly listing these elements, it considered them using different language. The four-element test used in the IACtHR is the most comprehensive test, so it is therefore the safest method for considering an Article 5 violation given the lack of guiding CERD jurisprudence.<sup>215</sup>

Applying the four elements to the United States’ handling of COVID-19 and its disparate impact on Black Americans shows that the United States violated the right to health.<sup>216</sup> For the first element, prisons were ill-equipped to provide adequate COVID-19 testing, PPE, and ventilation equipment.<sup>217</sup> COVID-19 testing has been widely inconsistent.<sup>218</sup> Further, the United States also has a general problem with overcrowding in its prisons, which made the conditions under COVID-19 worse, and aggravated its violation of Article 5 of the Convention.<sup>219</sup> Operating prisons with sub-standard living

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v. Russia, App. No. 21731/02, ¶ 71 (Apr. 10, 2012); *c.f.* CESCR General Comment No. 14, *supra* note 108, ¶ 12 (stating “the right to health in all its forms and at all levels contains the following interrelated and essential elements,” and listing the four elements discussed above); *see generally Right to Health: An Inclusive Right for All*, WORLD MED. ASS’N, <https://www.wma.net/what-we-do/human-rights/right-to-health/> (last visited Mar. 7, 2021).

214. *See* *Schebetov v. Russia*, App. No. 21731/02, ¶ 71 (Apr. 10, 2012).

215. *See International Standards on the Right to Physical and Mental Health*, *supra* note 213; *see also Right to Health: An Inclusive Right for All*, *supra* note 213.

216. *See* CESCR General Comment No. 14, *supra* note 102.

217. *See* Kliff et al., *supra* note 193.

218. *See* Schwartzapfel et al., *supra* note 47.

219. *See* Daniel Moritz-Rabson, ‘A Living Hell’: Inside United States Prisons During the COVID-19 Pandemic, ALJAZEERA (Feb. 26, 2021), <https://www.aljazeera.com/features/2021/2/26/a-living-hell-inside-us-prisons-during-the-covid-19-pandemic> (describing the overpopulated prisons as “an ongoing nightmare,” how communication and visitation were upended for prisoners, how prisoners had no support, and how the mental health of prisoners

conditions<sup>220</sup> shows a clear lack of available public health facilities, goods, and services.<sup>221</sup> Therefore, the United States did not meet the first element.<sup>222</sup>

For the second element, the COVID-19 pandemic demonstrated that adequate treatments were inaccessible for Black Americans in prison.<sup>223</sup> The United States neglected health care in prisons and left prisoners without state-provided means to stay safe.<sup>224</sup> Prisoners did not have the option to obey the World Health Organization's recommendations because the United States did not provide access to the necessary facilities, goods, or services.<sup>225</sup> Therefore, the second element of accessibility without discrimination has not been met.<sup>226</sup>

For the third element of quality of facilities, goods, and services, the low quality of health care in prisons is shown by the fact that solitary confinement has been used as a means of social distancing.<sup>227</sup> The use of solitary confinement as a means of social distancing takes a severe toll on the mental and physical health of the inmates that

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deteriorated as time passed).

220. See *Advocates and Public Health Experts Call on Carney and Doc To Make Changes to Mitigate Covid Outbreak*, ACLU (Dec. 3, 2020), <https://www.aclu.org/press-releases/advocates-and-public-health-experts-call-carney-and-doc-make-urgent-changes-mitigate>; see also Widra & Hayre, *supra* note 163 (presenting a state-by-state analysis of how little the respective governments did to ensure safe conditions in prisons after the COVID-19 outbreak).

221. See ICERD, *supra* note 7, art. 5; *1 in 5 Prisoners in the United States Has Had COVID-19*, *supra* note 40 (pointing out the racial disparity in prisoners who died from COVID-19).

