



**Using Human Rights Standards to Monitor and Address Racial Discrimination in Drug
Policing: The Case of the United States, United Kingdom, and Brazil**

By Jake Agliata

M.A. Long Thesis
Professor Julia Buxton
Central European University
1051 Budapest, Nador utca 9.
Hungary

© Central European University, November 29, 2019

Acknowledgements

I could fill up another 80 pages just acknowledging all the amazing people I have in life who supported me throughout this endeavor. But the people who need to be thanked the most are the incredible members of my loving family and supportive friends.

My mom, who saw the worst of me through this process yet still provided a supportive environment of unconditional love.

My dad, who gave me welcome distractions from the stress of life when I most needed them.

My sister Jac, who despite being younger is one of my role models.

My grandmother who reminds me it's ok to take pride in your accomplishments sometimes.

My best friends DJ, Mike, Justin, Kenny, Win, Scott, and Garrett, who encourage me to be myself without any filter. And to Anastasia, Jesse, Mirko, and Aga, without whom I never would have survived the year in Budapest.

Finally, Milo, whose entire existence gives physical form to the concept of empathy.

I also want to acknowledge the memory of Grandpa, Pop-Pop, and Mom-Mom. Although you have passed, your impacts, lessons, and examples continue to teach me new things every day. And to Sodapop, who I will never forget.

Fuck the drug war, go birds, ACAB, and trust the process.

Table of Contents

Abstract.....	4
Chapter 1: Introduction.....	5
Chapter 2: The Scope of State Obligations Concerning Racial Discrimination and Policing.....	9
1.1 Framing Racial Discrimination as a Human Rights Issue.....	9
1.2 The Convention and Committee on the Elimination of All Forms of Racial Discrimination (ICERD & CERD).....	11
1.3 Human Rights Standards for Racial Discrimination in Policing	16
1.4 Conclusion.....	22
Chapter 3: The United States – Drug Policing as a Pillar of Racial Hierarchy.....	24
1.1 US Implementation and Engagement with ICERD.....	24
1.2 Racialized Origins behind Police and Drug Prohibition: “The New Jim Crow”	28
1.3 Militarized Policing and the Drug Exception to the Constitution.....	35
1.4 Findings by CERD and Special Rapporteur concerning the US.....	41
1.5 Conclusion.....	45
Chapter 4: The United Kingdom.....	47
1.1 Development of Drug Laws in the UK.....	48
1.2 Racial Disparities & Stop and Search.....	53
1.3 Findings by CERD and Special Rapporteur concerning the UK.....	58
1.4 Conclusion.....	60
Chapter 5: Brazil – Balancing Security Needs With Combatting Police Violence.....	62
1.1 Motivation Behind Brazil’s Repressive Drug Laws.....	64
1.2 Contemporary Issues with Police Violence and Drug Trafficking.....	69
1.3 Findings by CERD and Special Rapporteur concerning Brazil.....	73
1.4 Conclusion.....	76
Chapter 6: Conclusion.....	77
Bibliography.....	80

Abstract

The purpose of this thesis is to examine whether international human rights mechanisms concerning racial discrimination can help reveal and address the problem of racial discrimination in the policing of drug policies. The primary mechanisms used are those which obtain their mandate from the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”). This includes the Committee on the Elimination of Racial Discrimination (“CERD”) and several Special Rapporteurs concerned with contemporary racism and minority rights. Using the jurisdictions of the United States, United Kingdom, and Brazil as comparators, I will demonstrate how drug laws contribute to racialized policing and determine whether the problem has been adequately addressed or noted by monitoring mechanisms. I will conclude by providing commentary of the analysis and recommend actions which can be done by both states and monitoring bodies to provide progressive remedies for the problem.

Chapter 1: Introduction

Since at least the 17th century, there is evidence that the criminalization of psychoactive drugs has been utilized as a tool to uphold racial hierarchy. Spanish-American colonists in South America seeking to protect their economic interests established a racial caste system among three distinct classes: European colonizers, Indigenous peoples, and African slaves.¹ Criminalizing the use of psychoactive plants which often played an important role in indigenous life allowed colonists to legally use violence against native communities.² This policy was justified back home by Catholic concerns that the use of these plants in ceremonies and traditional practices were attempts to summon demons and communicate with the devil.³ Prohibiting these practices was thus seen as necessary for the protection of colonists and for the purpose of spreading Catholicism in the new world. Establishing this moral high ground allowed the racial caste system to function with the European colonizers on top, and enabled violence against communities which used traditional psychoactive plants.

Unfortunately, this problem still exists today. Over the last century the prohibition and criminalization of drug use has been enshrined at the international level through three UN drug conventions and enforced through agencies such as the Commission on Narcotic Drugs, UN Office on Drugs and Crime, and International Narcotics Control Board. The current system was built around a consensus which emerged at the beginning of the 20th century supporting a unified

¹ Ali, Ismail Lourido, and Magalie Lerman. "Colonization Laid the Groundwork for the Drug War." The Fix. April 11, 2018. Accessed June 15, 2019. <https://www.thefix.com/colonization-laid-groundwork-drug-war>.

² *Ibid.*

³ *Ibid.*

global position on drug control.⁴ It has been well documented how the enforcement of this system is disproportionately skewed towards ethnic minorities, particularly people of African descent. In countries where deep racial divides already exist, drug control policies have been abused by state agents such as the police as a tool to perpetuate both implicit and explicit racial discrimination, and even contribute to the promotion of racial hierarchy.

The issue has not gone completely unnoticed. In a report on the implementation of the 2016 UNGASS document, the United Nations Office of the High Commissioner for Human Rights acknowledged ongoing challenges in drug control enforcement related to discrimination against minorities and indigenous communities⁵. The Committee on the Elimination of Racial Discrimination has stated it is concerned about the high rate of incarceration among indigenous communities and persons belonging to minority groups.⁶ The Working Group of Experts on People of African Descent considers racial profiling among people of African descent is encouraged due to the enforcement of drug prohibition.⁷ Furthermore, members of civil society will often cite racial discrimination as an argument in favor of a human rights approach to drug policy. Despite all of this, there is still a troubling lack of urgency displayed by most member states regarding the impacts drug policies are having on racialized police violence in particular. There seems to be a willingness to admit there are disparities in drug sentencing and arrest, but little willingness to identify how drug laws themselves enable discriminatory policing.

⁴ Boister, Neil. "Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs." 389.

⁵ "Implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights". OHCHR (HRC/39/2-8), 2018.

⁶ "Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada". (CERD/21-23), 2017.

⁷ "Report of the Working Group of Experts on People of African Descent". (HRC/33/9), 2016

In this thesis, I seek to answer whether international human rights mechanisms concerning racial discrimination can help reveal the link between drug criminalization and racialized policing, and to what extent can these mechanisms offer states solutions to address the problem. Using the United States, United Kingdom, and Brazil as comparators, I will analyze the extent to which national drug laws have contributed to racialized policing in each jurisdiction, followed by a review of state reports and communications with international monitoring mechanisms to see if they have reached similar conclusions. The primary mechanisms which will be utilized are those which have a mandate from the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”). This includes the Committee on the Elimination of Racial Discrimination (“CERD”) and several Special Rapporteurs concerned with contemporary racism and minority rights.

The states chosen for this thesis were selected for several reasons. In all three jurisdictions there is a clear link between the enforcement of drug policies and racialized policing, albeit not in the same manner and not always explicitly. The United States is arguably the most important country to study for any contemporary drug policy analysis, as many other countries have modeled their own laws after the American “War on Drugs”. Furthermore, recent criticisms by domestic activists have called attention to the unprecedented amount of resources given to police in the name of fighting drug use and trafficking in communities of color. For this reason, I wish to see if international monitoring mechanisms on racial discrimination have noted the same link as others have, and whether communication of this problem would even be effective in a country which has been hesitant to implement international human rights law into domestic policy. The United Kingdom was chosen because, compared to the United States, they have more eagerly embraced the provisions of ICERD, though with some reservations. They

were also chosen because unlike the United States, drug laws were not always centered around prohibiting use, and the links between contemporary drug policies and racialized policing are more indirect than intentional. Finally, Brazil was chosen because I wished to examine this question in the context of a state which has a legitimate security threat stemming from violence related to drug trafficking. Like the United States, Brazil also has a deep history of institutionalized discrimination against people of African descent which may inform their problem with racialized drug policing.

I will begin by establishing the obligations placed on states concerning the elimination of racial discrimination, primarily stemming from ICERD, and then reviewing the relevant monitoring mechanisms to established human rights standards for racial discrimination and policing. I will then devote one chapter to each of the three selected jurisdictions. Each chapter will discuss the state's implementation ICERD and their engagement with monitoring mechanisms, a critical history of the links between drug policies and racialized policing, and finally discuss how monitoring mechanisms have addressed this link, if at all. Each state will be analyzed independently, but the conclusion will provide broader oversights regarding how human rights mechanisms can be an asset in removing racial discrimination from drug policing entirely.

Chapter 2: The Scope of State Obligations Concerning Racial Discrimination and Policing

The purpose of this chapter is to introduce human rights standards by which racial discrimination in the policing of drug laws can be monitored. I will first discuss the scope of state obligations concerning the elimination of racial discrimination as defined by international law, with a focus on the components of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), as well as its monitoring body, the Committee on the Elimination of All Forms of Racial Discrimination (“CERD”). I will further examine how other UN mechanisms, such as the Human Rights Council, Office of the High Commissioner on Human Rights, and Special Procedures aid in the enforcement of the standards set forward in ICERD.

This chapter will not explicitly answer the question of whether these monitoring mechanisms are providing remedies to the problems with racial discrimination in drug policing; that analysis will come towards the end of this thesis. Rather, it will establish a framework by which to evaluate drug policing in each jurisdiction to determine if there are violations with international jurisprudence on racial discrimination.

Framing Racial Discrimination as a Human Rights Issue

Racial equality is a bedrock principle of international human rights law dating back to the League of Nations, whose Covenant included a racial equity clause⁸. At the conclusion World War II, the question of minority rights was a central consideration among so-called ‘small nations’ such as India, Haiti, and Uruguay, which were embracing self-autonomy after centuries of colonial rule and had endured racially motivated violence at the hands of policing agents

⁸ P.G. Lauren, ‘Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference’, *Diplomatic History* 2(3) (1978), 264.

sanctioned by the colonial state. The specific prohibition of racial discrimination also found broad support among European states and the Soviet Union. Though the aftermath of the Holocaust and the emergence of post-colonial race theory led all states to recognize the need to fully reject doctrines of racial superiority, there was apprehension by the United States and United Kingdom to adopt specific statements of racial equity in fear they would threaten domestic segregation policies.⁹ Additionally, there was no universal agreement on a scientific definition of race. This was enough to keep race mixed in with a universal principle of non-discrimination instead of a separate clause explicitly discussing minority rights.

In the Universal Declaration of Human Rights, race is mentioned in the general clause regarding the application of the Declaration's rights to all people without distinction in Article 2 as well as in Article 16, the right to marry, and Article 26, the right to education.¹⁰ Due to lack of consensus on the definition of race, the term "colour" was also added as a precaution.¹¹ Both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural rights follow this approach of including race in overall principles of non-discrimination, in lieu of a distinct clause concerning the protection of minority rights.

The absence of a dedicated convention on racial discrimination does not mean there were no established state obligations. One influential precursor to the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") was UNESCO's Four Statements on the Race Question: The Statement on Race (1950), Statement on the Nature of Race and Race

⁹ *Ibid.* 19.

¹⁰ UN General Assembly, *Universal Declaration of Human Rights*, New York, 10 December 1948, 217A (III).

¹¹ Hilpold, Peter. "The International Convention on the Elimination of All Forms of Racial Discrimination. A Commentary, written by Patrick Thornberry", *International Journal on Minority and Group Rights*, 25. (28 March 2018). 21.

Difference (1951), Proposals on the Biological Aspects of Race (1964), and the Statement on Race and Racial Prejudice.¹² All four statements were influential during the drafting ICERD. To summarize, the statements express the idea differences among humans are primarily due to historical and environmental factors, and there is no biological justification to the concept of inferior or superior races.¹³ They did not dispute the existence of racial differences, but stated these differences were socially constructed and often confused with cultural or national traits. UNESCO is recognized for introducing the term ‘racism’ in an international discourse, referring to a system supported through law which seeks to uphold racial hierarchy.

The Convention and Committee on the Elimination of All Forms of Racial Discrimination (ICERD & CERD)

In the modern UN human rights system, the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) is the primary instrument informing state obligations concerning the racial discrimination. The preamble of the Convention sets its goal to “...build an international community free from all forms of racial segregation and racial discrimination.”¹⁴ It is a successor to the 1960 General Assembly Resolution 1510 (XV), passed in response to global incidents of antisemitism, which called upon all states to “take necessary measures to prevent all manifestations of racial, religious and national hatred.”¹⁵ The Economic and Social Council further passed a resolution in 1962 calling on states to eliminate discriminatory national laws. Drafting on ICERD began in 1963 due to pressure from African nations to create a binding convention as well as a desire from some Arab states to distinguish

¹² *Ibid.* 23

¹³ *Ibid.*

¹⁴ *International Convention on the Eliminations of All Forms of Racial Discrimination*, New York, 21 December 1965, UN General Assembly. Art 24.

¹⁵ UN General Assembly, *Manifestations of racial and national hatred*, 15 December 1960, A/RES/1510.

racial intolerance from religious intolerance.¹⁶ Adopted by the General Assembly in 1965 and entered into force in 1969, the Convention currently has 88 signatories and 182 state parties.

The preamble of the convention echoes the UNESCO statements by proclaiming all doctrines or beliefs based on racial superiority are scientifically false, socially unjust, and unjustifiable in theory or practice. Racial discrimination is defined in Article 1 as:

“...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origins 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.”¹⁷

Notable in this definition is the use of “purpose or effect”, making it clear racial discrimination does not have to be the result of an intentional effort to promote preference based on race. Policies or actions which indirectly lead to the restriction of rights based on race can also be considered racial discrimination under ICERD. This will be important to keep in mind when considering how police enforcement of drug policies can lead to instances of racial discrimination.

After the preamble and Article 1 the Convention can be split into three sections: norms prohibiting racial discrimination (Articles 2-7), the establishment and procedures of the Committee on the Elimination of Racial Discrimination (Articles 8-16), and finally guidelines on

¹⁶ Schwelb, Egon. “The International Convention on the Elimination of All Forms of Racial Discrimination.” *International and Comparative Law Quarterly* 15, no. 4 (1966): 999.

¹⁷ *International Convention on the Eliminations of All Forms of Racial Discrimination*. Art 1(1).

revisions, ratification, accession, reservations, denunciation, and the role of the International Court of Justice (Articles 17-25).

ICERD places a broad negative obligation on states to refrain from all forms of discrimination based on race, specifically legal segregation and apartheid.¹⁸ States must also ensure there are no barriers to effective remedies through national tribunals for those seeking restitution from damages suffered from racial discrimination.¹⁹ In terms of positive obligations, ICERD calls on states to review, amend, or rescind any national laws which “have the effect of creating or perpetuating racial discrimination.”²⁰ Article 5 of the Convention encourages states to take active measures to protect the civil and political rights of all people,²¹ such as measures which deny certain racial groups the right to political participation, freedom of movement, housing, and education among others. Notably, Article 5(b) states all individuals have a right to be protected by the state against violence, including when inflicted by government officials.²² This is particularly relevant to the problem of police violence, and is further supported by the obligation to provide effective protection and remedies against acts of racial discrimination in Article 6.²³ This should also include, according to Article 7, “effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination.”²⁴ Perhaps the most discussed and controversial component of the first part of ICERD, Article 4 calls upon state parties to condemn propaganda or any dissemination of ideas promoting racial superiority and to make incitement to racial

¹⁸ *International Convention on the Eliminations of All Forms of Racial Discrimination*, Art 2-3.

¹⁹ *Ibid.* Art 6.

²⁰ *Ibid.* Art 2.

²¹ *Ibid.* Art 5.

²² *Ibid.* Art 5(b).

²³ *International Convention on the Eliminations of All Forms of Racial Discrimination*, Art 6.

²⁴ *Ibid.* Art 7

discrimination a punishable offense under national law, including incitement by law enforcement or other public authorities. This has been interpreted as placing an obligation on state parties to criminalize hate speech.

