

PANDEMICS AS RIGHTS-GENERATORS

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ABSTRACT

While the global pandemic has exposed the fragility of human rights protections, it has also resulted in rights victories for some of the most vulnerable members of society. This Essay examines epistemic, consequentialist, and normative rights reframing efforts that have been mobilized to advocate for and secure human rights during the pandemic through the lens of prisoners' rights. It argues that these rights seeking strategies hold promise for advancing rights claims of prisoners and other marginalized groups beyond the pandemic.

I. INTRODUCTION

While the global pandemic has seen most of the world's population contend with unprecedented restrictions on civil liberties, paradoxically, it has led to a small proportion of people securing tentative but significant victories in long-standing battles for the recognition of their rights. As people around the world adapt to the reality of lockdown, the incarcerated have demanded and, in some cases secured, release from confinement.¹ Thousands of homeless people have been housed and given support and shelter.² And renewed mobilization by civil society has pushed governments to protect the most vulnerable dispossessed, resulting in successful relocations of unaccompanied minor asylum seekers from refugee camps.³

Why did it take a pandemic to produce these results? And what can international human rights institutions, scholars, and advocates learn from these gains? This Essay focuses on the case of rights seeking during the pandemic for individuals in conditions of detention to draw out three rights reframing strategies—epistemic, consequentialist, and normative—for advancing human rights claims in international law. Prisoners form a class of people that seldom invites widespread public support or sympathy. Thus, initiatives and successes in mobilizing for the human rights of prisoners are an especially useful site for evaluating the promise of novel rhetorical devices for international, regional, and domestic human rights law.

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¹ See, e.g., Sarah Stillman, *Will the Coronavirus Make Us Rethink Mass Incarceration?*, NEW YORKER (May 18, 2020) (“Some efforts accomplished in weeks or months what activists had been working toward for decades, leading to large experiments in decarceration.”).

² Francisco Garcia, *Coronavirus Nearly Ended Homelessness in the UK. Why Can't We End it for Good?*, GUARDIAN (June 11, 2020).

³ Catarina Demony, *Portugal to Take Up to 60 Unaccompanied Migrant Children from Greek Camps*, REUTERS (May 9, 2020).

This Essay is structured in three parts. Part II briefly describes the limited success of international human rights law in securing the rights of prisoners. Part III dissects rights-reframing efforts to mobilize government and public support for the human rights of detainees during the pandemic. Part IV concludes by exploring if rights-seeking strategies that have buy-in during times of crisis can be effective for the “ordinary” business of advancing human rights.

II. DETAINEE RIGHTS AND INTERNATIONAL LAW

While prison governance and management falls squarely within the administrative authority of each state, prisons were amongst the first criminal justice issues to be brought within the ambit of international regulation.⁴ Initially developed as best practices for voluntary adoption by states, the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR) came to acquire greater moral authority and began to be referenced by bodies such as the Human Rights Committee (HRC) tasked with interpreting the provisions of the International Covenant on Civil and Political Rights (ICCPR) pertaining to detainee rights.⁵ Nonetheless, there was little appetite and momentum for adding legal heft to the UNSMR until the 1980s when the UN adopted a spate of rules and principles relating to specific categories of prisoners and conditions of detention.⁶ The UNSMR were finally revised in 2015 to reflect key developments in human rights and criminal justice and officially designated as the “Nelson Mandela Rules.”⁷ International nongovernmental organizations (NGOs) regularly invoke these soft law instruments to campaign for prison reform.⁸

These nonbinding rules are complemented by treaty provisions relating to prisoners in human rights conventions such as the ICCPR and the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.⁹ Treaty monitoring bodies, including the HRC and the Subcommittee on Prevention of Torture (SPT) receive and evaluate reports from states on, amongst other things, prison conditions.¹⁰ Notwithstanding this increased attention, soft law instruments dominate the international legal framework on conditions of detention and prison governance and governments often fail to take remedial action following negative findings by treaty bodies.¹¹

⁴ Dirk van Zyl Smit, *International Prison Standards and Transnational Criminal Justice*, 4 UC IRVINE J. INT’L TRANSNAT’L & COMP. L. 97, 102 (2019).

⁵ *Id.* at 103; NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 222–32 (1987).