222. See ICERD, *supra* note 7, art. 5; *1 in 5 Prisoners in the United States Has Had COVID-19*, *supra* note 40

223. See *1 in 5 Prisoners in the United States Has Had COVID-19*, *supra* note 40; see also Ivory, *supra* note 202.

224. See *1 in 5 Prisoners in the United States Has Had COVID-19*, *supra* note 40; see also Ivory, *supra* note 202.

225. Compare *Transmission Package: Protect Yourself and Others from COVID-19*, *supra* note 38 with Widra, *supra* note 163 (contrasting the WHO recommendations of physical distancing, wearing a mask, keeping rooms well ventilated, and avoiding crowds, with the reality of life in prison, in which all those precautions are impossible or very difficult, and prisons have failed to improve conditions).

226. See CESCR General Comment No. 14, *supra* note 102.

227. See Godfrey & Rovner, *supra* note 53.

have to go through it.<sup>228</sup> Those who must endure it are more likely to die prematurely upon release.<sup>229</sup> In many cases, prisoners go through solitary confinement, which has been deemed as torture by many international institutions,<sup>230</sup> because there is insufficient space to properly socially distance.<sup>231</sup> This failure to provide enough room for prisoners to safely socially distance, thereby forcing them to go through what is recognized as a violation of human rights,<sup>232</sup> shows that the United States did not provide for appropriate quality of facilities. Therefore, the United States did not meet the third element.<sup>233</sup>

The fourth element, acceptability of all races, is not as clear: there are no allegations of health care professionals outright denying Black Americans access to health care.<sup>234</sup> However, the courts in *Poblete Vilches* and *Cyprus* used the elements as considerations, so not every element must be met.<sup>235</sup>

The United States did not meet the elements required by international courts when considering whether there was a violation of the right to health.<sup>236</sup> Therefore, the United States' conduct, with

228. See *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert*, *supra* note 69; see also *COVID-19 in Correctional Facilities: Medical Isolation*, *supra* note 67 (acknowledging the need for isolation during COVID-19 while describing the key differences between keeping a safe distance and subjecting an inmate to solitary confinement).

229. See Fenster, *supra* note 72 (providing several statistics of prisoner health after going through placement(s) in solitary confinement as raising the chances of premature death from 55% to 129%, depending on the number of placements).

230. See *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert*, *supra* note 69.

231. See *id.*

232. See UDHR, *supra* note 80; see also *Human Rights Dimensions of COVID-19 Response*, *supra* note 46 (describing the ways in which human rights laws should apply to a state's COVID-19 response, including allowing for conditions to properly avoid contracting the virus); Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24, 32-34 (1994) (naming access to healthy living conditions as a right in international law in several different international treaty provisions).

233. See Godfrey & Rovner, *supra* note 53.

234. See CESCR General Comment No. 14, *supra* note 102.

235. See *Poblete Vilches v. Chile*, *supra* note 108; see also *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001).

236. See *Poblete Vilches v. Chile*, *supra* note 108; *Shchebetov v. Russia*, App. No. 21731/02, ¶ 71 (Apr. 10, 2012).

its similarities to prior international violations of rights to health, violated Article 5 of the Convention's right to health.<sup>237</sup>

2. *The United States violated Article 5 because the violation of the right to health was the result of racial discrimination*

The second prong of an Article 5 violation is racial discrimination.<sup>238</sup> An action is racially discriminatory when (1) a distinction based on race or ethnicity (2) has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise of the rights delineated in the Convention.<sup>239</sup> A comparison of similar cases shows that Black Americans were distinguished based on their race and were subjected to conditions that impaired their right to health.<sup>240</sup>

The first element is straightforward: a distinction based on race or ethnicity exists when a race of people is singled out by a state or an entity that the state is responsible for.<sup>241</sup> *Murat Er v. Denmark* demonstrates the standard for identifying this element.<sup>242</sup> In *Murat Er v. Denmark*, the CERD found that a Danish school singled out its Turkish and Pakistani students based on their ethnicities.<sup>243</sup> While the surrounding circumstances are quite different, the common thread is that a group of people were distinguished based on race.<sup>244</sup> The standard for the second element is also shown by *Murat Er v. Denmark*: the distinction of the petitioner's group had the purpose or effect of impairing his enjoyment of a right. The petitioner, a carpentry student distinguished by his Turkish ethnicity, lost his right to training and education.