Articles 8-16 outlines the establishment and procedures of the Committee on the Elimination of Racial Discrimination (“CERD”). CERD is composed of eighteen impartial experts elected for a term of four years, with consideration given to geographical diversity.²⁵ Under CERD all state parties must submit a report every two years detailing the implementation of the rights set forth in the convention.²⁶ This includes outlining legislative, judicial, policy, and any other measures taken to meet the obligations set forth in the convention. Each report is examined by the Committee, which relays concerns and recommendations to state parties as concluding observations and in its annual report. CERD may also release reports or opinions as instructed by other UN bodies such as the Human Rights Council. Under Article 11, state parties concerned that another state party is violating aspects of ICERD may bring those concerns to CERD, who then transmits the communication to the concerning party. The state receiving the communication can respond to these concerns via written statements clarifying the matter and discussing the remedies they have put in place.

CERD does consider individual complaints or communications from individuals within the jurisdiction of a state which has both ratified the convention and declared the competence of the Committee under Article 14 of the ICERD.²⁷ They will not consider communications from state parties which have ratified the convention but not made the declaration. The states who do

²⁵ *Ibid.* Art 8

²⁶ *Ibid.* Art 9

²⁷ *International Convention on the Eliminations of All Forms of Racial Discrimination*. Art 14(1).

make this declaration may select a national legal body to receive and consider petitions from those within their jurisdiction²⁸. States reserve the right to withdraw their declaration at any time, but this will not affect pending communications.²⁹ Like most individual complaint mechanisms, those submitting the communication must have exhausted all available domestic remedies and cannot submit anonymous communications, though the committee will not reveal their identity to state parties unless they are given consent to do so. The committee's suggestions and recommendations on communications, if they have any, are reported to both the State Party and the petitioner, along with being included in the committee's annual report.³⁰ Articles 11-13 of the ICERD lay out the procedure for interstate complaints.³¹ This is the only international human rights treaty where the interstate complaint mechanism is compulsory for all state parties upon ratification. Interstate complaints under ICERD are rare, just as they are for the entirety of international human rights treaties, with the one exception being a 2018 complaint filed by Palestinian diplomats alleging that Israel has imposed racist and discriminatory policies aimed at Palestinian citizens during their fifty-year colonial occupation.³²

To summarize; ICERD establishes racial discrimination as the restriction or preferential application of rights to an individual or group of individuals based on their identified race, which can constitute skin color, descent, national origin, or ethnicity. Racial discrimination does not have to be purposeful and can be the result of negligence or even an unintended side effect of state policies or actions. Nevertheless, states have an obligation to ensure all people in their

²⁸ *Ibid.* Art 14(2).

²⁹ *Ibid.* Art 14(3).

³⁰ *Ibid.* Art 7-8.

³¹ *Ibid.* Art 11-13.

³² Holmes, Oliver. "Palestine Files Complaints against Israel under Anti-Racism Treaty." *The Guardian*, Guardian News and Media, 23 April 2018, <<https://www.theguardian.com/world/2018/apr/23/palestinians-file-complaint-against-israel-under-anti-racism-treaty>>.

jurisdiction can fully enjoy rights absent of racial discrimination. These obligations are carried out by taking effective measures to review policies and remove discriminatory aspects, criminalize certain actions or speech which may incite racial violence, and ensure effective remedies to claims of racial discrimination. CERD is responsible for monitoring state compliance with their obligations through reporting, state visits, and an individual complaint procedure. The recommendations produced by CERD should, in the spirit of good faith, be adopted by states when applied.

Human Rights Standards for Racial Discrimination in Policing

While ICERD makes it clear states should not have laws which promote ideas of racial superiority, state agents such as police must ultimately be held accountable for operating without racial bias. Because ICERD establishes racial discrimination as something which can occur directly or indirectly, police must be held accountable for selective enforcement of laws based on race, even if such disparities are not intentional. The lengths to which a state will go to hold police accountable for racially motivated actions says a lot about how they will engage with monitoring mechanisms criticizing police for racial discrimination. To that end, several guidelines have been produced by CERD, the Office of the High Commissioner on Human Rights, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

CERD has broadly acknowledged that specific groups face significantly more attention from law enforcement, with a high risk for checks, searches, and detention due to their physical appearance or ethnic origin. Notably, general recommendation No. 34 recognizes that “racism and structural discrimination against people of African descent, rooted in the infamous regime of

slavery, are evident in the situations of inequality affecting them.”³³ States which have a history of laws and government systems which uphold racial hierarchy, such as slavery, segregation, or apartheid, are particularly susceptible to systemic discrimination. Findings of the Working Group of Experts on People of African Descent in a 2016 report to the OHCHR expressed concern that racial profiling is encouraged due to the enforcement of drug prohibition.³⁴ According to the working group, people of African descent are often stereotyped as drug dealers and subjected to racial profiling and detention as a result.³⁵ The problem is often overlooked due to the societal stigmatization against people who sell drugs, thus causing incidents of stereotyping and biased policing to go overlooked.

CERD’s general comment 31, adopted in 2005, discusses the broad prevention of racial discrimination in the criminal justice system. Most of the comment is spent laying out factual and legislative indicators states can use to identify the existence of racial discrimination in the criminal justice system, then recommending strategies to reveal and address the problems at all stages of criminal proceedings. Notably, CERD acknowledges that “no country is free from racial discrimination in the administration and functioning of the criminal justice system, regardless of the type of law applies or the judicial system in force, whether accusatorial, inquisitorial or mixed.”³⁶ It further establishes that at the time of the general comment, racial discrimination in criminal justice systems has increased due in part to the rise of immigration and

³³ UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 34: Racial discrimination against people of African descent*, 79th session, CERD/C/GC/34, Oct. 3, 2011. 6.

³⁴ “Report of the Working Group of Experts on People of African Descent”. (HRC/33/9), 2016.

³⁵ “Report of the Working Group of Experts on People of African Descent on its mission to the United States of America”, A/HRC/33/61/Add.2 art. 45.

³⁶ UN Committee on the Elimination of Racial Discrimination, “CERD General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System” (2005) CERD/C/GC/31. 2.

as a reaction to anti-terrorism measures which encourage anti-Arab feelings.³⁷ Of relevance to policing and drug policies, the comment notes the proportionately higher rate arrest and incarceration rates, as well as harsher sentences, for drug offences can be an indicator of racial bias in policing.³⁸ It further mentions the lack of complaints against the police for such biases could be an indicator in of itself, as fear of reprisal or lack of resources to engage with the complex judicial process creates a lack of trust in law enforcement.³⁹ Because drug use is so highly stigmatized, and thus not something which victims will readily admit to even when faced with racial police bias, this could help explain why not many cases have been brought to CERD which allege racial bias in the policing of drug policies.

In terms of legislative indicators which could reveal causes of racial discrimination, the general comment points to “the potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country, as well as legislation that has the effect of penalizing without legitimate grounds certain groups or members of certain communities.”⁴⁰ While drug policies are not specifically called out here, they have produced disproportionate arrest rates among minorities, a problem which will be examined later in each jurisdiction. Additionally, involvement with drugs is often used by law enforcement officials as a justification to target and arrest certain individuals under the provisions of the listed legislation types. For example, anti-immigration rhetoric in the United States often invokes drug trafficking as justification for why the country needs harsh controls over who can legally enter the country. As a response to this

³⁷ *Ibid.*

³⁸ “CERD General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System” art. 1d.

³⁹ *Ibid* art. 1b.

⁴⁰ *Ibid* art. 4b

problem the Committee recommends states review and eliminate laws which target racial minority groups indirectly in this way or otherwise do not follow the principle of proportionality.⁴¹ This falls in line with state obligations under Article 2(c) of ICERD to review and nullify laws which have the effect of perpetuating racial discrimination.

Additional findings of the comment worth noting include the idea insufficient representation of minority groups in the police force, as well as the overall system of justice, could indicate a race-based power imbalance among police and the general population.⁴² The committee recommends states promote policies which will encourage persons belonging to minority racial groups to become more involved in policing, particularly in communities where they live.⁴³ It also recommends fostering regular dialogue and cooperation between police authorities and representatives of communities affected by disproportionate arrest and sentencing.⁴⁴ Doing so may increase trust between the police and general public which may help address disparities in drug-related policing. Concerning reporting incidents of racial discrimination when they arise, the general comment notes it is difficult to fully comprehend the scale of the problem if states are not regularly collecting information from law enforcement which may indicate racial disparities in their work.⁴⁵ Furthermore, an overall lack of complaints regarding discrimination where arrest disparities exists could further indicate that a state is not fulfilling obligations to facilitate access to justice for victims of racism.

CERD is currently undergoing consultations regarding a new General Recommendation (No. 36) regarding preventing and combating racial profiling. The document is the result of a

⁴¹ *Ibid* art. 5a.

⁴² *Ibid* art. 1g

⁴³ *Ibid* art. 5b

⁴⁴ *Ibid* art. 5c

⁴⁵ *Ibid* art. 3

thematic discussion held during the 92nd session of CERD which discussed racial profiling as a central topic. In their draft published in May 2019, they note racial profiling is a serious problem among law enforcement agencies which can arise due to bias among individual officers or the result of a discriminatory policies born out of a culture which perpetuates ideas of racial hierarchy, either intentionally or unintentionally.⁴⁶ In their recommendations, CERD suggest states should develop training for police officers which promote understanding of the application of policies in the communities they serve.⁴⁷ The training should also include information about the role of police as state agents upholding human rights obligations of states.⁴⁸

Because racial discrimination is a bedrock principle of the international human rights system, UN bodies outside of CERD frequently provide guidance on state obligations concerning the elimination of racial discrimination. One such tool provided by the Office of the High Commissioner on Human Rights (“OHCHR”) is a 2004 handbook titled *Human Rights Standards and Practice for the Police*. Intended as a reference for police officers, it addresses several human rights standards relevant to police practices and offers recommendations for how police agencies can apply these standards in their work. While not directed at states, police operate as agents of the state. Therefore, these recommendations should ideally be enforced by states onto their own police agencies when reviewing overall compliance with human rights standards.

The handbook’s section on non-discrimination in law enforcement does not branch out racial discrimination specifically and includes it in a broader principle of non-discrimination,

⁴⁶ UN Committee on the Elimination of Racial Discrimination. “CERD Draft Recommendation 36 on preventing and combating racial profiling” (2019) CERD/C/GC/36 art. 8.

⁴⁷ *Ibid* art. 27.

⁴⁸ *Ibid* art. 28.

similar to the rest of the UN human rights system outside of ICERD.⁴⁹ When providing recommendations the handbook does, however, contain several provisions law enforcement should follow in recognition of racial divides within states. All police officers are recommended to become familiar with communities they monitor by getting to know leaders of different ethnic communities, and to gain the trust of community members by participating in community service activities.⁵⁰ It also urges police to speak out against racial stereotyping or slurs, particularly among peers, and calls on superior officers to engage in ethnic/race-relations trainings.⁵¹ On a broader scale, the handbook suggests developing a clear race-relations plan of action worked out in consultation with community leaders which includes active recruitment of under-represented racial groups into police service.⁵² Punishment of discriminatory behavior is recommended along with rewards for exemplary efforts by officers in support of better racial relationships in communities.⁵³

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance has further provided commentary on actions states must take regarding policing to ensure compliance with ICERD. In a 2015 report to the Human Rights Council on racial and ethnic profiling, the Special Rapporteur notes that “police, immigration and detention officials frequently employ racial and ethnic profiling, in many different and pernicious ways.”⁵⁴ They point to the disproportionate application of stop and frisk policies⁵⁵ and

⁴⁹ Office of the High Commissioner on Human Rights (OHCHR), “Human Rights Standards and Practice for the Police” (2004) Professional Training Series No.5/Add.3. 7.

⁵⁰ *Ibid* (8).

⁵¹ *Ibid* (9).

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ Human Rights Council, “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere” (20 April 2015) A/HRC/29/46. 16.

⁵⁵ *Ibid*.

the increased use of force against minority populations as examples of law enforcement practices which violate obligations established under Articles 2, 4, 5, and 7 of ICERD as well as the general provisions on equality and non-discrimination in the International Covenant on Civil and Political Rights.⁵⁶ To combat racial profiling in law enforcement, the Special Rapporteur recommends “a clear and unequivocal prohibition of the use of racial and ethnic profiling by law enforcement agencies”⁵⁷, effectively calling on states to legislate policies which outlaw racial profiling as a police tactic. They also recommend states “gather law enforcement data, including statistics disaggregated by ethnicity and race, which are essential in order to prove the existence and the extent of racial and ethnic profiling.”⁵⁸ Doing so can help mitigate risks where law enforcement claims racial profiling is justified based on ethnic statistics. The Special Rapporteur further recommends limitations on the discretion of law enforcement officers to make decisions which may be made based on racial stereotypes, and calls for a multi-stakeholder approach to inform civilians of their rights when stopped by police.⁵⁹

Conclusion

This chapter reviewed state obligations concerning racial discrimination in policing under ICERD and discussed some of the monitoring mechanisms utilized to analyze state compliance with the convention. In general, racial discrimination is defined as the restriction of rights, whether intentionally or unintentionally, to an individual or group of individuals based on race or ethnicity. States have an obligation to ensure all people within their jurisdiction can fully enjoy their rights by ensuring laws and policies do not perpetuate racial discrimination. This also

⁵⁶ *Ibid.* 19.

⁵⁷ *Ibid.* 66

⁵⁸ *Ibid.* 68

⁵⁹ *Ibid.* 73.

includes providing oversight into state agents such as the police and offering remedies to ensure people experiencing discrimination can achieve restitution. To that end, states should regularly review laws to ensure there are protections against possible racial bias. A key part of the analysis of each jurisdiction in this thesis will consider whether such reviews have occurred or if reviews of drug laws specifically have been suggested by monitoring bodies.

In terms of specific standards for policing, communications from CERD, the OHCHR, and Special Rapporteur on contemporary racisms make it clear states have an obligation to ensure policing is carried out without racial bias or preference. States can achieve this through several measures, including training of police, integration of community leaders in policing, and increasing the racial diversity of police forces. Data on law enforcement should also be collected which can identify potential racial disparities in police actions. The lack of complaints by individuals against police regarding discrimination is not in of itself proof that no racial bias exists, as victims may feel doing so is counterproductive if the state stands firmly in defense of the police. To this end, states should ensure regular reviews of law enforcement officials and make avenues for complaints readily available without stigma. Ultimately, police must be held accountable for racial profiling or bias when conducting their duties even if such discrimination is not intentional.

Chapter 3: The United States – Drug Policing as a Pillar of Racial Hierarchy

This chapter will go over the problems with drug policing in the United States and identify possible conflicts with the obligations and standards set out in the first chapter. As previously mentioned, the United States was chosen as a jurisdiction because of the history of both police and drug prohibition as mechanisms of racial hierarchy and because of its unique, if not combative, position on the international human rights system. The question I seek to answer is to what extent the United States' problems with racial discrimination in drug policing have been noted by international monitoring mechanisms and, given the state's reluctance to fully implement human rights obligations into domestic law, whether they have made efforts to rectify these problems. After reviewing the country's complicated relationship and ratification of ICERD, I will discuss the racialized origins behind both police organizations and drug laws in the United States followed by an analysis of how the War on Drugs has given police unprecedented power to enforce laws which uphold a form of racial hierarchy. I'll conclude this chapter by discussing state reports and comments provided to the United States by both CERD and the Special Rapporteur related to drug policing.

US Implementation and Engagement with ICERD

The United States has been hesitant to ratify international human rights conventions, including ICERD.⁶⁰ Understanding why is crucial before discussing how human rights indicators on racial discrimination have been viewed and accepted in the country. The initial opposition of the state concerned Article 4 of the convention, which obliged states to criminalize any incitement to racial discrimination, notably hate speech. The United States, initially backed in the

⁶⁰ Ferguson, C. Clyde. *The American Journal of International Law* 70, no. 3 (1976): 610.

drafting stage by the United Kingdom, supported looser restrictions which required states to only criminalize incitement which would result in, or would be likely to result in, violence. This position is in line with domestic jurisprudence concerning hate speech, notably the imminent lawless action standard established in *Brandenburg v. Ohio*. Under this test only speech which intentionally and imminently incites law breaking is unprotected by the First Amendment. Article 4 thus presented a conflict with US constitutional law as it would obligate the criminalization of racially charged speech even if it did not incite violence.

Domestically, there was a stronger reason for the United States' initial hesitation around ratifying ICERD. During the 1950s a national debate emerged around the executive authority to enter the US into international treaties without explicit congressional approval. There was a fear among many conservatives and isolationists that self-executing treaties would take precedence over the US Constitution, allowing foreign influences to threaten domestic liberties.⁶¹ A set of proposed constitutional amendments known as the Bricker Amendment would have limited the president's power to enter into foreign agreements without congressional approval and prevented the adoption of any self-executing treaty which contained provisions conflicting with the Constitution. Some argue the Bricker Amendment was pursued in part because of fear international conventions may "challenge segregationist laws and policies what were still firmly entrenched at the time".⁶² The 1952 California Supreme Court case *Fujii v. California*, which declared a state law barring Asian immigrants from owning property unconstitutional, provides some evidence of this belief. The ruling was controversial as the reasoning from the court found

⁶¹ *Ibid* 611.