⁶ GA Res. 40/33, UN Standard Minimum Rules for the Administration of Juvenile Justice (Nov. 29, 1985); GA Res. 43/173, UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Dec. 9, 1988); GA Res. 45/113, UN Rules for the Protection of Juveniles Deprived of Their Liberty (Dec. 14, 1990); GA Res. 65/229, UN Rules for the Treatment of Women Prisoners and Non-custodial Sanctions for Women Offenders (Dec. 21, 2010).

⁷ GA Res. 70/175, Annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015).

⁸ See, e.g., Penal Reform International & OSCE Office for Democratic Institutions and Human Rights, *Guidance Document on the Nelson Mandela Rules* (2018); Amnesty International, *Oral Statement, Human Rights Council, High-Level Intersessional Discussion Celebrating the Centenary of Nelson Mandela*, IOR 40/8296/2018 (Apr. 27, 2018), available at <https://www.amnesty.org/download/Documents/IOR4082962018ENGLISH.pdf>.

⁹ International Covenant on Civil and Political Rights, Arts. 7, 9–10, Dec. 16, 1966, 999 UNTS 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Art. 2, Dec. 10, 1984, 1465 UNTS 85.

¹⁰ Van Zyl Smit, *supra* note 4, at 111–12.

¹¹ *Id.* at 108–09, citing Response of Australia to the Views of the Human Rights Committee in Communication No. 1968/2010 (Blessington and Elliot v. Australia), available at <https://www.ag.gov.au/sites/default/files/2020-03/BlessingtonAndElliotVAustralia-AustralianGovernmentResponse.pdf>.

Regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹² the American Convention on Human Rights,¹³ and the African Charter on Human and Peoples' Rights,¹⁴ have also led to the development of targeted soft law instruments on prison reform. These include the 2008 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,¹⁵ the 1996 Kampala Declaration on Prison Conditions in Africa,¹⁶ the 2002 Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa,¹⁷ and the 2006 European Prison Rules.¹⁸

Regional human rights institutions, including the European Court of Human Rights and the European Committee on the Prevention of Torture have been particularly active in monitoring and safeguarding the rights of persons in detention, including by ordering the state to undertake structural reforms to provide medical services and reduce prison populations.¹⁹ However, these interventions have largely failed to make a dent in prison overcrowding and prison reforms introduced in response to court judgements have been characterized by ad-hocism and prone to reversal.²⁰ The international landscape of prisoners' rights thus continues to look bleak and in need of an overhaul.

III. RIGHTS SEEKING IN A PANDEMIC

The health emergency caused by COVID-19 has galvanized advocates to adopt creative rights framing strategies to push for prison reforms. This Part outlines three such devices that have been used separately and together to agitate for legal and policy change in conditions of detention and demand alternatives to incarceration.

A. *Epistemic Reframing Through Science*

Prisoners around the world face chronic health and safety issues relating to overcrowding and lack of adequate sanitation, food, physical security, and medical services.²¹ Additionally, in countries with harsh sentencing practices, pretrial detainees, prisoners who have been convicted for minor offenses, and those who pose little danger to society, may languish in detention for long periods of time.²² Efforts at prison reform and depopulation have nonetheless

¹² 213 UNTS 221.

¹³ 1144 UNTS 123.

¹⁴ 1520 UNTS 217.

¹⁵ OEA/Ser/L/V/II.131, doc. 26 (2008).

¹⁶ ECOSOC Res. 1997/36, Annex (July 21, 1997).

¹⁷ ACHPR/Res.64(XXXIV)03.

¹⁸ Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, Rec(2006)2 (Jan. 11, 2006).

¹⁹ European Union Agency for Fundamental Rights, *Criminal Detention Conditions in the European Union: Rules and Reality* 19–21 (2019).

²⁰ *Id.* at 21 (referring to reversals in Polish penal policy following initial compliance with the judgment of the ECtHR); Paul Hathazy & Michael Markus-Müller, *The Rebirth of the Prison in Latin America: Determinants, Regimes and Social Effects*, 65 *CRIME, L. & SOC. CHANGE* 113 (2016) (emphasizing the dramatic increase in Latin American prison populations).

²¹ Penal Reform International, *Global Prison Trends* 8, 10 (2019).