In applying this case law, the United States met both of these standards. First, the American criminal justice system distinguishes

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237. See *Poblete Vilches v. Chile*, *supra* note 108; *Shchebetov v. Russia*, App. No. 21731/02, ¶ 71 (Apr. 10, 2012); *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001).

238. See ICERD, *supra* note 7, art. 5.

239. *Id.* art. 1.

240. See *Zinzuwadia*, *supra* note 53.

241. ICERD, *supra* note 7, art. 5.

242. See *Murat Er v. Denmark*, *supra* note 126; *Poblete Vilches v. Chile*, *supra* note 108; *Cyprus v. Turkey*, *supra* note 113.

243. See *Murat Er v. Denmark*, *supra* note 126.

244. See *id.*; *Poblete Vilches v. Chile*, *supra* note 108; *Cyprus v. Turkey*, App. No. 25781/94, ¶ 219 (May 10, 2001).

Black Americans by their race.<sup>245</sup> This is shown in part by the history of discrimination in America and by the disproportionate number of Black American prisoners.<sup>246</sup> Relating this distinction to COVID-19 in prisons, Black American prisoners have been distinguished in that they have been affected disproportionately.<sup>247</sup> For example, Black American prisoners in New York made up sixty percent of total COVID-19 deaths, despite making up only fifty percent of the prison population.<sup>248</sup> In Missouri, they make up about fifty-eight percent of positive COVID-19 tests despite being only one-third of the prison population.<sup>249</sup> Black American prisoners in Vermont represented eighteen percent of positive tests despite only being nine percent of the prison population.<sup>250</sup>

Next, the United States' distinction of Black American prisoners based on race has the effect of impairing their right to health.<sup>251</sup> The right to health means that facilities, goods, and services must be available, accessible without discrimination, appropriate in quality, and accepting of all races. This right has been impaired for reasons explained in the previous section.<sup>252</sup> Incarcerated Black Americans are not receiving proper medical care,<sup>253</sup> and many are dying as a result.<sup>254</sup> This treatment is contrary to Convention because a racial

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245. See Nellis, *supra* note 25, at 4-6.

246. See ICERD, *supra* note 7, art. 2; see also Nellis, *supra* note 25.

247. See Nellis, *supra* note 25, at 4-6.

248. Godfrey & Rovner, *supra* note 53.

249. Chammah & Meagher, *supra* note 51.

250. *Id.*

251. Compare *Covid-19's Impact on People in Prison*, *supra* note 171, with Kliff et al., *supra* note 193 (showing that a comparison of the statistics shows that incarcerated Black Americans are getting hit by the lack of adequate access to medical equipment at a disproportionate rate).

252. See *supra* Part III, section A(b)(i).

253. See Rod McCullom, *Is Mass Incarceration Driving Racial Disparities in the Pandemic?*, *UNDARK* (Nov. 2, 2020), <https://undark.org/2020/11/02/convictions-mass-incarceration-racial-disparities-pandemic/> (explaining that racial disparities have caused a significant divide in who has been the most severely impacted by COVID-19); see also Schwartzapfel et al., *supra* note 47; see also *Human Rights Dimensions of COVID-19 Response*, *supra* note 46.

254. Brie Williams et al., *Correctional Facilities in the Shadow of COVID-19: Unique Challenges and Proposed Solutions*, *HEALTH AFF.* (Mar. 26, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/>; Moritz-



minority group has had its right taken away as the result of racial discrimination.<sup>255</sup> The U.S. criminal justice system, through its practice of distinguishing Black Americans by their race,<sup>256</sup> impaired the equal enjoyment of their right to health when it subjected them to the effects of mass incarceration during a global pandemic, resulting in disproportionately high COVID-19 infection and mortality rates.<sup>257</sup>

Additionally, the CERD itself has already found that the United States has distinguished Black Americans by their race, and that this distinction had the effect of nullifying or impairing their rights with similar issues.<sup>258</sup> Although these prior findings on similar issues do not themselves prove that the CERD would find a violation of the right to health in prisons, they do provide insight into how the CERD might react to the present case.<sup>259</sup> The CERD has already expressed concern about United States police officers using excessive force

Rabson, *supra* note 211 (describing prison health conditions as “a living hell”).