⁶² Gay J. McDougall, "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination", 40 *Howard Law Journal* (1997): 576.

the law unconstitutional because it violated the UN Charter, suggesting the US's ratification of the charter superseded domestic legislation.⁶³ Defenders of the state law were outraged international treaty obligations were being cited to overturn domestic legislation, as opposed to judging the law based solely on US constitutional jurisprudence, and claimed the court's decision could open the door for further infringements of domestic law. Those who agreed with the ruling argued these critics were merely perpetuating this fear to justify upholding a discriminatory and racist law.

While the Bricker Amendment ultimately failed, it did succeed in creating a political environment where attempts to ratify international treaties were met with suspicion and hostility. As a result, the U.S. Senate failed to achieve the two-thirds majority necessary to ratify the Convention for nearly three decades. The first time ICERD was presented to the Senate for ratification was under the Jimmy Carter administration in 1978, as part of a broader effort to align the United States with international human rights. Ratification of ICERD was stalled in the Senate Foreign Relations Committee until the 1990s, when the Bill Clinton administration asked the Senate to give it renewed attention along with a group of limitations.⁶⁴ Finally, ICERD was ratified along with the limiting measures in June 1994.

These limitations took on the form of three reservations, an understanding, and a declaration to ICERD. The first reservation stated the United States would not accept any obligation under articles 4 and 7 to restrict speech rights through the adoption of legislation meant to censor hate speech, in accordance with the First Amendment of the US Constitution. A second reservation further rejected obligations set forth under articles 2, 3, and 5 which set broad

⁶³ Greg Robinson. "Fujii v. California," *Densho Encyclopedia* <<https://encyclopedia.densho.org/Fujii%20v.%20California>> (accessed June 26 2019).

⁶⁴ *Ibid.*

regulations on private conduct, again saying such obligations were not compatible with the right to be free from government interference in private conduct as set forward in the Constitution. The third reservation stated the consent of the United States is required before bringing any dispute to which they are a state party before the International Court of Justice in accordance with article 22 of the Convention. The declaration directly addresses the primary domestic concern around international treaties by rendering ICERD as a non-self-executing treaty. This meant national litigation could not invoke the treaty if there wasn't any corresponding US federal law.

The large number of limiting measures by the United States was criticized by international scholars and commentators, particularly the declaration. There was a belief among many in the international community that the US's ratification of ICERD was an empty, rhetorical act meant to appease civil rights activists back home while not making any meaningful steps towards addressing racial discrimination in the country. The Lawyers Committee for Human Rights argued the United States' limited ratification of ICERD "reflects a deep cynicism about the presumed common commitment to making progress towards international human rights standards".⁶⁵ A member of the Committee believed that "one could conclude that the [Clinton] Administration merely intended a rhetorical commitment to the international human rights treaty regime."⁶⁶ No matter the reason, the US clearly had no desire to be legally bound by the provisions of ICERD or any other international convention.

⁶⁵ Elisa Massimino, "Moving from Commitment to Compliance: Human Rights Treaties in U.S. Law", 5 GEO. J. on Fighting Poverty. 264

⁶⁶ McDougall, "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination". 587.

Racialized Origins behind Police and Drug Prohibition: “The New Jim Crow”

Due to intense anti-drug propaganda over the last century, it’s easy for many U.S. citizens to forget that for most of the country’s history, drugs were not regulated at all beyond religious communities and occasionally for medical purposes.⁶⁷ It was not until the late 19th and early 20th centuries when many of the currently illicit drugs were prohibited for recreational and medical use.⁶⁸ Related to this change in policy is the increased use of police as a mechanism for enforcing racial hierarchy. Ultimately, drug criminalization became another enforceable tool for police to utilize in this mission.

In the United States, policing has always been closely related to the maintenance of racial hierarchies. The first state-funded police forces were “slave patrols” made up of White property-owning men assigned the task of capturing escaped slaves and preventing uprisings.⁶⁹ These patrols were essential towards upholding white supremacy in states such as South Carolina where the number of slaves outnumbered the numbers of whites. After the end of slavery, slave patrols were replaced with police units charged with enforcing “Black Codes”, state laws which turned petty offenses such as loitering into serious offenses when committed by Freedmen and Freedwomen.⁷⁰ Incarcerated individuals were then “hired out” against their will as cotton pickers, miners, and laborers in a situation nearly identical to slavery.⁷¹ These laws were clearly passed with the intention of upholding the system of racial hierarchy which existed during

⁶⁷ Musto, David F. “The American Disease: Origins of Narcotic Control”. New York, NY: Oxford University Press, 2010. 24.

⁶⁸ *Ibid.*

⁶⁹ Cooper H. L. “War on Drugs Policing and Police Brutality.” Substance use & misuse. 2015. 50 (8-9), 1189.

⁷⁰ *Ibid.*

⁷¹ Pelaez, Vicky. “The Prison Industry in the United States: Big Business or a New Form of Slavery?” Centre for Research on Globalization, September 13, 2019.

slavery, and the police were tasked with their enforcement. Although the federal government overturned Black Codes during the Reconstruction era, the nature of police officers as agents defending white hierarchy had already been woven into the identity of policing. This is further evident by the failure of police to stop lynching of black suspects in their custody and the willing enforcement of Jim Crow laws during the early 20th century.⁷²

In the late 19th century xenophobia against immigrants was rampant among white Americans, particularly against Chinese immigrants on the West Coast. President Grover Cleveland famously said the Chinese were “ignorant of our constitution and laws, impossible of assimilation with our people and dangerous to our peace and welfare.”⁷³ Even after the Chinese Exclusion Act of 1882 effectively shut down immigration, those who were already settled in the West Coast were viewed as threats by white communities. These fears were fueled in part by rumors Chinese men were using opium to lure white women into sexual slavery.⁷⁴ Though unfounded, these rumors fueled public calls for action against the Chinese population, leading cities such as San Francisco to respond by criminalizing the smoking of opium. In 1909, US Congress would adopt the same policy on a federal scale after passing the Anti-Opium Act. Although opium was used for medical and sometimes even recreational purposes throughout American society, it was primarily consumed through injecting or drinking tinctures rather than smoking, which was more popular with Chinese immigrants.⁷⁵ Thus, by criminalizing only the

⁷² Ritchie AJ, Mogul JL. “In the shadows of the war on terror: Persistent police brutality and abuse of people of color in the United States.” *DePaul Journal for Social Justice*. 2008 ;1(2):188.

⁷³ “A Ragged Tale of Riches.” *The Economist*. June 19, 2003. Accessed August 16, 2019. <https://www.economist.com/books-and-arts/2003/06/19/a-ragged-tale-of-riches>.

⁷⁴ Redford, Audrey, and Benjamin Powell. “Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914.” *The Independent Review* 20, no. 4 (2016): 502.

⁷⁵ *Ibid.*

smoking of opium, the law effectively targeted Chinese immigrants by giving law enforcement officials justification for arresting, detaining, and deporting members of their community.

A similar approach would be used against African Americans when the Harrison Narcotics Tax Act of 1914 prohibited cocaine use. Myths that cocaine was fueling violent behavior among blacks were fueled by sensationalists newspaper articles, such as a 1914 piece by *The New York Times* titled “Negro Cocaine Fiends are a New Southern Menace: Murder and Insanity Increasing Among Lower Class Blacks Because They Have Taken to Sniffing”.⁷⁶ Headlines such as these coming from popular newspapers reinforced the negative stereotypes whites held about the black community and resulted in demands for the federal government to do something.⁷⁷ Thus, Congress once again made a decision to criminalize a drug on the basis of white xenophobia against a minority group.

The United States continued to use drug prohibition to enforce harsh laws on minority groups in 1930 when the newly formed United States Narcotics Bureau appointed Harry Anslinger as its first commissioner, who immediately started a media campaign seeking the prohibition of marijuana. Just as opium was associated with violent Chinese behavior, and cocaine was associated with violent African American behavior, marijuana at the time was associated with violent behavior among Mexican and Latin American immigrants. Increasingly high racial tensions in border towns led to sensationalist claims by law enforcement about how marijuana promotes lawless behavior. In one instance, a Texas police captain claimed, “Under

⁷⁶ Williams, Edward H. "NEGRO COCAINE "FIENDS" ARE A NEW SOUTHERN MENACE." *The New York Times*, February 8, 1914. Accessed August 16, 2019. <https://www.nytimes.com/1914/02/08/archives/negro-cocaine-fiends-are-a-new-southern-menace-murder-and-insanity.html>.

⁷⁷ Redford, Audrey, and Benjamin Powell. "Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914." 504.

marijuana Mexicans become very violent, especially when they become angry and will attack an officer even if a gun is drawn on him. They seem to have no fear. I have also noted that under the influence of weed they have enormous strength and it will take several men to handle on man while, under ordinary circumstances, one man could handle him with ease.”⁷⁸ Anslinger, backed by law enforcement, sought to use these fears to argue in favor of marijuana prohibition.⁷⁹ Enlisting the help of newspaper mogul and anti-Mexican advocate William Randolph Hearst, he started spreading false myths that marijuana promoted interracial marriage, caused white women to behave provocatively, and fueled Mexican violence⁸⁰. This led to another public outcry, and eventually Congress officially prohibited marijuana with the Marijuana Tax Act of 1937, once again legislating based on unsubstantiated claims stemming from racial xenophobia.

In 1968 the United States ratified the Single Convention on Narcotic Drugs, and in a rare case of immediately implementing an international treaty into domestic law, followed up by passing the Controlled Substances Act of 1970. By the time Richard Nixon officially declared the “War on Drugs” in 1971, drug prohibition was widely accepted in American society as a legitimate and necessary policy, its racist origins nearly forgotten in the public eye. Nixon was instrumental in turning the public rhetoric around drug laws away from controlling the behavior of minority groups towards protecting national security and the rule of law, famously calling drug abuse “public enemy number one.”⁸¹ This allowed millions of dollars to be allocated to law enforcement for the purpose of upholding laws rooted in racist fears without directly evoking the

⁷⁸ Block, Frederic. *Disrobed: An inside Look at the Life and Work of a Federal Trial Judge*. Eagan, MN: West, 2012.

⁷⁹ Herer, Jack, Leslie Cabarga, and Todd McCormick. *Jack Herers The Emperor Wears No Clothes*. Austin, TX: Ah Ha Pub., 2010. 46.

⁸⁰ *Ibid.*

⁸¹ Niesen, Molly. "Public Enemy Number One: The US Advertising Councils First Drug Abuse Prevention Campaign." *Substance Use & Misuse* 46, no. 7 (May 06, 2011): 874.

xenophobic rhetoric. White communities eagerly bought into the idea that militarized enforcement of drug criminalization was necessary, in part due to reports of US soldiers becoming addicted to drugs such as heroin in Vietnam. The origins of drug prohibition were unimportant to the masses, but many suspect the Nixon Administration knew exactly what they were doing by passing policies which would strengthen law enforcement's ability to legally harass minority communities. One of Nixon's top domestic policy advisers, John Ehrlichman, stated during a 2016 interview:

“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”⁸²

Though Ehrlichman's claims should be taken with a grain of salt due to the interview taking place over 40 years after the fact, they should also not be entirely dismissed. Identifying black people as an enemy demonstrates a willingness to disrupt black communities and some belief in ideas of racial hierarchy.

By the time the Reagan administration began its “Just Say No” campaign, arrests for drug possession had more than tripled. Racial disparities among arrests also intensified; by 1992,

⁸² Baum, Dan. "Legalize It All, by Dan Baum." Harper's Magazine. March 31, 2016. Accessed June 20, 2019. <https://harpers.org/archive/2016/04/legalize-it-all/>.

blacks accounted for 40% of all drug-related arrests despite accounting for only 12% of the total population and equal rates of illicit drug use with whites.⁸³ This was aided by Reagan-era legislation establishing mandatory minimum sentences. Like the Anti-Opium Act, mandatory minimums were more harshly applied among substances and methods of consumption more popular among black communities. The Anti-Drug Abuse Act of 1986, for instance, distinguished harsher penalties for crack cocaine than powder cocaine.⁸⁴ Categorically, these are both the same drug, but due to a number of socioeconomic factors, crack cocaine is used more by blacks while powder cocaine tends to be consumed more by whites.⁸⁵ Despite this, the Act established the same mandatory minimum sentence of 5 years for both possession of 500 grams of powder cocaine and 5 grams of crack cocaine, increasing the likelihood of a longer prison sentence for a black consumer of crack compared to a white consumer of cocaine. Additionally, the 1988 Anti-Drug Abuse Act established crack cocaine, but not powder cocaine, as the first controlled substance to carry a mandatory minimum sentence for a first-time possession charge.⁸⁶ These laws are clear examples of racial privilege, given the leniency given to forms of consumption more popular among whites.

Michelle Alexander, a civil rights litigator, argued in her 2010 book “The New Jim Crow: Mass Incarceration in the Age of Colorblindness” that mass incarceration of black and other minority ethnicities is a successor to the Jim Crow laws which enforced racial segregation.⁸⁷ She points to how the number of black individuals incarcerated for drug offenses have increased even

⁸³ Lynch M. *Theorizing the role of the “war on drugs” in US punishment*. Theoretical Criminology. 2012 ;16 : 175.

⁸⁴ Yaner Lim, "Understanding the War on Drugs in America through the Lens of Critical Race Theory," *Bristol Law Review* 2018 (2018): 168.

⁸⁵ *Ibid.* 160.

⁸⁶ *Ibid.*

⁸⁷ Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press, Distributed by Perseus Distribution, 2010. 5.

as overall crime rates have steadily declined.⁸⁸ Alexander believes this can be attributed both to an unfounded public perception on crime based in racially biased rhetoric and the heavy incentives given to police to enforce drug laws which, as previously discussed, disproportionately affect targeted minority groups.⁸⁹ Research into arrest disparities supports the idea drug laws are being selectively enforced. A 1980 analysis by economist Robert Fairlie found whites were 45% more likely to sell drugs than their black counterparts.⁹⁰ The 2012 National Survey on Drug Use and Health indicated that whites are not only more likely to sell drugs, but use drugs as well.⁹¹ Only 10% of blacks reported using illegal drugs within a month of the survey, which is not statistically deviant from the percentage of white users.

Black liberation activist Angela Davis agrees with Alexander's conclusion that selective enforcement of drug policies is mirroring Jim Crow laws, even going further to make comparisons to the aftermath of the Civil War when Southern states passed Black Codes to mirror the system of slavery.⁹² Statistics on prison labor support the idea a form of wage slavery is being operated in US prisons. UNICOR, a government owned corporation created in 1934 as a labor program for people incarcerated in federal prisons, employs 22,560 federal inmates (roughly 25% of all able-bodied federal prison workers) at a meager pay scale of \$0.12-\$0.40 per hour.⁹³ In privately run prisons, around 18 major corporations generate over \$1 billion a year in

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* 16.

⁹⁰ Fairlie, Robert W. "Drug Dealing and Legitimate Self-Employment." *Journal of Labor Economics* 20, no. 3 (2002): 538.

⁹¹ Rothwell, Jonathan. "How the War on Drugs Damages Black Social Mobility." Brookings. Brookings, July 29, 2016.

⁹² Savali, Kirsten West. "Bigger Than Incarceration: Angela Davis Talks Mass Criminalization, Mental Health and the War on Drugs." *The Root*. April 29, 2016. Accessed August 21, 2019. <https://www.theroot.com/bigger-than-incarceration-angela-davis-talks-mass-crim-1790855129>.

⁹³ "Section 3 The Prison Economy - Prison Labor - Prison Index." Prison Policy Initiative. Accessed August 21, 2019. <https://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

profits thanks to extremely low labor costs averaging \$0.20 per hour.⁹⁴ With drug arrests contributing a large amount of the total inmate population, and with most of those arrested African Americans, it's apt to compare the results of the War on Drugs to the results of Black Codes as well as Jim Crow laws.

Stigmatization and dehumanization of people who use drugs has been a central part of the rhetorical arguments in favor of drug prohibition. As previously discussed, much of the argument in favor of drug prohibition is based in false stereotypes that drug use causes violent, erratic behavior among people of color. This has been used to dehumanize drug users of color and portray them in a negative public light. Meanwhile, despite equal rates of use, drug use among white people is treated much differently, as evident by examining racial disparities in the current U.S. overdose crisis. Throughout the crack cocaine overdose crisis in the 1980s and 90s, stereotypes painting black crack users as violent and dangerous drove policy solutions towards enforcing mandatory minimum sentences and heavy policing in black communities.⁹⁵ Today, the focus of the overdose crisis has shifted towards overdoses from opioids as it has become more of a problem in white communities. Accordingly, policy solutions have shifted towards gentler treatment of victims and public health approaches in lieu of heavy criminalization. This demonstrates how even today, drug policies are still legislated and enforced in a selective, racialized manner given favorable treatment to whites.