²² *Id.* at 12–14.

failed to gain traction since they are viewed through the *political* lens of crime control and public safety. Indeed, there is often a bipartisan consensus on and immense political pressure to appear “tough on crime.”²³ Criminals are also seen as morally culpable individuals who choose to visit the penalties for conviction upon themselves.²⁴ Coupled with the collateral consequences of criminal convictions such as disenfranchisement in some jurisdictions, introducing more humane prison legislation is rarely a winning political strategy.²⁵ “Zero tolerance” policies toward crime thus continue to proliferate, partly in response to public opinion, stalling any attempts at radical prison reform.²⁶

COVID-19 has opened up possibilities to change this discourse by recasting the urgency of prison reform as a *medical or public health* issue rather than a political problem. The modalities of disease transmission and the impossibility of social distancing in conditions of detention has provided human rights advocates with an unprecedented opportunity to make common cause with epidemiologists, public health scholars, doctors, and other medical experts and jointly push for prison reform in the language of science.²⁷ International and regional guidelines and policy statements issued during the pandemic have repeatedly emphasized the link between mass incarceration, conditions of detention, and heightened health risks faced by both prisoners as well as prison staff.²⁸ Recommendations on aggressive testing, increased data sharing and transparency with respect to prisoners’ health statistics, and decarceration measures such as early release policies, are now cast as medically necessary demands rather than liberal politics.²⁹

This newly medicalized landscape of prison reform has the potential to shape both how the public reacts to state prison policy and also how it views the prisoners themselves.³⁰ Unlike

²³ See, e.g., Tim Newburn, “Tough on Crime”: Penal Policy in England and Wales, 36 CRIME & JUST. 425 (2007); David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1507 (2014).

²⁴ See Michael Tonry, *Can Twenty-First Century Punishment Policies Be Justified in Principle?*, in RETIBUTIVISM HAS A PAST: HAS IT A FUTURE? 3, 7–9 (Michael Tonry ed., 2011).

²⁵ See Christopher Uggen, Mischelle Van Brakle & Heather McLaughlin, *Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 59 (Alec C. Ewald & Brandon Rottinghaus eds., 2009) (conducting a comparative survey of national characteristics and prisoner disenfranchisement).

²⁶ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 142 (2001) (describing the populist punitive turn in penal policy).

²⁷ See, e.g., Stuart A. Kinner, Jesse T. Young, Kathryn Snow, Louise Southalan, Daniel Lopez-Acuña, Carina Ferreira-Borges & Éamonn O’Moore, *Prisons and Custodial Settings Are Part of a Comprehensive Response to COVID-19*, 5 THE LANCET E188 (Apr. 1, 2020).

²⁸ Michelle Bachelet, United Nations High Commissioner for Human Rights, *Urgent Action Needed to Prevent COVID-19 “Rampaging Through Places of Detention”* (Mar. 25, 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>; Council of Europe Commissioner for Human Rights, *COVID-19 Pandemic: Urgent Steps Are Needed to Protect the Rights of Prisoners in Europe* (Apr. 6, 2020), at https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLI/content/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe; African Commission on Human and Peoples’ Rights, Special Rapporteur on Prisons Press Release, *Conditions of Detention and Policing in Africa on the Release of Prisoners During the COVID-19 Pandemic* (Apr. 17, 2020), at <https://www.achpr.org/pressrelease/detail?id=492>.

²⁹ Editorial, *Tackle Coronavirus in Vulnerable Communities*, 581 NATURE 239 (2020).

³⁰ See, e.g., World Health Organization Regional Office for Europe Press Release, *Experience of Health Professionals, Police Staff and Prisoners in Italy Informs WHO COVID-19 Guidelines for Prisons* (May 28, 2020), at <http://www.euro.who.int/en/countries/italy/news/news/2020/5/experience-of-health-professionals,-police-staff-and-prisoners-in-italy-informs-who-covid-19-guidelines-for-prisons> (noting that the shift in the attitude of Italian prison staff toward prisoners on account of working alongside health care professionals).

the “soft” language of rehabilitation, legislation or directives passed to depopulate prisons during the pandemic can be portrayed as responsible government responses in keeping with the best scientific advice and render them politically palatable.³¹ While populations oscillate in their confidence in and respect for the government, medical or scientific expertise—especially in the midst of general fear and distrust—can be seen as a data-based, neutral tool for action.³² Advocacy and political decisions to implement measures aimed at the health and safety of prison populations, including those that are directed toward overcrowding, can thus be bolstered and legitimized through scientific framing which lends them a veneer of objectivity.³³