255. Williams et al., *supra* note 247.

256. See Loury, *supra* note 30 (describing the accumulation of discrimination resulting from racist policies since the post-slavery era in America and how they have evolved into the system that perpetuates Black Americans being put at disadvantage); see also RAM SUBRAMANIAN ET AL., *DIVIDED JUSTICE: TRENDS IN BLACK AND WHITE JAIL INCARCERATION, 1990–2013*, (Cindy Reed ed., 2018) (exploring the statistical differences between how often Black Americans are arrested with how often white people are arrested).

257. See *Covid-19's Impact on People in Prison*, *supra* note 171 (describing how the impact of COVID-19 is significantly worse within prisons, especially as it pertains to Black Americans, who are dying at a higher rate than the rest of the population); see also Nelson & Kaminsky, *supra* note 42 (laying out the science behind the reason COVID-19 is spreading so fast within prisons and why it is affecting Black Americans the most).

258. *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures: Statement 1 (2020): United States of America*, COMM. ELIMINATION RACIAL DISCRIMINATION (2020), <https://www.ohchr.org/Documents/HRBodies/CERD/earlywarning/statements/USA.PDF>.

259. Compare *id.* with Nelson & Kaminsky, *supra* note 42 (showing the similarities between COVID-19's disparate focus on Black Americans because of the criminal justice system and the CERD's expression that it is “convinced that systemic and structural discrimination permeates State institutions and disproportionately promotes racial disparities against African Americans, notably in the enjoyment of the rights to equal treatment before the tribunals, security of person and protection by the State against violence or bodily harm, and other civil, economic, social and cultural rights enshrined in the [Convention].”

against minorities, especially those that are unarmed.<sup>260</sup> The issues that the CERD has already noticed, namely the systemic racial discrimination and police actions that have led to mass incarceration, are closely and necessarily linked to the fact that Black Americans are getting sick and dying in prisons at much higher rates.<sup>261</sup>

To better understand how the CERD operates, it is helpful to look at how it has handled similar issues. One issue that has a lot in common with Black Americans in prisons is the high infant mortality rates within the Black American community.<sup>262</sup> A comparison of these two reveals a common thread between infant mortality and mass incarceration among Black Americans: they are both problems where the right to health is at issue, and they both affect Black Americans more than the rest of the population.<sup>263</sup> Regarding infant mortality rates, in a report to the CERD, the United States itself acknowledged that there is significant room for improvement in providing health care access for racial minorities.<sup>264</sup> Further, the CERD already sent a complaint to the United States about how its State practice of systemic discrimination has directly led to

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260. *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures: Statement 1 (2020): United States of America*, *supra* note 259.

261. See McCullom, *supra* note 246 (connecting high levels of incarceration in African American communities with the disproportionate impact from COVID-19 experienced by those same communities).

262. See *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care*, CTR. REPRODUCTIVE RTS, (2014), [https://reproductiverights.org/sites/default/files/documents/CERD\\_Shadow\\_US.pdf](https://reproductiverights.org/sites/default/files/documents/CERD_Shadow_US.pdf) (noting that high infant mortality disproportionately affects minority groups in the U.S.).

263. See *id.*; see also *Reproductive Health: Infant Mortality*, CDC (2018), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> (showing that the 2018 infant mortality rate was 10.8 among Black Americans, while it was 4.6 among non-Hispanic White Americans); Jan Gaby Galvin, *Black Babies Face Double the Risk of Dying Before Their First Birthday*, U.S. NEWS (Aug. 1, 2019), <https://www.usnews.com/news/healthiest-communities/ArticleArticleArticleArticleArticles/2019-08-01/black-babies-at-highest-risk-of-infant-mortality> (tying higher infant mortality rates to low socioeconomic status and lack of access to healthcare, two issues which disproportionately affect African American mothers).