Militarized Policing and the Drug Exception to the Constitution

So far, I have established how drug control policies in the United States have origins in racial hierarchy and have been selectively enforced on black and minority ethnicities. Now, I will

⁹⁴ Pelaez, Vicky. "The Prison Industry in the United States: Big Business or a New Form of Slavery?"

⁹⁵ Rothwell, Jonathan. "How the War on Drugs Damages Black Social Mobility."

examine how police have been given unprecedented power and authority to enforce this system. Just as with Black Codes, police in the United States have been charged with enforcing policies which ultimately fill prisons and produce cheap labor, and they have been given unprecedented power to carry out this task in the name of combatting drug abuse. Starting with the Ronald Reagan administration and continuing throughout the 90s and early 2000s, anti-drug enforcement spending dramatically increased on local, state, and federal levels. Between 1992 and 2008, state and local expenditures on police nearly doubled from \$131/per capita to \$260/capita⁹⁶, and the number of trained officers increased by 26%,⁹⁷ leading to more officers patrolling the streets of communities where illicit drugs were believed to be used and sold.

The gradual erosion of the Posse Comitatus Act, a key piece of legislation intended to curtail the power of law enforcement officials over civilians, has given police access to military equipment, resources, and training to advance the War on Drugs. Passed in 1878 to prevent the military from acting as civilian law enforcement, the law makes a clear distinction between the roles of the armed forces and the police. While the military was charged with destroying enemies of the country using whatever means necessary, law enforcement was charged with keeping the peace while using as little force as possible.⁹⁸ In 1981 the Military Cooperation with Law Enforcement Act granted the first ever exemption to the Posse Comitatus Act by authorizing the military to transfer military grade equipment to local, state, and federal police agencies for use in drug policing.⁹⁹ The Act also authorized the military to train officers on this equipment and to take a more active role in preventing drug trafficking. In 1986, Reagan declared drugs a national

⁹⁶ Lynch M. "Theorizing the role of the 'war on drugs' in US punishment." *Theoretical Criminology*. 2012; 16: 179.

⁹⁷ Bureau of Justice Statistics at the US Department of Justice. *Census of State and Local Law Enforcement Agencies*, 2008. Washington, DC: US Department of Justice; 2011. Vol. July 2011, NCJ 23398.

⁹⁸ Balko, Radley. "Overkill: The Rise of Paramilitary police raids in America." Washington DC: Cato Institute; 2006. 6.

⁹⁹ *Ibid.* 7.

security threat and called for close cooperation between the military and the police to enforce drug laws.

Ensuing laws throughout the 80s and 90s would further blur the lines between military and civilian drug enforcement by allowing large transfers of military equipment to local and state police agencies and permitting the US Army to train police departments in urban warfare.¹⁰⁰ Equipment such as Mine Resistant Ambush-Protected vehicles (MRAPs), grenade launchers, hollow point ammunition, and advanced surveillance technology could now be employed by police to enforce drug prohibition.¹⁰¹ Although these laws overruled a longstanding domestic policy, there was little media or public attention because of the heavy anti-drug rhetoric coming from the Reagan, Bush, and Clinton administrations stating the drug problem was too serious to rely only on traditional policing.¹⁰² The heavy stigmatization of drug use in black communities, despite equal rates of use among whites as previously mentioned, also contributed to the lack of protest, as the effects of police militarization were not immediately present in their own communities.

The War on Drugs has further empowered racialized police by creating what Thurgood Marshall once called “the drug exception to the Constitution”.¹⁰³ The Fourth Amendment of the U.S. Constitution guarantees “the right of people to be secure in their persons, houses, papers, and effects” and was inserted in response to warrantless searches and seizures by British officers in the American colonies.¹⁰⁴ However, key Supreme Court cases over the last several decades

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* 9.

¹⁰³ Lynch M. “Theorizing the role of the ‘war on drugs’ in US punishment.” 183.

¹⁰⁴ Saleem O “The age of unreason: The impact of reasonableness, increased police force, and colorblindness on Terry ‘Stop and Frisk’” *Oklahoma Law Review*. (1997) 50(4):4 51–493.

have lowered the threshold for police intervention in civilian life by enabling the proliferation of stop and frisk tactics which make it easier for police to harshly enforce drug laws. The landmark case *Terry v Ohio* (1968) first established that police could stop a civilian under “reasonable suspicion” that they were currently or had been engaged in criminal activity.¹⁰⁵ The Court also ruled stop and frisk tactics could be used by police who reasonably suspected someone was armed and dangerous, allowing officers even more leeway to harass individuals under the cover of the law.¹⁰⁶ *Whren v US* (1996) lowered the threshold for stop and frisk even more by allowing officers to make “pretext stops”, or stopping an individual for an unrelated reason to the officer’s suspicion. This has given police the ability to conduct stop and frisk when, for instance, someone commits a minor traffic infraction but the police want to search a car for drugs.¹⁰⁷ *Minnesota v. Dickerson* (1993) further incentivized officers to conduct stop and frisk by establishing the “plain feel” doctrine, stating that as long as an officer’s initial search was valid under criteria established in *Terry*, any other contraband found during the search can be seized.¹⁰⁸

Those who defend stop and frisk argue people who have done nothing wrong have nothing to fear from being searched, and that the procedure is minimally invasive. While this may have been the design, the low thresholds for stop and frisk have allowed searches and seizures to be conducted without a warrant in clear defiance of the Fourth Amendment. Furthermore, it has enabled racial discrimination to be carried out by the police. According to data from the Prison Policy Initiative on New York City’s stop and frisk program, nearly 90% of

¹⁰⁵ Cooper H. L. *War on Drugs Policing and Police Brutality*. 1191.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* 1192

¹⁰⁸ “Racial Biases within Stop and Frisk: The Product of Inherently Flawed Judicial Precedent.” Ramapo Journal of Law & Society. Accessed August 26, 2019. <https://www.ramapo.edu/law-journal/thesis/racial-biases-within-stop-and-frisk-the-product-of-inherently-flawed-judicial-precedent/>.

all uses of stop and frisk in New York City from 2011 to 2017 were conducted on Black and Latin American people.¹⁰⁹ Physical force was used in 23% of these stops, compared to only 16% of the stops for Whites.¹¹⁰ Though searching for weapons is the primary reason usually given by police for stop and search, less than 1% of stops have resulted in a weapon being found.

Stop and frisk has worked hand in hand with rising militarization of the police under the War on Drugs. Due to civil asset forfeiture laws passed by Congress in the 1980s, police departments are permitted to keep up to 80% of property seized from those suspected of drug crimes.¹¹¹ Between 1988 and 1992 alone, it is estimated over one billion dollars' worth of assets has been seized by police under these laws.¹¹² This money is given directly to police departments to fund militarized equipment and officer bonuses, incentivizing widespread drug arrests. Stop and frisk is a useful tactic in this regard; because *Dickerson* established police can seize any illegal objects found during a search, even if it was not the contraband they were looking for, police officers have more incentive to utilize stop and frisk under the grounds established in *Whren*. Under these conditions it is no surprised stop and frisk has been widely abused to conduct drug searches which can yield financial opportunity for police departments.

The combined effects of both police militarization and stop and frisk have been disastrous for black and other minority communities in the United States. No official national database exists to track police killing, meaning studies by civil society are the primary source of numbers on police violence in the United States. The Black Lives Matter movement has highlighted the unjustified deaths by police violence of victims such as Eric Garner, Freddie

¹⁰⁹ Lenehan, Rose. "What 'Stop-and-Frisk' Really Means." Prison Policy Initiative. Accessed August 26, 2019. <https://www.prisonpolicy.org/reports/stopandfrisk.html>.

¹¹⁰ *Ibid.*

¹¹¹ Balko, Radley. "Overkill: The Rise of Paramilitary police raids in America." 18.

¹¹² *Ibid.*

Gray, and Sandra Bland. While these anecdotal stories grab headlines and fuel social unrest, they have also generated interest among activists in gathering statistics which point to a systemic problem with racialized police violence. One study published in August 2019 found that death by police is a leading cause of death for black men, occurring at a rate of about 1 death for every 1000 people even when excluding cases which police described as suicide.¹¹³ Only assault, accidents, suicides, heart disease, HIV, and cancer have higher mortality rates; notably, drug-related death is absent from this list. For Latino men and youth, the risk of being victims of police violence are 1.4 times higher than it is for whites, and for Native American men, the risk is 1.2 to 1.7 times higher.¹¹⁴ For women, the overall risk of police violence is much lower than it is for men, however racial discrepancies still occur. Black women were found 1.4 times more likely to be killed by police as white women, and Native American women 1.1 to 2.1 times more likely.¹¹⁵

According to the Bureau of Justice Statistics ('BJS'), white people are slightly more likely than blacks or Hispanics to have contact with the police, and police were as likely to initiate contact with whites than with blacks.¹¹⁶ However, this is disputed by a 2019 study in the *Journal of Politics* which found that blacks and Hispanics have a higher rate of contact with police, especially in urban areas.¹¹⁷ The BJS statistics do recognize that blacks make up the highest percentage of police-initiated contact for most categories, including traffic stops. Among

¹¹³ Edwards, Frank, Hedwig Lee, and Michael H Esposito. "Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex." *PNAS* (August 2019). 116 (34). 18.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Bureau of Justice Statistics at the US Department of Justice. *Contacts Between Police and the Public*, 2015. Washington, DC: US Department of Justice; 2015.

¹¹⁷ Streeter, Shea (2019-06-07). "Lethal Force in Black and White: Assessing Racial Disparities in the Circumstances of Police Killings". *The Journal of Politics*. 81 (3): 1132.

those whose contact with the police involved threats or use of force, blacks (5.2%) and Hispanics (5.1%) were far more likely than whites (2.4%) to experience this kind of police interaction.¹¹⁸

The Bureau's statistics on homicide by police are a little unclear, as it is uncertain whether they are accounting for all deaths caused by police or only those which have not been reported as accidental by departments.

The combined data from civil society and what is available from the US government clearly shows a racial discrepancy concerning police violence and killings. Because the high rate of contact with police among black and ethnic minorities is fueled by practices established to fight the War on Drugs, one can easily reach the conclusion police enforcement of drug laws is a major contributor towards racialized police violence. This is not to say that drug laws are the sole cause of violence; as has been discussed, the US as a state has sought ways to legitimize oppression against black and other minority communities ever since the end of slavery. Ending the War on Drugs alone does not remove this problem. However, it cannot be denied that the criminalization of drugs has served as a convenient method for police to act as justified state agents working to uphold racial hierarchy.

Findings by CERD and Special Rapporteur concerning the United States

In the addendum of CERD's 2001 report to the General Assembly, the Committee expressed concern about the reluctance by the United States to adopt legislation implementing the provisions of the Convention, and specifically singles out their reservation on Article 4 as well as their far-reaching declaration.¹¹⁹ Notably, the Committee expressed concern that the

¹¹⁸ *Ibid.*

¹¹⁹ UN General Assembly "Report of the Committee on the Elimination of Racial Discrimination" (March 2001) A/56/18. 391.

United States was operating with a definition of racial discrimination that is not in line with Article 1 of ICERD.¹²⁰ While not mentioning drug laws specifically, CERD does recognize that public policies are often executed with racial bias which leads to disparities in both arrests and sentencing, particularly among black men. They recommend the US review its criminal code and related legislation to exclude racial profiling and bias as a factor in police interactions with the public.¹²¹ Furthermore, the Committee recommended the United States take immediate measures to combat racially motivated police violence, including access to effective legal remedies.¹²²

CERD submitted concluding observations to the United States on their fourth, fifth, and sixth periodic reports in 2008. The Committee was largely critical of the country's efforts and reiterated concerns that the US's definition of racial discrimination is not always in line with the Convention due to their broad reservations and declarations.¹²³ While recognizing the state had made efforts at federal and state levels to combat racial profiling in the criminal justice system, it remained concerned about the issue and recommended the US review the recommendations set forth in the 2005 general recommendation 31 on combatting racial discrimination in the functioning of the criminal justice system.¹²⁴ Once again, drug policies are not mentioned explicitly, and the focus on racial profiling in the criminal justice system seems to be on those accused of terrorism. Concluding observations on the seventh, eight, and ninth periodic reports of the United States were submitted by CERD in 2014. The concerns raised were largely the same, despite the US acknowledging after the previous report that racial or ethnic profiling is an

¹²⁰ *Ibid.* 393.

¹²¹ *Ibid.* 392.

¹²² *Ibid.* 394.

¹²³ Committee on the Elimination of Racial Discrimination, "Reports submitted by States parties under article 9 of the Convention: Sixth periodic reports of state parties due in 2005: Addendum: United States of America" (24 April 2007) CERD/C/USA/CO/6. 10

¹²⁴ *Ibid.* 14.

inconsistent practice in law enforcement. However, here the Committee does mention the disproportionate application of mandatory minimum drug sentences as a contributor to racial disparities in the criminal justice system.¹²⁵ CERD recommended the US begin tracking statistics on racial profiling in law enforcement, in addition to reiterating its recommendation for the US to adopt the provisions in General Recommendation 31.¹²⁶

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance made a state visit to the United States in 2009. Interestingly, in its following report to the Human Rights Council, they praised the Supreme Court's decision in *When v. United States* for establishing that the Constitution's Equal Protection Clause prohibits racial profiling by the police.¹²⁷ It makes no mention, however, of the lower pretexts for stop and frisk established with the same decision which have enabled such profiling to occur. The Special Rapporteur does note that "blacks are 3.5 times more likely and Hispanics were 2 times more likely to experience use of police force."¹²⁸ The report further notes disparities between the mandatory minimums established with crack versus powder cocaine have contributed to further discrimination regarding the arrest and sentencing of black and Hispanic citizens. In their official recommendations to the state, they suggest reviewing all mandatory minimum sentences to assess the discriminatory impact on racial and ethnic minorities.¹²⁹ There is no specific recommendation to review racial bias in the actual enforcement of drug policies, but

¹²⁵ Committee on the Elimination of Racial Discrimination, "Reports submitted by States parties under article 9 of the Convention: Seventh to ninth periodic reports of States parties due in 2011: United States of America" (3 October 2013) CERD/C/USA/7-9. 20.

¹²⁶ *Ibid.*

¹²⁷ Human Rights Council "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene: Mission to the United States of America" (28 April 2009) A/HRC/11/36/Add.3. 20.

¹²⁸ *Ibid.* 48.

¹²⁹ *Ibid.* 103

there is a broad recommendation to, as a matter of urgency, adopt comprehensive legislation which would prohibit racial profiling.¹³⁰ Another recommendation calls on the state to monitor trends which lead to racialize police abuse.¹³¹ Such monitoring could, conceivably, include a review of the enforcement of drug policies, though this is not stated.

The Special Rapporteur further commented on racial profiling in the United States in its 2015 report to the Human Rights Council concerning racial and ethnic profiling in law enforcement. They praised the US for a 2003 initiative, updated in 2014 by the Department of Justice, which established mechanisms to combat racial profiling in law enforcement.¹³² The guidance note stated race or ethnicity may not be a consideration in police activities except to the extent permitted by the Constitution. However, the Special Rapporteur notes this guidance only applies to federal agencies, and not to state or local authorities. Their report also does not discuss racial profiling in the United States based on suspicion of drug offenses, and primarily pins the problem on discrimination stemming from terrorist profiling.¹³³ The absence of a mention of drug laws is concerning considering the established connection between these laws and the oppressive use of police force against minority communities.

In its 2019 report to the General Assembly, the Special Rapporteur recognized that “even today, black people are killed and brutalized at alarming rates by law enforcement authorities and vigilantes, who have little to no accountability.”¹³⁴ The Special Rapporteur recognizes this has not occurred by accident, stating that mass incarceration, police violence, and legal forms of

¹³⁰ *Ibid.* 101.

¹³¹ *Ibid.* 102.

¹³² Human Rights Council “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere.” (20 April 2015) A/HRC/29/46. 26.

¹³³ *Ibid.* 46.

¹³⁴ UN General Assembly “Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance” (21 August 2019) A/74/321. 22.

racial segregation are all vestiges of slavery in the United States and consequences of public policies built with the intention of upholding racial hierarchy. It does not mention the War on Drugs or drug policies specifically, but including this in an official communication to the General Assembly is significant nonetheless.