This also applies to the terminology of “vulnerability” emphasized in public statements, such as those issued by the UN High Commissioner for Human Rights and the Council of Europe Commissioner for Human Rights urging governments to “release those particularly vulnerable to COVID-19, among them older detainees and those who are sick, as well as low-risk offenders.”³⁴ Vulnerability to disease thus becomes an additional, neutral category for offenders who can and should be released from prison, and that can be evaluated based on medical necessity unlike the much more fraught category of “low-risk offenders.”³⁵ Rather than having to make value-laden and politically difficult calculations as to which offenders should benefit from lenient treatment, international policymakers, institutions, governments, and courts can simply deputize the issue to medical experts who distinguish between classes of prisoners based on scientific evidence and vulnerability to disease.

Due to its greater claim to impartiality, scientific, rather than political, reasoning can also form a common frame of reference to persuade those who might be skeptical or even hostile toward other kinds of rights claims that are often viewed through the lens of identity and subjective experience. Take, for instance, the joint statement issued by UN human rights experts urging the U.S. government to reduce the number of people in places of detention on the ground that they are “particularly vulnerable to COVID-19 and for many, their pre-existing medical conditions increase the risk of death.”³⁶ The statement goes on to emphasize that COVID-19 has disproportionately affected minorities, who also comprise the bulk of the prison population, and poses extra medical challenges for detainees who are gender-diverse,

³¹ See, e.g., Josiah Rich, Scott Allen & Mavis Nimon, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASH. POST (Mar. 17, 2020), at <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

³² See, e.g., Carey Funk & Brian Kennedy, *Public Confidence in Scientists Has Remained Stable*, PEW RES. CTR. (March 22, 2019), at <https://www.pewresearch.org/fact-tank/2019/03/22/public-confidence-in-scientists-has-remained-stable-for-decades/>.

³³ See, e.g., New York City Bar Association Written Testimony, *Oversight Hearing T2020-6171: COVID-19 in City Jails and Juvenile Detention Centers* (May 19, 2020), available at https://www.asf.be/wp-content/uploads/2020/04/EN-Déclaration-conjointe-Covid-19-prisons-Afrique.VU_.BL-updated.pdf; Avocats Sans Frontières, *Joint Statement, Faced with the Spreading of COVID-19, Take Urgent and Immediate Measures to Protect the Rights of Detainees in Africa* (Mar. 24, 2020), available at https://www.asf.be/wp-content/uploads/2020/04/EN-Déclaration-conjointe-Covid-19-prisons-Afrique.VU_.BL-updated.pdf.

³⁴ United Nations High Commissioner for Human Rights Statement, *supra* note 28; Council of Europe Commissioner for Human Rights Statement, *supra* note 28.

³⁵ Evaluating “risk” remains controversial even in criminal justice systems that have begun to favor algorithmic risk assessments. See Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 96 WASH. U. L. REV. 681 (2018).

³⁶ OHCHR Press Release, *US Government Urged to Do More to Prevent Major Outbreaks of COVID-19 in Detention Centers—UN Experts* (May 29, 2020), at <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=25912&LangID=E>.

sexual minorities, and people with disabilities.³⁷ While the various groups mentioned in the statement would have self-standing discrimination claims even in the absence of a pandemic, coupling them with an emphasis on greater medical vulnerability backed by scientific evidence forms a neutral terrain for grounding their rights.

B. Consequentialist Emphasis on Public Welfare

The second shift in rhetorical strategy for advancing prisoners' rights is embedding the discourse within the framework of public health and safety rather than the welfare of prisoners alone. Prisons that are normally sealed off from the consciousness of the general public have been pushed to the forefront of public attention as COVID-19 hotspots.³⁸ Some government efforts to contain the pandemic have taken the form of even stricter confinement measures and led to rioting by prisoners as fear and panic have taken hold inside prison halls.³⁹ However, the concentrations of cases in detention centers worldwide have also spurred the realization that the virus cannot be controlled in the general population without also containing it within detention centers. Medical experts and the media have described detention centers in clinical language as "petri dishes" and "epidemiological pumps," which must be prioritized in state efforts to flatten the curve.⁴⁰ International NGOs have also explicitly referenced community well-being to pressure governments to avoid massive casualties: "[r]eleasing people who don't need to be in prison will not only protect incarcerated people, but staff and the broader communities as well."⁴¹ Preventative and treatment measures in prisons are thus being urged not only to benefit prisoners, but as a public necessity.