264. *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, UNITED STATES DEP'T STATE para. 202 (June 12, 2013), [https://2009-2017.state.gov/j/drl/rls/CERD\\_report/210605.htm](https://2009-2017.state.gov/j/drl/rls/CERD_report/210605.htm).

disproportionately high deaths within the community.<sup>265</sup> Although what constitutes adequate health care in infant mortality cases looks different from health care for COVID-19, the parallels are clear: systemic racism is directly putting Black Americans in harm's way, constituting a violation of the Convention's Article 5 right to health.<sup>266</sup>

#### B. THE UNITED STATES VIOLATED ARTICLE 5 OF THE CONVENTION DESPITE ITS RESERVATIONS

Through its liberal use of reservations, the United States is known for poking holes in the treaties it ratifies.<sup>267</sup> Even though the United States made several reservations that hinder the effectiveness of the Convention, it still violated Article 5.<sup>268</sup> The United States intended to be bound by Article 5, and even though its reservations deny the jurisdiction of any international venue, it still violated the right to health.<sup>269</sup>

##### *i. The United States intended to be bound by Article 5 of the Convention*

The United States' reputation in the international human rights community points to the unavoidable conclusion that the United

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265. See *UN Committee Calls on United States to Immediately Address Racial Discrimination in Health Care*, CTR. REPRODUCTIVE RTS. (Aug. 29, 2019), <https://reproductiverights.org/un-committee-calls-on-united-states-to-immediately-address-racial-discrimination-in-health-care/> (calling on the U.S. to improve data collection on infant mortality and to improve monitoring and accountability mechanisms); Galvin, *supra* note 256 (showing the disparities in infant mortality among racial minority groups); see also Russell Kirby, *The United States Black-White Infant Mortality Gap: Marker of Deep Inequities*, 107(5) AM. J. PUB. HEALTH 644, 645 (May 2017) (highlighting the fact that the infant mortality gap among racial groups is a symptom of larger systemic concerns).

266. ICERD, *supra* note 7, art. 5; see Nicole Lindahl-Ruiz, *supra* note 4 ("Prison overcrowding is an urgent matter in the fight against racial injustice and COVID-19.").

267. See *United States Ratification of International Human Rights Treaties*, *supra* note 131.

268. ICERD, *supra* note 7, art. 5.

269. See U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151.

States is not afraid to carve out reservations in the treaties it signs.<sup>270</sup> Here, the United States carved out many reservations in the Convention and was quite meticulous and unafraid in declaring which rules it will and will not abide by.<sup>271</sup> Notably, the Article 5 right to health was not mentioned in the United States' reservations.<sup>272</sup> The United States cannot in good faith claim that its existing reservations could limit the reach of Article 5's right to health.<sup>273</sup> By not addressing Article 5 in its reservations, the United States therefore necessarily intended to be bound by its right to health.<sup>274</sup>

*ii. Lack of venue does not void a violation*

The United States would likely argue that it does not have to follow Article 5(e)(iv) because the Convention is not self-executing.<sup>275</sup> However, as mentioned previously, the lack of jurisdiction does not equate to having no obligation under the treaty.<sup>276</sup> Prisoners' right to health still stands, despite the United States' reservations.

Despite the United States' reservation stating that neither the ICJ nor the CERD can receive complaints,<sup>277</sup> the United States still signed and ratified the Convention.<sup>278</sup> In other words, even if

270. See *United States Ratification of International Human Rights Treaties*, *supra* note 131.

271. See U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151.

272. See *id.*

273. See Hammarskjöld, *supra* note 133 (explaining that reservations are the exceptions to what the signing party is willing to ratify; therefore, the provisions of a treaty that are not excepted are the parts that the signing party is fully agreeing to).

274. See *id.*

275. U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151.

276. See *Jurisdictional, Preliminary, and Procedural Concerns in BENCHMARK ON INT'L L.* § II.A (Diane Marie Amann ed., 2014).

277. U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151.

278. See *Status of Ratification: ICERD* *supra* note 6; U.S. Reservations,

Americans cannot be heard in any legal forum, the United States still committed itself to a right to health and thereby to protect minorities from being disproportionately killed by a disease due to systemic racism.<sup>279</sup> A violation can exist despite a lack of jurisdiction, as long as the State expressed its consent to be bound through ratification.<sup>280</sup> Here, the United States ratified the Convention, so it should be bound.<sup>281</sup>

#### IV. RECOMMENDATIONS

Although the United States has violated the right to health, there are several ways it could achieve compliance with the Convention and avoid future violations. The first set of recommendations include several ways to mitigate the spread of COVID-19 and protect the health of those already in prison, and the second set of recommendations encompass precautions that would save lives and maintain compliance with the Convention if another pandemic should occur in the United States again in the future.