Conclusion

It is not difficult to trace the racialized origins of drug prohibition in the United States and its continued use as a mechanism upholding institutional racial hierarchy even today. The huge amount of military resources and unprecedented power given to police in the name of fighting the ‘War on Drugs’ has been one of the major contributors to police violence and harassment of black and other ethnic minorities. Because the drug war has placed such a heavy stigmatization on people who use drugs, particularly those of color, many feel this approach is appropriate and thus, it has been allowed to continue even today.

The United State’s difficult and unique position with respect to ICERD makes it difficult for international monitoring mechanisms to provide sound recommendations for improvement. If the state continues refusing to implement the provisions of the Convention into federal legislation, they will always be at odds with the Committee and other Special Procedures. However, when these reports have had an opportunity to address racial discrimination in the United States, they have fallen short of explicitly linking drug laws to the problem. Such an omission is significant; if they are failing to recognize the connection between drug prohibition and police violence in a country where the link is so obvious, it’s difficult to trust they will do so in other states. Ultimately, though the actual impact on the United States would likely be minimal, it would be welcome for CERD and the Special Rapporteurs given mandates over minority issues and racism to place a bigger focus on the roles of drug laws towards police

violence and harassment. A good recommendation to begin with would be for the establishment of an official monitoring body which would track police violence throughout the United States.

Chapter 4: The United Kingdom – Moving Towards Explain or Reform

As previously stated, the United Kingdom was chosen for this thesis because, like the United States, a pattern can be traced between the implementation of drug control policies and racialized policing. However, it is less clear if this has been done as part of a broader effort to give police ability to uphold racial hierarchy, or if this is more of an unintended consequence stemming from existing racial bias. The United Kingdom has also more eagerly embraced and accepted human rights treaties such as ICERD, meaning they may be more likely to accept recommendations from monitoring mechanisms if they are provided. I will start by providing a brief overview of their implementation and engagement with the Convention.

Unlike the United States, the United Kingdom was quick to enter ICERD into force, ratifying in 1968 with little national debate, though several reservations were submitted. The first reservation stated application of the Convention to Rhodesia, at the time an unrecognized state within South Africa, could not be ensured by the UK. The second concerned interpretations of several prominent articles. Of note, the UK interpreted Article 4 as requiring state parties to adopt legislative measures criminalizing incitement to racial discrimination only with due regard to the principles in the Universal Declaration of Human Rights. They also interpret Article 6, concerning assurances for effective remedies, as fulfilled if any form of redress is available and interprets satisfaction as any measure which ends the discriminatory conduct. Effectively, this means the UK does not consider reparations for past or present damages an obligation under ICERD, only the end of the discriminatory practice.

The United Kingdom's final reservation states their position that the Commonwealth Immigrants Acts of 1962 and 1968 do not involve any racial discrimination within the meaning of Article 1 of the Convention and reserved its rights to continue implementing these laws. The

1962 Act specified that all Commonwealth citizens, including those in UK colonies, who were either not born in the UK or do not hold a British passport are subject to immigration control.

The 1968 Act further reduced the rights of the same citizens from migrating to the UK, limiting the right of entry to only those born in the UK or those who had at least one parent or grandparent born there. While these acts have been modified today, the UK's reservation still stands. This could indicate that when implementing ICERD, the UK has an interest in ensuring the Convention does not interfere with immigration laws affecting entry into the country.

Development of Drug Laws in the UK

Just as in the United States, drug use in the UK was not heavily controlled until the last century. Unlike the United States, the development of drug control policies has mostly come about due to medical concerns, rather than developed as part of a larger system of social control over minorities. In the late 19th century public health concerns began to emerge among opium use among the working class, particularly regarding manufacturing workers.¹³⁵ There were also concerns about the practice of “infant doping” using products containing opium but marketed under misleading trade names such as “Soothing Syrup”.¹³⁶ This is not to say the UK was absent of racially charged fears concerning drugs; like the United States there were concerns about Chinese-operated opium dens in London which were pushing opium use onto working class citizens.¹³⁷ However, these fears did not immediately lead to the domestic criminalization of drugs as it did in the United States.

¹³⁵ Pearson, Geoffrey. “Drug-Control Policies in Britain.” *Crime and Justice* 14 (1991): 168.

¹³⁶ *Ibid* 170.

¹³⁷ *Ibid*.

At the outbreak WWI, press hysteria around the availability of cocaine to British troops in WWI led to a public divide on drug use between those who continued to view it as a medical issue and those who believed drugs to be a dangerous vice necessitating control through criminal sanctions. The UK did sign the 1912 Hague Opium Convention largely because of global economic and diplomatic pressure, but the UK largely maintained its medical approach to substance misuse.¹³⁸ Still, domestic legislation would be implemented in response to the UK's ratification of the Convention. The 1916 Defence of the Realm Acts (DORA) prohibited cocaine possession in response to press hysteria around the availability of cocaine to British troops in WWI.¹³⁹ They also put more restrictions on liquor licensing and sales, which received more public pushback than the cocaine prohibition. This indicates that although it may not have been racially based, there did exist some level of stigmatization against particular drugs over others. The UK further moved closer towards a US-like prohibition approach to drugs with the Dangerous Drugs Acts of 1920, 1923, and 1928. The first two made the possession of opiates and cocaine illegal unless prescribed by a doctor while the third placed restriction on cannabis use, putting the UK in compliance with the international controls established in the 1925 Geneva Convention.¹⁴⁰ In addition to international obligations, this shift happened amidst sensationalism among the British press that foreign drug traffickers, often stereotyped as African or Chinese, were fueling a rising addiction crisis in England and Wales.¹⁴¹ While not quite as direct as the United States, there is a similarity in that fearmongering by the press about minority groups and drugs encouraged support for criminalization.

¹³⁸ *Ibid.* 171

¹³⁹ British Medical Association, Board of Science. "Drugs of Dependence: The Role of Medical Professionals" (2013). 89.

¹⁴⁰ *Ibid.* 90.

¹⁴¹ Pearson, Geoffrey. "Drug-Control Policies in Britain." 173.

The landmark Departmental Committee on Morphine and Heroin Addiction – named the Rolleston Committee after its chair, physician Sir Humphry Rolleston - was established in 1924 to:

“Consider and advise on the circumstances, if any, in which the supply of morphine and heroin...to persons suffering from addiction to those drugs may be regarded as medically advisable, and as to the precautions which it is desirable that medical practitioners administering or prescribing morphine or heroin should adopt for the avoidance of abuse.”¹⁴²

The committee’s conclusions laid the framework for what would come to be known as the “British System”. It recognized addiction as an issue in the domain of medical practice and thus sought to build a system based on prescription access. Prescriptions to heroin and morphine would be permitted to people requiring gradual withdrawal from use, as well as for people whose work or social functionality deteriorated when not supplied with regulated doses.¹⁴³ A medical panel would be responsible for managing prescribing practices through self-regulation among physicians.¹⁴⁴ Criminal sanctions would still exist for possession of illicit drugs without a prescription, but ultimately the British System has been viewed as striking a balanced medical approach with a penal framework.¹⁴⁵

In the 1960s, Britain saw an increase of heroin use outside of the prescription system, particularly amidst youth. A committee convened in 1961 recommended no changes but increasing media intention towards heroin use led to calls for more restrictions. At the same time

¹⁴² *Ibid.*

¹⁴³ *Ibid.* 174.

¹⁴⁴ *Ibid.*

¹⁴⁵ British Medical Association, Board of Science. “Drugs of Dependence: The Role of Medical Professionals”. 95.

the use of cannabis, LSD, and amphetamines were also on the rise by young people, attributed primarily to the emerging hippie counterculture. However, there were also media generated concerns centered around illicit drug use by black minority groups, including visiting African American musicians.¹⁴⁶ Like the Chinese opium den rumors, fears emerged among white communities that jazz clubs frequented by people of African descent were fueling drug use by young people.¹⁴⁷ As a result of these factors, Parliament passed the 1967 Dangerous Drugs Act. This restricted the number of doctors who could prescribe heroin to those licensed by the Home Office and set up treatment centers within the National Health Services.

In 1971, the UK would further restrict drugs after ratifying the 1961 Single Convention. To meet treaty obligations, the 1971 Misuse of Drugs Act introduced a drug scheduling scheme and established the Home Secretary as the primary office in drug licensing. Criminal penalties were established for drug offences based on their scheduling, though even for drugs in the highest scheduling class, it is permitted to possess if it is administered by prescription. The Act can be considered a significant shift in the UK's drug policy towards a more criminal approach similar to the United States. Though a specific 'War on Drugs' was never proclaimed, by its very nature the Act necessitated more cooperation by law enforcement to enforce criminal laws. There were also some racially based motivations contributing to public support for more law enforcement involvement in the drug policy. Much of the new heroin coming into the UK was originating from Central Asia. While research attributed the rise in use more to the proliferation of smokable heroin, which was attractive to young people who did not want to inject, foreigners

¹⁴⁶ Rowdy, Yates. "A Brief History of British Drug Policy, 1950-2001" (2002) *Drugs: Education, Prevention and Policy*, 9:2, 115.

¹⁴⁷ *Ibid.*

from Iran and Pakistan were often blamed with introducing the new form of consumption to British youth.¹⁴⁸

Despite this shift in policy, recreational drug use continued to rise throughout the 1980s, particularly with cannabis and “party drugs” such as ecstasy. Although the HIV/AIDS epidemic led to the implementation of public health strategies based in harm reduction for people injecting drugs, there was a growing public and political concern about links between drug use and crime. Amidst calls to increase the roll of law enforcement to prevent drug use believed to be leading to a rise in crime, a 1995 Government publication outlining the state’s new drug strategy restated the new aim of national drug policy to be “accessible treatment combined with vigorous law enforcement”.¹⁴⁹ The strategy moved focus away from the harm reduction approach of previous years in favor of promoting a drug-free state under the belief reducing drug use would reduce crime overall.

Generally, this continues to be the state of UK drug policy today. Strategies in the 2000s emphasized the need to move people using drugs into treatment, but still under the same goal of promoting a drug-free state which would reduce crime.¹⁵⁰ The 2010 national drug strategy started to move away from the drugs and crime link towards a focus on the broader socioeconomic factors which drive problematic drug use. However, due in part to the UK’s treaty obligations under the three UN drug conventions, criminal penalties remain in effect. In summary, it’s clear from the UK’s drug policy history that the clear link between drug policy and the maintenance of racial hierarchy is not present as it is in the United States. Over time the introduction of a penal framework would necessitate involvement from law enforcement. Yet the beginning there was a

¹⁴⁸ *Ibid.* 117.

¹⁴⁹ British Medical Association, Board of Science. “Drugs of Dependence: The Role of Medical Professionals”. 92.

¹⁵⁰ *Ibid.* 94.

clear focus on public health, and though racial xenophobia certainly contributed to a shift towards a more penal framework, it was never the sole driver of policy change.

Racial Disparities & Stop and Search

Though drug policing may not have developed as a mechanism upholding racial hierarchies, there is still evidence that just as in the United States, policing of drug policy is contributing to arrest disparities in the UK's criminal justice system. Recent research by the London School of Economics and several NGOs indicate enforcement of drug laws is disproportionately focused on Black and Asian communities, despite similar rates of drug use with White communities.¹⁵¹ Black people in particular are eight times more likely than white people to be arrested for drug offenses, particularly for cannabis possession.¹⁵² The conviction rate is even higher, with black people convicted for cannabis possession at 11.8 times the rate at which white people are convicted, even though data suggests lower rates of use.¹⁵³ Sentencing disparities are also an issue as black people are 9.1 times more likely to be sentenced to immediate custody¹⁵⁴.

At the center of the problem are stop and search policies, which operate similarly to the US stop and frisk practice. Stop and search was first introduced for drugs in the 1971 Misuse of Drugs act and are further expanded upon in the 1984 Police and Criminal Evidence Act.¹⁵⁵ Police officers, who must be in uniform, have the power to conduct a stop and search if they have

¹⁵¹ Carre, Zoe; Delsol, Rebekah; Eastwood, Niamh; Shiner, Michael. "The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales." (2018) StopWatch, Release, London School of Economics: Drug Policy Unit. London. 49.

¹⁵² *Ibid.*

¹⁵³ *Ibid.* 39.

¹⁵⁴ *Ibid.* 42.

¹⁵⁵ "Stop and Search." Release, October 11, 2019. <https://www.release.org.uk/law/stop-and-search>.

reasonable grounds to suspect someone is carrying drugs, weapons, stolen property, or an object which could be used to commit a crime.¹⁵⁶ Stop and search can also be conducted without reasonable grounds if it has been approved by a senior police officer and it is suspected serious violence could take place.¹⁵⁷ Before conducting a search the police officer must state their name, police station, what they are looking for, and that the suspect is entitled to a copy of the search record.¹⁵⁸ During the search the officer can require a suspected individual to remove outer clothing and pat them down, but more thorough searches must be conducted out of the public eye and by an officer of the same sex.¹⁵⁹

The use of stop and search slightly decreased since 2011 across all racial groups.¹⁶⁰ However, it has fallen more sharply among white people, indicating a concentration of the tactic on black and minority ethnicities. Overall Black people were stopped and searched more than eight times more than white people in 2017/17, while Asian people and those of mixed ethnicity were twice as likely to be searched.¹⁶¹ Policing of drugs is driving this disparity; in 2017 almost two-thirds of all stop-searches were targeted at drugs, up from 50% in 2011.¹⁶² It's also worth pointing out that the rate at which drugs are found during searches is lower for black people than white people, suggesting that the reasonable grounds for searches are more lenient when applied to the former. The disparities over stop and search further carries over into conviction and

¹⁵⁶ Ceil, Chenoy, Police and Criminal Evidence Act 1984 (April 21, 2015). 2.

¹⁵⁷ *Ibid.* 3.

¹⁵⁸ *Ibid.*

¹⁵⁹ "Stop and Search." Release.

¹⁶⁰ Bear, Daniel; Eastwood, Niamh; Shiner, Michael. "The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales." (2013). Release, London School of Economics and Political Science. London. 11.

¹⁶¹ Carre, Zoe; Delsol, Rebekah; Eastwood, Niamh; Shiner, Michael. "The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales." 49.

¹⁶² *Ibid.* 9

sentencing. In 2018, 17% of searches resulted in an arrest, while 14% resulted in another kind of action.¹⁶³

The racial disparities in stop and search clearly contribute to the racial disparities in conviction and sentencing. Despite recent reforms to reduce the rate of stop and search, none have directly addressed the disparity problem. This indicates that, like the United States, there is a selective enforcement of drug laws occurring from over policing communities with high black and minority ethnicity populations. It is also similar to the United States in that stop and search was developed as a tactic to make it easier for police to enforce drug policies, even if it is not the sole reason for its implementation. Still, some raise questions about whether this is merely an unintended effect from targeting low income communities which, based on a variety of socioeconomic factors, tend to be predominantly populated by both black and other minority ethnicities and people who use drugs. Those who argue the latter tend to reject the idea drug policy is a racial justice issue in the UK, framing the problem more relevant to income discrimination which highlights drug use in poorer communities because there are fewer private spaces to consume drugs. They believe the statistics used to prove arrest, conviction, and sentencing disparities based on race are chosen selectively and lack further context.¹⁶⁴ This argument is further supported by the fact that, unlike the United States, there is not a history of drug policy being developed as a mechanism of maintaining racial hierarchy.

To test this argument, consider the findings of the 2016/17 Lammy Review, which was commissioned as a review of racial bias in the UK Criminal Justice System. The Report confirms many of the statistics previously discussed and seeks explanations for why they exist to uncover

¹⁶³ *Ibid.*

¹⁶⁴ “The Lammy Review Fails to Prove Bias in the Criminal Justice System.” Civitas, January 2, 2018. <http://www.civitas.org.uk/press/the-lammy-review-fails-to-prove-bias-in-the-criminal-justice-system/>.

the source of the problem. One of the biggest concerns the report raises is that even in figures which point to an overall reduction in crime numbers across all ethnicities, the numbers for black and minority ethnicities ('BME') are still rising significantly.¹⁶⁵ This links back to a problem discussed with stop and search; although the rate of stop and search has decreased overall, it has decreased most significantly among white populations while remaining relatively high among black and other minority populations. The Lammy Review notes that often, stop and search is linked to suspicions of gang activities among youth such as drug dealing. Black youth are ten times more likely than white youth to be arrested for drug offences in relation to gang activity.¹⁶⁶ The report notes there is a public narrative about young black people associating with gangs which may be fueling this disparity in stop and search among black youth¹⁶⁷. This supports the argument police are disproportionately using the tactic on BME people as a result of racial stereotypes, as opposed to the racial disparity being an unintended consequence of low-income policing.

This further contributes to a primary problem highlighted by the report; distrust in the criminal justice system. The report cites a 2015 crime survey for England and Wales which indicates 51% of people from BME communities believe "the criminal justice system discriminates against particular groups and individuals."¹⁶⁸ This can lead to more instances where BME people act cautiously around police in a manner which could be interpreted as suspicious by an officer who may be influenced by racial bias. Findings further suggest suggest

¹⁶⁵ Lammy, David. "The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System." (2017) London: 4.