##### A. COMPLYING WITH THE CONVENTION IN THE AGE OF COVID-19

The United States should release prisoners of non-violent crimes that are at-risk of contracting COVID-19 through compassionate release programs.<sup>282</sup> Commendably, some states have already taken these precautions;<sup>283</sup> however, many prisons have not released nearly

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Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151.

279. See *Jurisdictional, Preliminary, and Procedural Concerns*, *supra* note 277.

280. See Int't L. Comm., Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, 34-36 (2001) (naming the only two elements for an internationally wrongful act of a State as “[conduct] attributable to the State under international law [and] a breach of an international legal obligation in force for that State at that time,” notably excluding a jurisdiction requirement); see *generally Basis of the Court’s Jurisdiction*, I.C.J., <https://www.icj-cij.org/en/basis-of-jurisdiction> (last visited Mar. 7, 2021) (last visited Mar. 7, 2021) (describing the various ways in which States can consent to the jurisdiction of the ICJ).

281. See Responsibility of States for Internationally Wrongful Acts, *supra* note 273, at 71.

282. See Williams et al., *supra* note 247 (recommending solutions to problems faced by the correctional system due to COVID-19).

283. See *id.*; *Response to the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (Feb. 5, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html/>

enough of their at-risk population.<sup>284</sup> In fact, wardens denied or ignored ninety-eight percent of compassionate release requests since the start of the pandemic.<sup>285</sup> By releasing a higher amount of the non-violent, at-risk population, the United States could meet its obligations under the Convention and reduce overcrowding in prisons.<sup>286</sup> This would help the United States meet its obligations because fewer prisoners would create greater availability and accessibility to health care facilities, goods, and services.<sup>287</sup>

Beyond releasing prisoners, the United States should also ensure adequate PPE is available for prisoners and staff so they can properly protect themselves from the spread of COVID-19.<sup>288</sup> Statistics show that prison staff are also dying at a high rate, illustrating the inadequate access to the equipment needed to survive.<sup>289</sup> Surveys of correctional staff show that there is already a severe shortage of PPE for both them and the inmates.<sup>290</sup> Masks can be the difference between life and death with COVID-19, so prisons must supply

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(highlighting efforts by states such as New Jersey and North Carolina to release prisoners).

284. See Keri Blackinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> (noting that out of 10,940 federal prisoners who applied for compassionate release only 156 were approved).

285. *Id.*

286. See *id.* (revealing that there has not been any Board of Prisons-initiated motions for compassionate release in response to the pandemic); *COVID-19 Prisoner Releases Too Few, Too Slow*, HUM. RTS. WATCH (May 27, 2020), <https://www.hrw.org/news/2020/05/27/covid-19-prisoner-releases-too-few-too-slow#> (imploping governments to release prisoners to reduce preventable deaths from COVID-19).

287. *Id.*

288. See *COVID-19 Prisoner Releases Too Few, Too Slow*, *supra* note 281 (asserting that prison staff risk exposure of themselves and their communities to COVID-19 by virtue of their work); Williams et al., *supra* note 247 (urging prisons to make a health a priority).

289. Park et al., *supra* note 42.

290. Nelson & Kaminsky, *supra* note 42 (reporting that at one time only 59% of facilities surveyed indicated that they had adequate access to PPE); Luke Barr, *Federal Prisons Facing Shortages of Resources Amid Coronavirus Outbreak*, ABC NEWS (Apr. 1, 2020), <https://abcnews.go.com/Health/federal-prisons-facing-shortages-resources-amid-coronavirus-outbreak/story?id=69920966> (describing the struggle faced by prisons to secure necessary PPE).

them, especially given prison overcrowding.<sup>291</sup> Special safety training for staff would also promote the health of prisoners.<sup>292</sup>

The United States should immediately cease its use of solitary confinement as a means of social distancing.<sup>293</sup> Putting prisoners through what many label as torture is not an acceptable alternative to keeping six feet between inmates.<sup>294</sup> If the United States applies all of the above recommendations and follows public health officials' advice, it would better comply with the Convention.