¹⁶⁶ *Ibid.* 19.

¹⁶⁷ *Ibid.* 6.

¹⁶⁸ Bowen, Phil. "Building Trust How our courts can improve the criminal court experience for Black, Asian, and Minority Ethnic defendants" Centre For Justice Innovation. (2017). 7.

one of the reasons the high sentencing disparities exist is because BME defendants often plead not guilty due to fear they are being coerced by the police into a guilty plea, thus passing up the opportunity for a reduced or commuted sentence.¹⁶⁹ There is a clear ‘us vs them’ mentality when it comes to law enforcement and BME communities, especially the youth who are stereotyped as gang members. It cannot be denied that the disproportionate use of stop and search for drugs is one of the things fueling this distrust.

These findings in the Lammy Review support the idea drug policing is a big contributor to the overall disparities in the UK criminal justice system, though it cannot be called the only factor. Disproportionate application of stop and search in BME communities has eroded trust in the police, which further drives higher rates of conviction and sentencing. Ultimately, more evidence is needed to understand which reforms may be implemented to resolve the problem. The report recommends setting higher standards for analysis of ethnicity in the criminal justice system, calling for an approach of ‘explain or reform’.¹⁷⁰ If there are disparities in drug policing that cannot be explained through evidence, then by default action needs to be taken to close the disparity. This means that to those who argue racial bias in policing is an unintended consequence, the burden on proof is on them to prove what is fueling the disparities instead. Otherwise, the criminal justice system should be altered to reduce this disparity. In the case of the UK, this could mean further restricting the use of stop and search to account for racial biases which may exist among police officers.

¹⁶⁹ *Ibid.*

¹⁷⁰ Lammy, David. “The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System”. 14.

Findings of CERD and Special Rapporteur concerning the United Kingdom

The most recent communication from CERD on the United Kingdom was in 2016, when they submitted concluding observations on the state's combined 21st to 23rd periodic reports. The report contains mostly concerns, particularly regarding the UK's reservations under Articles 4 and Article 6. CERD feels these reservations have prevented the UK from fully implementing ICERD into domestic law, particularly in their overseas territories.¹⁷¹ Related to policing, the Committee does praise the UK for the "2020 Vision" policy, which seeks to increase the number of people from ethnic minority groups in police forces and other areas of employment.¹⁷² They also recognize recent measures adopted by the UK to ensure stop and search is not practiced with racial profiling have led to some reductions in the use of the practice against people of African and Asian descent in certain parts of England.¹⁷³ However, the Committee remains largely concerned that stop and search is being used disproportionately on black and other ethnic minorities. They recommend the state refer to General Recommendation 31 for suggestions on how to ensure stop and search is not used in a discriminatory manner¹⁷⁴. CERD further criticizes the country for the overall disparities in arrests and sentencing regarding people of minority ethnicities.¹⁷⁵ There is no commentary on the impact of drug policies specifically with this problem, and the Committee again refers to General Recommendation 31 for suggestions on how the state can address racial bias in the overall criminal justice system.¹⁷⁶

¹⁷¹ Committee on the Elimination of All Forms of Racial Discrimination "Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland". (3 October 2016) CERD/C/GBR/CO/21-23. 10.

¹⁷² *Ibid.* 10.

¹⁷³ *Ibid.* 26.

¹⁷⁴ *Ibid.* 27.

¹⁷⁵ *Ibid.* 30.

¹⁷⁶ *Ibid.* 31.

In its 2015 report to the Human Rights Council, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance points to several initiatives undertaken by the United Kingdom to counter racial profiling in policing. It mentions the 2000 Race Relations (Amendment) Act as an example of a positive action taken by a state to address racial profiling among the police.¹⁷⁷ The Act establishes a clear prohibition on racial profiling by extending it to the performance of public functions by the police. The Special Rapporteur further notes progress made by the Equality Act of 2010, which establishes a legal framework to advance equal opportunity under the law by calling on all organizations performing public duties, such as the police, “to advance equality of opportunity for minority groups and to foster good relations between minorities and the rest of the community.”¹⁷⁸ The report further praised the UK’s Independent Police Complaints Commission for investigating complaints about police misconduct, noting in particular its independence from police or government.¹⁷⁹ The Metropolitan Police Authority in London is also praised for setting up a panel on stop and search intended to hold police officers accountable for overstepping their duties.¹⁸⁰

In July 2019 the Special Rapporteur made an official state visit to the United Kingdom and makes several comments of note. It praises findings of the Lammy Review concerning stop and search, noting that a “tolerated culture of racial profiling is at work in certain police forces” and stating in particular the effect drugs have on these disparities.¹⁸¹ In the state’s comments on

¹⁷⁷ Human Rights Council “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere.” (20 April 2015) A/HRC/29/46. 44.

¹⁷⁸ *Ibid.* 45.

¹⁷⁹ *Ibid.* 52.

¹⁸⁰ *Ibid.* 55.

¹⁸¹ Human Rights Council “Visit to the United Kingdom of Great Britain and Northern Ireland” (27 May 2019) A/HRC/41/54/Add.2. 38.

the visit by the Special Rapporteur, the UK restates their commitment to implementing the Lammy Review recommendations and state their belief that stop and search procedures have been reformed to be more intelligence-led. But while the Special Rapporteur commends the UK's efforts to address biased policing, neither they nor the government provide recommendations to review drug policies in particular. This is odd, considering they recognize how racial profiling stemming from drug stereotypes contribute to the disparities of stop and search. It seems to be the only policy which they do not specifically mention reviewing. In the concluding recommendations they do mention fully implementing the recommendations made in the Lammy Review, which includes the explain or reform approach regarding drug policies.¹⁸² Perhaps this should be taken as a recommendation to review the effects of drug policies on policing, though it would be more effective to state so explicitly.

Conclusion

The United Kingdom, like the United States, has a clear problem with racial discrimination in the policing of drug policies. Disparities exist in the arrest, conviction, and sentencing rates between BME communities and white communities which are being fueled in large part due to stop and search tactics executed with racial bias. However, unlike the United States, the development of penal drug laws has not been closely linked to the maintenance of racial hierarchy. Aside from stop and search, drug laws have not given extra privilege and resources to the police in the name of combatting drug use in the same manner as the United States. Still, the UK is clearly in violation of their ICERD obligations as racial discrimination can still occur as the results of negligence or unintended side effects of policies. Thus, the UK

¹⁸² *Ibid.* 74(o).

should address the issue through the ‘explain or reform’ approach outlined in the Lammy Review.

This approach falls in line with provisions laid out in ICERD to review legislation and policies which may be a contributing factor to racial discrimination. CERD has largely recommended this to UK in its comments on their periodic reports, though they have failed to recommend reviews of drug policies specifically. The Special Rapporteur has come closer to this kind of suggestion but has still not explicitly stated a recommendation to review drug laws. Ultimately, while the Lammy Report lays out the same type of recommendations which would be welcome by CERD or Special Rapporteurs, it would be welcome to see a more direct acknowledgement of the role drug policies play in racialized policing by these monitoring bodies.

Chapter 5: Brazil – Balancing Security Needs with Combatting Police Violence

Brazil was chosen as a jurisdiction in this paper because its' problem with racial inequality is often compared to the United States. Both countries were among the last to abolish slavery in the Western Hemisphere, with Brazil being the last country to do so in 1888. During the Atlantic slave trade era, an estimated 4.9 million slaves from Africa were brought to Brazil, composing 40% of the total number of slaves brought to the Americas.¹⁸³ As such, the country is still dealing with the ramifications of a long-established system of racial hierarchy favoring people of European descent. Sociologist Michael Lowy argues there is a close relationship between inequalities of race and class, pointing to how the great majority of the lower income classes in Brazil are black or mixed race.¹⁸⁴ This inequality is seen in both rural and urban areas of the country. Due to its geographical position and size, Brazil has also emerged as a pivotal drug trafficking location, particularly for cocaine smuggling into Europe. Violence associated with drug trafficking has pushed Brazil to adopt a punitive approach to drugs which requires police to operate with military authority in communities where illicit drugs are present. The question I seek to answer in this chapter is to what extent is this a legitimate response to the problem of violence associated with trafficking, or whether underlying racial tensions have perpetuated a culture of violence against Afro-Brazilians in the name of combatting trafficking.

Like the United Kingdom, Brazil was quick to enter ICERD into force, ratifying in 1969. In Brazil, a law predating ICERD gave Afro-Brazilians the right to report incidents of racial disputes to the judiciary and punishes prejudice based on race as a misdemeanor. The 1951 law,

¹⁸³ Conrad, Robert. "Children of God's Fire". The Pennsylvania State University Press. 1984.

¹⁸⁴ Lowy, Michael. "Brazil: A Country Marked by Social Apartheid". Logos: A Journal of Modern Society and Culture, Volume 2 Issue 2, Spring 2003. 21.

known as the Afonso Arinos Act, was enacted after a major social debate regarding the refusal to host a black U.S. dancer in a luxury São Paulo hotel.¹⁸⁵ Black activists were divided on the law. Some saw it as a victory as it gave legal precedent to challenge segregationist laws and hold white Brazilians accountable for prejudice.¹⁸⁶ Others saw it as a weak law aimed at appeasing black voters while not actually addressing the core issue of racism.¹⁸⁷ By the 1980s, the consensus among leaders in the Afro-Brazilian community was that treating racism as merely a misdemeanor was not enough, and called for implementing measures which would criminalize racist behaviors.¹⁸⁸

Once Brazil signed onto ICERD, the legislature voted to approve the Convention with no reservations. However, due in part to the pacification of black activists after the Alfonso Arinos Act, this was not followed by implementation of national legislation to carry out the Convention's positive obligations.¹⁸⁹ Furthermore, Brazil did not recognize the competence of the Committee to receive individual complaints until 2002, when fresh demands for measures such as affirmative action were being heard by the government at the insistence of Afro-Brazilian activists.¹⁹⁰ It should be noted that although Brazil generally failed to act on their treaty obligations for nearly 40 years after adopting the Convention, this can in part be attributed to civil strife as a result of the country's military dictatorship. The 1988 Brazilian constitution did include provisions which carried out treaty obligations such as criminalizing the propagation of

¹⁸⁵ Ferreira, Carolina Cutrupi; Santos, Natalia Neris da Silva; Machado, Marta Rodriguez de Assis Machado. "Punitive Anti-Racism Laws in Brazil: An Overview of the Enforcement of Law by Brazilian Courts." Brazilian Center of Analysis and Planning, Section of Law and Democracy. 2011. 2.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.* 3.

¹⁸⁹ Martins, Sergio da Silva; Medeiros, Carlos Alberto; Nascimento, Elisa Larkin. "The Road from 'Racial Democracy' to Affirmative Action in Brazil." *Journal of Black Studies*, vol. 34 no. 6. July 2004. 797.

¹⁹⁰ *Ibid.* 803.

prejudice against ethnic groups and expanding the ability for Afro-Brazilians to seek reparations for racial discrimination in court.

Motivation Behind Brazil's Repressive Drug Laws

Drugs were generally not regulated under criminal control in Brazil prior to the 20th century, with one notable exception. Like the US, the first drug control law in Brazil was enacted with the intent of criminalizing a racial minority group. In 1830, as a response to cannabis use among African slaves cultivating hemp, the Municipal Council of Rio de Janeiro prohibited cannabis being brought into the city and established punishments for any slave who consumed.¹⁹¹ There was a belief cannabis use among slaves was not only wasteful, but inspired thoughts of rebellion. This historical precedent has led to a stigmatization of cannabis use in Brazil's second largest city. It's also notable that during the Second International Opium Conference in 1924 the Brazilian delegate argued in favor of a proposal by Egypt to list cannabis along with opium and cocaine as a controlled substance, even calling cannabis "as dangerous as opium".¹⁹² It is theorized Brazil took this approach partially due to the association with cannabis use among Afro-Brazilians. Brazil's support for this proposal was crucial for its approval during the conference.

From 1964 to 1985 Brazil operated under the authority of a military dictatorship. This period was marked by severe political oppression, suspensions of habeas corpus, and violent suppression of free expression upheld through police enforcement of a strict criminal code. Unsurprisingly, under these wider suppressions of democratic freedoms, a tough crime and

¹⁹¹ Clarke, Robert; Merlin, Mark. "Cannabis: Evolution and Ethnobotany". University of California Press. 1 September 2013. 182.

¹⁹² Kendell, Robert. "Cannabis condemned: the prescription of Indian hemp". Addition 98. 2003. 143.

punishment approach to drugs was also adopted. Drug legislation was strongly influenced by the 1961 and 1971 UN Drug Conventions, as was the government's close diplomatic ties to the United States.¹⁹³ A strict penal code modeling the US War on Drugs was implemented in 1968 under Decree-Law No. 385, passed during the *de facto* government while Congress was suspended. The law equated the use of drugs to trafficking of drugs, giving both crimes the same penalty of one to five years in prison plus fines.¹⁹⁴ It also made it illegal to merely encourage the use of illegal drugs.

Though in general the same approach to drugs continued throughout the 1970s and 1980s, there were some changes. The "Toxics Law" of 1976 gathered all of Brazil's previous drug legislation into one single, unified law.¹⁹⁵ Notably, it established obligatory drug treatment as a possible punishment for use in lieu of prison. However, because the logic from this approach stemmed from an antiquated medical vision labeling drug users as weak and powerless, this still maintained an overtly authoritative approach to drugs. In practice this was often used to punish an individual even if they had committed no crime, and prison time was still more likely for those convicted of drug use.¹⁹⁶ Furthermore, the law also limited certain rights of the defense and increased the range of sentencing for trafficking. Unsurprisingly, as a result of these laws there was a massive increase in the total number of people incarcerated in Brazil, most of them Afro-Brazilians.¹⁹⁷

¹⁹³ Ferreira, Carolina Cutrupi; Santos, Natalia Neris da Silva; Machado, Marta Rodriguez de Assis Machado. "Punitive Anti-Racism Laws in Brazil: An Overview of the Enforcement of Law by Brazilian Courts." 9.

¹⁹⁴ Metaal, Pien; Youngers, Coletta. "Systems Overload: Drug Laws and Prisons in Latin America". Transnational Institute & Washington Office on Latin America. (March 2011). 30.

¹⁹⁵ *Ibid.* 31.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.* 32

As the country transitioned out of dictatorship and into democracy, laws in the 1990s began to ease penalties for drug use. However, the Brazilian Supreme Court's interpretation of these laws denied the possibility of alternative or lessened penalties for trafficking, as it was still viewed as a major part of the overall violence plaguing the country.¹⁹⁸ As a result, a wide class divide emerged among middle and upper class drug users, who could afford to fully fund their habit, and lower class users who typically had to engage in selling or trafficking drugs to fund their habit. Because of social inequality in Brazil, most of these lower-class offenders arrested for trafficking were Afro-Brazilian.¹⁹⁹

Understanding the concept of “penal populism”, referring to the general belief that military or police rule guarantees safety, is key to understanding why Brazil has taken such a hardline approach to drug trafficking and has generally not distinguished trafficking from use.²⁰⁰ Under this philosophy police bloodshed and violence in the country, especially urban areas, justifies a militarized approach to policing which also overlooks misconduct. Support for the idea of penal populism is widespread in not only Brazil, but in many Latin American countries which have a history of military dictatorships and have witness a sharp rise in violence associated with drug trafficking. Groups such as *Comando Vermelho* (The Red Command), founded in 1969 by left-wing political prisoners, declared a war on the police initially in the name of fighting back against fascist repression.²⁰¹ The group carried out attacks on police stations which included explosions causing collateral and public damage to bystanders. These activities were funded in large part by drug trafficking in collaboration with Colombian cartels.²⁰² This coincided into

¹⁹⁸ *Ibid.* 33.

¹⁹⁹ *Ibid.*

²⁰⁰ Desimone, Arturo. “Brazil’s failed war on drugs revisited”. Open Democracy. (13 May 2019). <https://www.opendemocracy.net/en/democraciaabierta/brazils-failed-war-on-drugs-revisited/>

²⁰¹ *Ibid.*

²⁰² *Ibid.*

violent clashes between police and people suspected of collaborating with the Red Command or similar groups, such as *Primeiro Comando da Capital* (PCC), a similar prisoners' movement which emerged in São Paulo. By the 1980s, after achieving little in the way of political victories, these groups had abandoned their political ideologies and moved primarily into profit-driven cocaine trafficking²⁰³. Because groups such as the Red Command took on leadership roles in poor, predominantly Afro-Brazilian urban neighborhoods, police resources were directed towards enforcing criminal codes, such as drug prohibition, in these communities.