#### B. COMPLYING WITH THE CONVENTION IN A FUTURE HEALTH CRISIS

Fortunately, the COVID-19 pandemic will come to an end as more people are vaccinated.<sup>295</sup> With that in mind, it would be devastating if the United States went back to business as usual without implementing the necessary changes or considering its lessons learned from this tragic pandemic.<sup>296</sup> There is a possibility of another pandemic sweeping the world in the future, and that one could be even deadlier than COVID-19.<sup>297</sup> In preparation for such an event,

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291. Robert H. Shmerling, *Masks Save Lives: Here's What You Need to Know*, HARV. HEALTH PUB. (Nov. 19, 2020), <https://www.health.harvard.edu/blog/masks-save-lives-heres-what-you-need-to-know-2020111921466> (explaining the efficacy of masks in mitigating the spread of COVID-19).

292. See *Correctional Facility Workers and Employees*, OSHA <https://www.osha.gov/coronavirus/control-prevention/correctional-facility> (last visited Mar. 6, 2021) (recommending various infection prevention and control strategies for employers).

293. See Godfrey & Rovner, *supra* note 53, at 132–33 (noting that solitary confinement can result in long-lasting or permanent harm which is compounded by COVID-19).

294. See *id.* at 129–30 (establishing that officials must recognize the difference between punitive isolation and medical isolation in prisons).

295. See, e.g., *id.*

296. See Daniel Xu & Rashmita Basu, *How the United States Flunked the COVID-19 Test: Some Observations and Several Lessons*, 50 AM. REV. PUB. ADMIN. 568, 574 (2020) (urging that the US must learn from the COVID-19 pandemic for improved response to future public health emergencies); Micah Zenko, *The United States Will Learn Nothing from the Pandemic*, FOREIGN POL'Y (Jun. 5, 2020), <https://foreignpolicy.com/2020/06/05/coronavirus-pandemic-covid-lessons-united-states-9-11/> (comparing the potential for Americans to forget lessons from the COVID-19 pandemic to American forgetfulness after the 9/11 disaster).

297. Mark Johnson, *We'll Face Another Pandemic. Experts Warn It Will Be*

the United States should implement measures similar to those in the above COVID-19 recommendations.

*i. Providing adequate and accessible health care*

First, the United States government must ensure that there is a consistent and accurate flow of information regarding the disease to all inmates and correctional staff.<sup>298</sup> Second, prisons need to work closely with health authorities to ensure that they are doing everything in their power to effectively keep inmates safe.<sup>299</sup> Third, when the next pandemic comes, there needs to be independent quality oversight to keep prisons in check.<sup>300</sup> Although the COVID-19 pandemic was unexpected, the lack of oversight contributed to how unhealthy prisons became.<sup>301</sup> Finally, prisons need to work with health experts to establish new pathways and protocols for hospitalization when correction staff become ill.<sup>302</sup>

*ii. Reforming the criminal justice system*

On a broader scale, the United States must rethink and reform its criminal justice system to prevent any more unnecessary loss of life.<sup>303</sup> The United States must reform or remove policies in place

*'Even More Damaging if the U.S. Doesn't Take Action on Lessons Learned from COVID-19* MILWAUKEE J. SENTINEL (last updated Dec. 30, 2020), <https://www.jsonline.com/story/news/2020/12/30/u-s-must-act-covid-19-lessons-before-next-pandemic-hits/3994246001/> (asserting that the United States would be in a difficult position if a new pathogen emerged).

298. See Gabrielle Beaudry et al., *Managing Outbreaks of Highly Contagious Diseases in Prisons: A Systematic Review*, 5 *BMJ GLOBAL HEALTH* 1, 10–14 (2020) (“Information sharing between institutions and public health authorities regarding measures employed and indications of effectiveness could help improve preparedness for future prison outbreaks.”).

299. See *id.*

300. See Emily Wang et al., *COVID-19, Decarceration, and the Role of Clinicians, Health Systems, and Payers*, 324 *J. AM. MED. ASS'N* 2257, 2257 (Dec. 8, 2020).