Throughout the years of dictatorship in Brazil, penal populism drove support for a militarized crackdown on drugs, not only because of the left-wing identity of criminal trafficking organizations, often referred to as Comandos, but also due to their heavy influence over community life. Drug traffickers were labeled as terrorists by prominent political figures to justify the use of military grade equipment such as armored cars, helicopters, automatic assault rifles, and snipers by the police.²⁰⁴ This is strikingly like the US approach of militarizing domestic police with equipment designed for war. However, as opposed to the US, it could be argued Brazil's approach was justified because Comandos presented a real and present danger to public life. Gabriel Feltrain, a researcher on urban life in Brazil, argues trafficking groups maintain *de facto* control over certain territories where they manage informal justice systems.²⁰⁵ In Sao Paulo, for instance, the PCC assumes jurisdiction over petty crimes and community conflicts, laying down punishments and restitution as if they had a legally supported mandate.²⁰⁶

²⁰³ "Red Command." InSight Crime, May 18, 2018. <https://www.insightcrime.org/brazil-organized-crime-news/red-command-profile/>.

²⁰⁴ Santoro, Mauricio. "The Brutal Politics of Brazil's Drug War." *The New York Times*. Accessed October 28, 2019. <https://www.nytimes.com/2019/10/28/opinion/brazi-war-on-poor.html>.

²⁰⁵ Miraglia, Paula. "Drugs and Drug Trafficking in Brazil: Trends and Policies." Brookings Institute, Latin America Initiative. 5 May 2015. 6.

²⁰⁶ *Ibid.* 7.

Because these organizations essentially claim a monopoly on law and order over the police, they have been labeled as enemies of the state in the same vein as a foreign combatant. In addition to the monopoly over law and order, drug trafficking organizations are also responsible for a heavy amount of arms trafficking, which increases the rate of violence and homicide in communities where Comandos maintain a greater presence than the police. Viva Rio, a Brazilian NGO, found that between 7.6 million and 10.7 million illegal firearms are trafficked throughout Brazil by trafficking organizations.²⁰⁷ Arms trafficking has contributed to the high levels of violence stemming from territorial disputes among Comandos and during clashes with the police.

In the name of combatting the influence of Comandos, police in Brazil have been encouraged to match violence with more violence. State policies during the 1980s and 1990s actively rewarded police with financial incentives based on the number of criminals they killed.²⁰⁸ Jurema Werneck, Executive Director of Amnesty International Brazil, says “the repercussions of this inhumane approach are felt to this day. Instead of guiding the police to protect and preserve life, the state has reinforced the notion that the police’s role is to kill.”²⁰⁹ The 1993 Candelária massacre is a good example of how police violence plays out in urban Brazil. The Candelária church in central Rio de Janeiro had become a popular location for hundreds of homeless black youth who were suspected of being involved with drug trafficking. As a result, this area was heavily patrolled by police and residents faces persistent harassment. On the morning of July 22, 1993, several youths threw stones at police cars. Later that evening, police retaliated by pulling up in cars outside of the church and fired without discretion at a

²⁰⁷ *Ibid.* 11.

²⁰⁸ “Brazil: Police Killings of Black Youths Continue, 25 Years after the Candelária Massacre.” Amnesty International. Accessed October 27, 2019. <https://www.amnesty.org/en/latest/news/2018/07/brazil-police-killings-of-black-youths-continue-25-years-after-the-candelaria-massacre/>.

²⁰⁹ *Ibid.*

group of roughly seventy people sleeping in the vicinity.²¹⁰ Six children and two adults were killed, and dozens other were wounded. Despite condemnation of the massacre both inside and outside of the country, only two of the estimated fifty officers who participated in the shootout were ever sentenced to prison time. The Brazilian documentary *Bus 174*, chronicling a separate police massacre, tracked the fate of the other survivors and found 39 of them were eventually killed in other instances of police violence.²¹¹

Contemporary Issues with Police Violence and Drug Trafficking

The end of the military dictatorship in Brazil did not lead to any ease in the tensions between police and Comandos, and interestingly, there has been an increase in police related violence since Brazil's return to democracy. One study which examined police violence in 19 Brazilian states from 1994 found that underlying racial tensions, stemming from police operations in Afro-Brazilian communities where cartels maintain operations or indirect jurisdiction, continue to significantly drive the use of lethal force by military police.²¹² The problem is most present in cities such as Rio de Janeiro, where violent homicides occur at a rate of 32.5 per 10,000 people.²¹³ In the first quarter of 2019 alone, an average of seven people a day were killed by police in the city, which is the highest average in over two decades.²¹⁴ State security forces have further been identified as responsible for 38% of all violent deaths in the city.²¹⁵ Collateral damage is a huge problem in these campaigns; victims are often accidentally struck in the crossfire and are left without assistance by police in pursuit of fleeing suspects.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Ronald E. Ahnen. "The Politics of Police Violence in Democratic Brazil." *Latin American Politics and Society* 49, no. 1 (2007): 145.

²¹³ *Ibid.* 146.

²¹⁴ *Ibid.*

²¹⁵ Santoro, Maurício. "The Brutal Politics of Brazil's Drug War."

Some witnesses of these killings report military police officers fire without discretion into crowds or at vehicles, despite claims the use of military grade equipment would allow for more precise aiming and operations.

Victims of police violence throughout Brazil's major cities are more likely to be Afro-Brazilian than any other ethnicity. A 2008 study found that "non-white, darker-skinned men continue to be the most common targets of police harassment."²¹⁶ A separate survey studying the city of Sao Paulo found 91% of black men in the city had been stopped by the police at some point.²¹⁷ Across all of Brazil, 53% of citizens identify as black or mixed-race, yet also make up 77% of all homicide victims.²¹⁸ Research has identified that a significant number of all Afro-Brazilian homicides are committed by the military police.²¹⁹ In 2013, nearly 80% of homicide victims resulting from police intervention were Afro-Brazilian.²²⁰ Police are rarely held accountable for these deaths, compounded by a defense instrument known as 'resistance followed by death', an old mechanism from the years of dictatorship which legitimizes police homicides on the grounds of self-defense.²²¹

One important characteristic of police brutality in Brazil is what some call to "the paradox of the black-on-black nature of much police abuse, especially by the military police."²²² This refers to the fact much of the police violence against Afro-Brazilians is committed by black

²¹⁶ French, Jan Hoffman. "Rethinking Police Violence in Brazil: Unmasking the Public Secret of Race." *Latin American Politics and Society* 55, no. 04 (2013): 163.

²¹⁷ *Ibid.*

²¹⁸ Ribeiro, Eduardo. "How Carnival Showcases Brazil's Racist Drug Policy." Open Society Foundations. Accessed October 27, 2019. <https://www.opensocietyfoundations.org/voices/how-brazil-s-drug-war-became-crusade-against-people-color>.

²¹⁹ Human Rights Council. "Reports of the Special Rapporteur on minority issues on her mission to Brazil." (9 February 2016) A/HRC/31/56/Add.1. 50.

²²⁰ *Ibid.*

²²¹ *Ibid.* 52.

²²² French, Jan Hoffman. "Rethinking Police Violence in Brazil: Unmasking the Public Secret of Race".162.

police officers. Some use this as an argument to assert colorblindness among the police and deny any aspect of racial discrimination; they argue if black police are responsible for violence against black citizens, then certainly racial discrimination is not a problem in policing. However, this ignores the historical role of police in Brazil as state agents charged with upholding a system of racial hierarchy. The fact police officers can be the same race of those who are being oppressed does not negate this reality; if anything, it reaffirms tactics used to integrate black minorities into a white dominated society by offering certain privileges in exchange for assistance upholding the status quo. Many Afro-Brazilians join the police because it offers an opportunity to escape from poverty or because it is one of the few career paths which offer them social ascension.²²³ This is a historic tool used to pit members of an oppressed group against each other to the benefit of their oppressor; in this case, the white ruling class in Brazil is using the privileges of being a police officer to divide Afro-Brazilian communities. It also absolves the white officers of responsibility over racial disparities.

The most recent changes to Brazil's drug law took place in 2006 with The New Drug Law (Law 11,343/2006).²²⁴ One notable aspect of the law is the recognition of "fundamental rights of human persons, especially with regard to their autonomy and liberty, the acknowledgment of diversity, and the adoption of a multidisciplinary approach."²²⁵ The law also recognizes the value of harm reduction as an official policy, which was in line with the more moderate approach to prohibition being adopted in other countries. The most important change in the 2006 law was Article 28, which decriminalized the use of drugs and removed of penal sanctions for both users and repeat offenders.²²⁶ Instead, users are sanctioned through community

²²³ *Ibid.* 169.

²²⁴ Metaal, Pien; Youngers, Coletta. "Systems Overload: Drug Laws and Prisons in Latin America". 34.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

service and a mandatory educational course. Another notable development in Article 28 was equalizing penalties for personal cultivation to personal use. Previously, all forms of cultivation were considered a form of trafficking.

Although these would seem to be welcome developments, the law still fails to provide a clear legal difference between use and trafficking when there is a dispute as to what charge should be brought. The law establishes that the difference between charges can be determined by the quantity or quality of the drug, prior offenses of the person being charged, and the circumstances of the arrest.²²⁷ For trafficking, a profit motive does not have to be established to bring about a charge, which makes it difficult to determine trafficking vs use with these distinctions. Because this criterion is so vague, the determination of what to charge is usually made at the subjective discretion of the arresting officer.²²⁸ Additionally, punishments for trafficking were increased to carry a minimum sentence of five years, and do not include any intermediate penalties. This was justified by lawmakers as necessary for “toughening the war on traffic”²²⁹, indicating that Brazil’s motive with this law is to continue giving police whatever means necessary in the fight against cartels, all while giving the appearance of a more progressive attitude towards drug use. Ultimately, because the law does not define in strict terms the difference between users (subjected to non-penal alternative measures) and traffickers (subjected to long sentences), it remains a punitive focused policy despite the decriminalization of personal use.

The broad mandate and discretion given to police by the 2006 law has continued to permit police violence against Afro-Brazilians in the name of fighting traffickers. There is

²²⁷ *Ibid.* 35.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

clearly a selective application of penal sanctions in Brazil against Afro-Brazilians accused of being a part of criminal trafficking organizations purely on the suspicion of law enforcement alone. A study on judicial sentences in Rio de Janeiro and Brasilia found that among Afro-Brazilians, police were more likely to arrest individuals on charges of trafficking than personal use when discretion can be applied.²³⁰ The majority of those arrested for trafficking acted alone, carried relatively small quantities of drugs, and were not, by definition, members of any criminal organization. Despite this, over 58% of trafficking arrests resulted in prison sentences higher than the legal minimum of five years.²³¹ Because association with a cartel can be charged by law enforcement at their subjective discretion, judges in a number of cases have declined to accept any evidence which indicated an individual was not a member of a cartel or other trafficking organization.

Findings by CERD and Special Rapporteur concerning Brazil

CERD's most recent observations on Brazil were in 2004 and considered the 14th to 17th periodic reports submitted by the state. In a familiar theme from the comments concerning the US and the UK, the observations make no mention of drug laws as a source of racial discrimination in policing. To be fair, this report was submitted before the 2006 drug law was passed. CERD does express broad concern over the persistence of "deep structural inequalities affecting black and mestizo communities and indigenous peoples"²³², including a recognition that Brazil operates under de facto racial segregation in urban areas.²³³ They further critique that

²³⁰ *Ibid.* 37.

²³¹ *Ibid.*

²³² Committee on the Elimination of Racial Discrimination. "Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Brazil." (28 April 2004) CERD/C/64/CO/2. 12.

²³³ *Ibid.*

despite widespread recognition of racial segregation and violence, domestic legislation against racist crimes have not been widely applied.²³⁴ As such, they recommend Brazil improve the implementation of such laws and call upon the state to review existing laws for factors which may contribute to racial bias.²³⁵ Such a review could include reforms to drug laws.

In a welcome departure from the US and the UK, Brazil's approach to drugs has been called out by two Special Rapporteurs for contributing to racialized police violence, particularly due to the profiling of Afro-Brazilian youth as drug dealers. During their 2005 state visit, the Special Rapporteur on contemporary racism, racial discrimination, xenophobia and racial intolerance noted "the population of African descent does not feel protected by public authorities. Youth Blacks are persistently taken for drug dealers and criminals: they are constant victims of racial profiling and discrimination. Many testimonies relates that the police enter the houses of black families and end up killing someone."²³⁶ In response to this, the Special Rapporteur recommends heavy sanctions be placed on police officers responsible for homicides against Afro-Brazilians.²³⁷ They also call for the Office of the Public Prosecutor to be handed investigative powers allowing them to properly handle instances of police violence.²³⁸ At the time of the Special Rapporteur's visit, police officers carried all internal investigations themselves, leading to a lack of leverage for prosecutors when submitting qualifying case in a case against officers.²³⁹

²³⁴ *Ibid.* 18.

²³⁵ *Ibid.*

²³⁶ Economic and Social Council. "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudu Diene". (28 February 2006) E/CN.4/2006/16/Add.3. 36.

²³⁷ *Ibid.* 73.

²³⁸ *Ibid.* 76.

²³⁹ *Ibid.*

In the same 2019 report in which the Special Rapporteur called out the United States for operating policies under the vestige of slavery, it names Brazil as another example of a country which is dealing with the damaging legacy of slavery. Though this report does not mention drug policies specifically, it does discuss the preservation of racial hierarchies through policies which promote institutional discrimination.²⁴⁰ It also mentions that, as a result of State-sanctioned discrimination, police have been offered a mandate to criminalize and subject Afro-Brazilians to violence, including extrajudicial executions, such as what happened in the Candelária massacre.²⁴¹

The Special Rapporteur on minority issues expressed concern about the effects of drug policies on police violence and discrimination of Afro-Brazilians in their 2016 report to the Human Rights Council. They note ambiguities in drug legislation, such as the unclear distinction between use and trafficking, as a factor which enables police discrimination against people with a certain racial profile.²⁴² This is fueled by stigmatizing media portrayals of Afro-Brazilians as drug dependent, which further contributes to justifications of lethal force in their communities in the name of fighting trafficking.²⁴³ In their official recommendations to the state, the Special Rapporteur explicitly recommends re-examining drug policies due to their connection to police violence against Afro-Brazilians.²⁴⁴ This is significant as a similar recommendation has not been made to either the United States or United Kingdom.

²⁴⁰ UN General Assembly “Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance” (21 August 2019) A/74/321. 24.

²⁴¹ *Ibid.*

²⁴² Human Rights Council. “Report of the Special Rapporteur on minority issues on her mission to Brazil.” (9 February 2016). A/HRC/31/56/Add.1. 51.

²⁴³ *Ibid.* 56.

²⁴⁴ *Ibid.* 103.

Conclusion

Columbia University neuroscientists and drug policy reformer Dr. Carl Hart once said that Brazil is living under apartheid and blaming it on drugs.²⁴⁵ This seems to accurately sum up the situation with drug policing in the country. In the name of combatting trafficking organizations which present a threat to social order and public safety, law enforcement agencies have been given a broad mandate to apply a heavily militaristic approach towards policing communities where drugs are present and moved. This has contributed to the status of Brazil as a state of social apartheid by perpetuating state-sanctioned violence against Afro-Brazilians. The fact black police officers are given special privileges and incentives to cooperate with such an approach further underscores that Brazil's approach is not entirely about eradicating violence from trafficking.

At the same time, it is difficult to say that drug laws in Brazil have purposely upheld racial hierarchy similar to the United States because drug cartels do present a real and present danger in urban communities. There exists some legitimate justification for a militarized approach to combatting criminal organizations trafficking not only guns, but weapons, and who sometimes maintain *de facto* legal control over territory. Although one could certainly argue racial hierarchy in Brazil has contributed to the existence of these groups in the first place, it's not entirely accurate to say that attempts to combat their influence are solely motivated in the interests of upholding racial hierarchy. Thus, Brazil fits somewhere in between the US, which developed drug laws with the intention of giving police a mandate to uphold racial hierarchy, and the UK, where drug laws have more indirectly contributed to racial discrimination in society.

²⁴⁵ "How Carnival Showcases Brazil's Racist Drug Policy." Open Society Foundations. Accessed October 29, 2019. <https://www.opensocietyfoundations.org/voices/how-brazil-s-drug-war-became-crusade-against-people-color>.

Chapter 6: Conclusion

The purpose of this thesis was to analyze whether human rights monitoring mechanisms concerning racial discrimination can help reveal and address the problem of racial discrimination in the policing of drug policies. The United States, United Kingdom, and Brazil were all selected as jurisdictions which have a clear problem with racial discrimination in drug policing. Each state was examined to demonstrate how drug policies inform discrimination, followed by an analysis of monitoring mechanisms to determine if such issues have been recognized and what recommendations have followed.

Returning to the state obligations established by ICERD; racial discrimination is the restriction of rights or selective application of policies to a group of individuals based on their identified race or ethnicity. All states have an obligation to ensure the full enjoyment of human rights absent of any racial discrimination, whether intentionally or through negligence. They must undertake regular and effective reviews of policies to remove discriminatory aspects, collect data on police associated violence, and ensure effective remedies to those who have been victims of discrimination by state agents such as the police. International monitoring mechanisms established by ICERD, such as CERD and the Special Rapporteur on contemporary racism, can help states identify policies which should be reviewed and reformed. However, states are ultimately responsible for implementing these changes.

Ultimately, all three jurisdictions discussed in this thesis have failed in their ICERD obligations in some capacity by enforcing criminal drug policies which give way to racialized policing. The United States has blurred the line between military and police in the name of fighting the “War on Drugs” in a manner which has upheld systemic racism, similar to the effect of Jim Crow laws. The United Kingdom may not have developed their drug policies based in the

criminalization of BMEs like the United States, but policies such as stop and search have been disproportionately applied to racial minorities. Though Brazil may have a legitimate interest in militarizing the police to fight trafficking, the rising police violence centered on Afro-Brazilians only exasperated the state's underlying issues with systemic racism rather than adequately address their security concerns. Each of these cases underline the same issue of overlooking the influence drug policies are having on racial discrimination in policing.

Given all of this, as well as the historical context of drug policies being used as a tool to uphold racial hierarchy, it is imperative states are actively measuring how drug control policies are being enforced by police to ensure no racial bias. If drug policies are driving racial discrimination in policing, then by the obligations set forth in ICERD, those policies must be reviewed and reformed. The UK has come the closest of all three states to initiating an intentional review of drug policies for racial discrimination with the Lammy Review, which suggested an explain or reform approach. The United States has not called for a similar review of drug laws, but there is at least awareness over how policies such as stop and frisk help perpetuate racial profiling in policing. However, it would be more in line with CERD suggestions to review the drug laws which justified the use of stop and frisk in the first place. Brazil tried to reform their approach to drugs with their 2006 Law, but the lack of a clear distinction between use and trafficking meant it was ultimately ineffective. Making this legal distinction clearer would help Brazil balance its legitimate security concerns with obligations to review laws informing racial bias in policing.

A key part of this analysis is to what extent monitoring bodies have suggested reviews to drug laws which could help identify sources of racialized policing. In this regard, CERD and the Special Rapporteur on contemporary racism have missed multiple opportunities to explicitly

state this in various communications. Though disparities in sentencing and arrests have been noted, the specific connection to policing is absent. It's unclear why this has been omitted, given that it is not difficult to make the connection between the implementation of drug policies and racialized policing. The Special Rapporteur on Minority Issues has stated this problem for Brazil only, and it would be interesting to see if they would reach similar conclusions after state visits to the United States or United Kingdom.

Ultimately, it must be recognized that the enforcement of drug policies has influenced or supported racialized policing which has contributed to violence, oppression, and even the maintenance of longstanding racial hierarchies. Reforming drug laws alone will not solve the problem, as racism is a systemic issue which is borne into the foundation of many government agencies, police included. However, removing the tools by which police can carry out discrimination can help specifically address state-sanctioned racism, and move them closer towards fulfillment of human rights obligations laid out by ICERD and other treaty bodies. It would be a welcome start for the United States and Brazil to implement an explain or reform approach similar to the United Kingdom, and international monitoring mechanisms have the ability to recommend these states do so. Though it may be unlikely that this alone will influence these states to reform, monitoring bodies on racial discrimination have no legitimate reason to exclude reviews of drug laws from their recommendations to states so long as such laws continue to perpetuate racial discrimination and beliefs of racial hierarchy.

Bibliography

"A Ragged Tale of Riches." *The Economist*. June 19, 2003. Accessed August 16, 2019. <https://www.economist.com/books-and-arts/2003/06/19/a-ragged-tale-of-riches>.

Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press, Distributed by Perseus Distribution, 2010.

Ali, Ismail Lourido, and Magalie Lerman. "Colonization Laid the Groundwork for the Drug War." *The Fix*. (April 11, 2018). Accessed June 15, 2019. <https://www.thefix.com/colonization-laid-groundwork-drug-war>.

Baum, Dan. "Legalize It All, by Dan Baum." *Harper's Magazine*. March 31, 2016. Accessed June 20, 2019. <https://harpers.org/archive/2016/04/legalize-it-all/>.

Balko, Radley. "Overkill: The Rise of Paramilitary police raids in America." Washington DC: Cato Institute; 2006.

Bear, Daniel; Eastwood, Niamh; Shiner, Michael. "The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales." (2013). Release, London School of Economics and Political Science. London.

Block, Frederic. *Disrobed: An inside Look at the Life and Work of a Federal Trial Judge*. Eagan, MN: West, 2012.

British Medical Association, Board of Science. "Drugs of Dependence: The Role of Medical Professionals" (2013).

Boister, Neil. "Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs."

Bowen, Phil. "Building Trust How our courts can improve the criminal court experience for Black, Asian, and Minority Ethnic defendants" Centre For Justice Innovation. (2017).

"Brazil: Police Killings of Black Youths Continue, 25 Years after the Candelária Massacre." Amnesty International. Accessed October 27, 2019. <https://www.amnesty.org/en/latest/news/2018/07/brazil-police-killings-of-black-youths-continue-25-years-after-the-candelaria-massacre/>.

Bureau of Justice Statistics at the US Department of Justice. *Census of State and Local Law Enforcement Agencies*, 2008. Washington, DC: US Department of Justice; 2011. Vol. July 2011, NCJ 23398.

Bureau of Justice Statistics at the US Department of Justice. *Contacts Between Police and the Public*, 2015. Washington, DC: US Department of Justice; 2015.

Carre, Zoe; Delsol, Rebekah; Eastwood, Niamh; Shiner, Michael. "The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales." (2018) StopWatch, Release, London School of Economics: Drug Policy Unit. London.

Clarke, Robert; Merlin, Mark. "Cannabis: Evolution and Ethnobotany". University of California Press. 1 September 2013.

Conrad, Robert. "Children of God's Fire". The Pennsylvania State University Press. 1984.

Cooper H. L. "War on Drugs Policing and Police Brutality." *Substance use & misuse*. 2015. 50 (8-9).

Desimone, Arturo. "Brazil's failed war on drugs revisited". *Open Democracy*. (13 May 2019). <https://www.opendemocracy.net/en/democraciaabierta/brazils-failed-war-on-drugs-revisited/>

Edwards, Frank, Hedwig Lee, and Michael H Esposito. "Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex." *PNAS* (August 2019). 116 (34).

Fairlie, Robert W. "Drug Dealing and Legitimate Self-Employment." *Journal of Labor Economics* 20, no. 3 (2002)

Ferguson, C. Clyde. *The American Journal of International Law* 70, no. 3 (1976).

Ferreira, Carolina Cutrupi; Santos, Natalia Neris da Silva; Machado, Marta Rodriguez de Assis Machado. "Punitive Anti-Racism Laws in Brazil: An Overview of the Enforcement of Law by Brazilian Courts." Brazilian Center of Analysis and Planning, Section of Law and Democracy. 2011.

French, Jan Hoffman. "Rethinking Police Violence in Brazil: Unmasking the Public Secret of Race." *Latin American Politics and Society* 55, no. 04 (2013):

Gay J. McDougall, "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination", 40 *Howard Law Journal* (1997).

Greg Robinson. "Fujii v. California," *Densho Encyclopedia* <<https://encyclopedia.densho.org/Fujii%20v.%20California>> (accessed June 26 2019).

Elisa Massimino, "Moving from Commitment to Compliance: Human Rights Treaties in U.S. Law", 5 *GEO. J. on Fighting Poverty*.

Herer, Jack, Leslie Cabarga, and Todd McCormick. *Jack Herers The Emperor Wears No Clothes*. Austin, TX: Ah Ha Pub., 2010.

Hilpold, Peter. "The International Convention on the Elimination of All Forms of Racial Discrimination. A Commentary, written by Patrick Thornberry", *International Journal on Minority and Group Rights*, 25. (28 March 2018).

Human Rights Council, "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere" (20 April 2015) A/HRC/29/46.

Holmes, Oliver. "Palestine Files Complaints against Israel under Anti-Racism Treaty." *The Guardian*, Guardian News and Media, 23 April 2018, <<https://www.theguardian.com/world/2018/apr/23/palestinians-file-complaint-against-israel-under-anti-racism-treaty>>.

Kendell, Robert. "Cannabis condemned: the prescription of Indian hemp". Addition 98. 2003.

Lammy, David. "The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System." (2017) London.

Lenahan, Rose. "What 'Stop-and-Frisk' Really Means." Prison Policy Initiative. Accessed August 26, 2019. <https://www.prisonpolicy.org/reports/stopandfrisk.html>.

Lowy, Michael. "Brazil: A Country Marked by Social Apartheid". *Logos: A Journal of Modern Society and Culture*, Volume 2 Issue 2, Spring 2003.

Lynch M. *Theorizing the role of the "war on drugs" in US punishment*. Theoretical Criminology. 2012; 16.

Martins, Sergio da Silva; Medeiros, Carlos Alberto; Nascimento, Elisa Larkin. "The Road from 'Racial Democracy' to Affirmative Action in Brazil." *Journal of Black Studies*, vol. 34 no. 6. July 2004.

McDougall, "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination".

Metaal, Pien; Youngers, Coletta. "Systems Overload: Drug Laws and Prisons in Latin America". Transnational Institute & Washington Office on Latin America. (March 2011).

Miraglia, Paula. "Drugs and Drug Trafficking in Brazil: Trends and Policies." Brookings Institute, Latin America Initiative. 5 May 2015.

Musto, David F. "The American Disease: Origins of Narcotic Control". New York, NY: Oxford University Press, 2010.

Niesen, Molly. "Public Enemy Number One: The US Advertising Councils First Drug Abuse Prevention Campaign." *Substance Use & Misuse* 46, no. 7 (May 06, 2011).

P.G. Lauren, 'Human Rights in History: Diplomacy and Racial Equality at the Paris Peace Conference', *Diplomatic History* 2(3) (1978).

Pearson, Geoffrey. "Drug-Control Policies in Britain." *Crime and Justice* 14 (1991)

Pelaez, Vicky. "The Prison Industry in the United States: Big Business or a New Form of Slavery?" Centre for Research on Globalization, September 13, 2019.

"Racial Biases within Stop and Frisk: The Product of Inherently Flawed Judicial Precedent." Ramapo Journal of Law & Society. Accessed August 26, 2019. <https://www.ramapo.edu/law-journal/thesis/racial-biases-within-stop-and-frisk-the-product-of-inherently-flawed-judicial-precedent/>.

"Red Command." InSight Crime, May 18, 2018. <https://www.insightcrime.org/brazil-organized-crime-news/red-command-profile/>.

Redford, Audrey, and Benjamin Powell. "Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914." *The Independent Review* 20, no. 4 (2016).

Ribeiro, Eduardo. "How Carnaval Showcases Brazil's Racist Drug Policy." Open Society Foundations. Accessed October 27, 2019. <https://www.opensocietyfoundations.org/voices/how-brazil-s-drug-war-became-crusade-against-people-color>.

Ritchie AJ, Mogul JL. "In the shadows of the war on terror: Persistent police brutality and abuse of people of color in the United States." *DePaul Journal for Social Justice*. 2008; 1(2).

Rothwell, Jonathan. "How the War on Drugs Damages Black Social Mobility." Brookings. Brookings, July 29, 2016.

Ronald E. Ahnen. "The Politics of Police Violence in Democratic Brazil." *Latin American Politics and Society* 49, no. 1 (2007):

Rowdy, Yates. "A Brief History of British Drug Policy, 1950-2001" (2002) *Drugs: Education, Prevention and Policy*, 9:2

Saleem O "The age of unreason: The impact of reasonableness, increased police force, and colorblindness on Terry 'Stop and Frisk'" *Oklahoma Law Review*. (1997) 50(4):4.

Santoro, Mauricio. "The Brutal Politics of Brazil's Drug War." *The New York Times*. Accessed October 28, 2019. <https://www.nytimes.com/2019/10/28/opinion/brazi-war-on-poor.html>.

Savali, Kirsten West. "Bigger Than Incarceration: Angela Davis Talks Mass Criminalization, Mental Health and the War on Drugs." *The Root*. April 29, 2016. Accessed August 21, 2019. <https://www.theroot.com/bigger-than-incarceration-angela-davis-talks-mass-crim-1790855129>.

Schwelb, Egon. "The International Convention on the Elimination of All Forms of Racial Discrimination." *International and Comparative Law Quarterly* 15, no. 4 (1966).

"Section 3 The Prison Economy - Prison Labor - Prison Index." Prison Policy Initiative. Accessed August 21, 2019. <https://www.prisonpolicy.org/prisonindex/prisonlabor.html>.

Streeter, Shea (2019-06-07). "Lethal Force in Black and White: Assessing Racial Disparities in the Circumstances of Police Killings". *The Journal of Politics*. 81 (3).

Terry D. Johnson, "Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System," *Rutgers Law Review* 56, no. 1 (Fall 2003).

"The Lammy Review Fails to Prove Bias in the Criminal Justice System." Civitas, January 2, 2018. <http://www.civitas.org.uk/press/the-lammy-review-fails-to-prove-bias-in-the-criminal-justice-system/>.

Williams, Edward H. "NEGRO COCAINE "FIENDS" ARE A NEW SOUTHERN MENACE." *The New York Times*, February 8, 1914. Accessed August 16, 2019. <https://www.nytimes.com/1914/02/08/archives/negro-cocaine-fiends-are-a-new-southern-menace-murder-and-insanity.html>.

Yaner Lim, "Understanding the War on Drugs in America through the Lens of Critical Race Theory," *Bristol Law Review* 2018 (2018).

Cited UN Treaties and Communications

Committee on the Elimination of Racial Discrimination, "Reports submitted by States parties under article 9 of the Convention: Sixth periodic reports of state parties due in 2005: Addendum: United States of America" (24 April 2007) CERD/C/USA/CO/6.

Committee on the Elimination of Racial Discrimination, "Reports submitted by States parties under article 9 of the Convention: Seventh to ninth periodic reports of States parties due in 2011: United States of America" (3 October 2013) CERD/C/USA/7-9.

Committee on the Elimination of Racial Discrimination. "Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Brazil." (28 April 2004) CERD/C/64/CO/2.

Committee on the Elimination of All Forms of Racial Discrimination "Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland". (3 October 2016) CERD/C/GBR/CO/21-23.

"Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada". (CERD/21-23), 2017.

Economic and Social Council. “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudu Diene”. (28 February 2006) E/CN.4/2006/16/Add.3.

Human Rights Council “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene: Mission to the United States of America” (28 April 2009) A/HRC/11/36/Add.3.

Human Rights Council “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere.” (20 April 2015) A/HRC/29/46.

Human Rights Council. “Reports of the Special Rapporteur on minority issues on her mission to Brazil.” (9 February 2016) A/HRC/31/56/Add.1.

Human Rights Council “Visit to the United Kingdom of Great Britain and Northern Ireland” (27 May 2019) A/HRC/41/54/Add.2.

“Implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights”. OHCHR (HRC/39/2-8), 2018.

International Convention on the Eliminations of All Forms of Racial Discrimination, New York, 21 December 1965, UN General Assembly.

Office of the High Commissioner on Human Rights (OHCHR), “Human Rights Standards and Practice for the Police” (2004) Professional Training Series No.5/Add.3

“Report of the Working Group of Experts on People of African Descent”. (HRC/33/9), 2016.

“Report of the Working Group of Experts on People of African Descent on its mission to the United States of America”, A/HRC/33/61/Add.2

UN Committee on the Elimination of Racial Discrimination, “CERD General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System” (2005) CERD/C/GC/31.

UN Committee on the Elimination of Racial Discrimination, “General recommendation No. 34: Racial discrimination against people of African descent. ” 79th session, CERD/C/GC/34, Oct. 3, 2011.

UN Committee on the Elimination of Racial Discrimination. “CERD Draft Recommendation 36 on preventing and combating racial profiling” (2019) CERD/C/GC/36.

UN General Assembly “Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance” (21 August 2019) A/74/321.

UN General Assembly, *Manifestations of racial and national hatred*, 15 December 1960, A/RES/1510.

UN General Assembly “Report of the Committee on the Elimination of Racial Discrimination” (March 2001) A/56/18. 391.

UN General Assembly, *Universal Declaration of Human Rights*, New York, 10 December 1948, 217A (III).