301. See *id.* at 2257.

302. See Emily Widra & Peter Wagner, *How Prepared are State Prison Systems for a Viral Pandemic?* PRISON POL'Y INITIATIVE (Apr. 10, 2020), <https://www.prisonpolicy.org/blog/2020/04/10/prepared/> (lamenting the lack of preparedness for the pandemic that state departments of corrections demonstrated in an April 2020 survey).

303. See *id.* (reporting that state prisons were drastically underprepared for the



that make it hard to release people from prison, such as mandatory minimums.<sup>304</sup> These kinds of policies are in large part why so many states had difficulty quickly releasing prisoners as COVID-19 continued to spread. Such policies should be replaced by an increased use of clemency, parole expansion, and other policies that allow the release of prisoners to be a faster process.<sup>305</sup> The COVID-19 pandemic highlighted how unsanitary and unsafe it can be to keep millions of people in crowded prisons.<sup>306</sup> If the next pandemic rears its head in the United States, reforming the prison process itself will make it significantly easier to protect the lives of those within the prison walls.<sup>307</sup>

## V. CONCLUSION

The United States is often criticized in the international community both for having the highest proportion of its citizens behind bars globally, and for its history of racism against Black Americans.<sup>308</sup> Despite its many reservations,<sup>309</sup> the United States ratified the Convention and committed itself to eliminating racial discrimination, including any discrimination that pertains to the right

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*COVID-19 pandemic).*

304. See Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL'Y INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html> (describing how failure to reduce prison populations has led to increased spread of COVID-19 not only in prisons, but to external communities); *Hearing on Reports of Racism in the Justice System of the United States*, ACLU (Oct. 27, 2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) (describing mandatory minimums, which have significant disparate racial effects, as the policy that requires offenders of certain crimes to stay in prison for a pre-determined number of years based on the crime committed).

305. Hooks & Sawyer, *supra* note 304 (noting that the American criminal justice system is based on policies that make it difficult to release prisoners).

306. See *id.* (asserting that the crowded and unsanitary conditions of prisons provided ideal conditions for the spread of COVID-19).

307. See Wang et al., *supra* note 300, at 2257–58.

308. See Robertson, *supra* note 1.

309. U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 151.

to health.<sup>310</sup> However, the racially discriminatory practices within the criminal justice system disproportionately deprived Black American prisoners of their right to health.<sup>311</sup>

The United States violated Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination by not administering adequate living conditions in their prisons during the COVID-19 pandemic,<sup>312</sup> which led to disproportionately high deaths of Black Americans.<sup>313</sup> It must comply with the Convention that it ratified and take swift action to ensure more lives are not lost because of racial discrimination.<sup>314</sup>

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310. ICERD, *supra* note 7, art. 5.

311. *See id.*; Watson, *supra* note 134 (explaining that despite being a party to the ICERD, the US has made little effort to end racial discrimination); *see also* Peter W. Schroth & Virginia S. Mueller, *Racial Discrimination: The United States and the International Convention*, 4 HUMAN RIGHTS 171, 172–73 (1975) (arguing that the United States' failure to ratify the ICERD undermined the effectiveness of the Committee it established).

312. *See* Godfrey & Rovner, *supra* note 53, at 136 (noting that the living conditions imposed by solitary confinement harm the health of prisoners).

313. *See* Nelson & Kaminsky, *supra* note 42 (describing the disparate impact COVID-19 had on black prison populations)..

314. *See Reducing Jail and Prison Populations During the COVID-19 Pandemic*, BRENNAN CENTER FOR JUSTICE (last updated Feb. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> (elaborating that releasing the elderly, sick, and those incarcerated for parole violations would ease the impact of the pandemic in prisons); *see also* Wendy Netter Epstein, *A Healthy Sentence: Why Vaccinating Prisoners Should Be a Priority*, U.S. NEWS (Feb 19, 2021), <https://www.usnews.com/news/health-news/ArticleArticleArticleArticleArticles/2021-02-19/vaccinating-prisoners-against-covid-19-should-be-a-priority> (explaining that prisoners tested positive at four times the rate of the general population).