There have been previous attempts to apply a public health framing to criminal justice issues such as substance abuse disorders.⁴² These initiatives have also argued for the treatment of these conditions as medical disorders that are both preventable as well as treatable through tried and tested public health interventions, including behavioral therapies, medical treatment, social support, and better access to quality health care.⁴³ However, these initiatives have faced an uphill battle in commanding broad-based public support and sympathy for offenders who are typically viewed as individually responsible for having made bad life choices.⁴⁴ In contrast, the public health framing of the COVID-19 crisis and its impact on

³⁷ *Id.*

³⁸ Tahla Burki, *Prisons are "In No Way Equipped" to Deal with COVID-19*, 395 LANCET 1412 (2020).

³⁹ Clavel Rangel, Joe Parkin Daniels & Tom Phillips, "We're All on Death Row Now": *Latin America's Prisons Reel from COVID-19*, GUARDIAN (May 16, 2020).

⁴⁰ See, e.g., Richard Coker, *Expert Report: COVID-19 and Prisons in England and Wales* 19 (Mar. 31, 2020), available at https://howardleague.org/wp-content/uploads/2020/04/2020_04_01_COKER_Report_HL_PRT.pdf; Jake Harper, *Crowded Prisons Are Festering "Petri Dishes" for Coronavirus, Observers Warn*, NPR (May 1, 2020), at <https://www.npr.org/sections/health-shots/2020/05/01/848702784/crowded-prisons-are-festering-petri-dishes-for-coronavirus-observers-warn>.

⁴¹ Human Rights Watch, *COVID-19 Prisoner Releases Too Few, Too Slow* (May 27, 2020), at <https://www.hrw.org/news/2020/05/27/covid-19-prisoner-releases-too-few-too-slow>.

⁴² Editorial, *Rethinking America's "War on Drugs" as a Public-Health Issue*, 357 LANCET 971 (2001).

⁴³ Nora D. Volkow, Vladimir Paznyak, Shekhar Saxena & Gilberto Gerra, *Drug Use Disorders: Impact of a Public Health Rather than a Criminal Justice Approach*, 16 WORLD PSYCHIATRY 213 (2017).

⁴⁴ See, e.g., Colleen L. Barry, Emma Elizabeth McGinty, Bernice Pescosolido & Howard H. Goldman, *Stigma, Discrimination, Treatment Effectiveness and Policy Support: Comparing Public Views About Drug Addiction with Mental Illness*, 65 PSYCHIATRIC SERVICES 1269 (2014) (noting public hostility toward drug addicts and lack of support for policies aimed at their rehabilitation).

prison populations is one that is based on universal, blameless vulnerability to disease. Quite simply, the virus takes no prisoners—anyone can get infected and without any fault on their part. Efforts to reduce the impact of the virus on prison populations can thus be sold as a measure to ameliorate its impact not only on prisoners and prison staff, but equally on us all.

This is the framing adopted by American medical experts in an open letter to members of the U.S. Congress, which sketches out a “tinderbox” scenario where disease outbreaks at detention centers overwhelm local hospitals, resulting in critical shortages in equipment and personnel for treating other members of the community. In this situation, “many people from the detention center *and the community* die unnecessarily for want of a ventilator.”⁴⁵ Much like vaccination campaigns that not only emphasize individual but community health, improving health, safety, and security in prisons combined with early release policies can be presented as a collective national effort to protect “the herd.”⁴⁶

The slogan that “prison health is public health by definition” may counter the public tendency to treat detention centers as isolated islands by emphasizing the porosity of the boundaries between prisons and communities.⁴⁷ Shared susceptibility to disease may also work to generate empathy for the plight of a group that is more likely to contract the disease due to their inability to take personal preventative actions.⁴⁸ While pleas to ameliorate abysmal prison conditions may have fallen on deaf ears in normal times, and even be justified by some as part of the penance that prisoners must undergo for their crimes, fewer people would be willing to go as far as consigning prisoners to a potential death sentence. International and domestic human rights institutions have thus consistently highlighted the potential loss of lives in prisons and its impact on their families and communities.⁴⁹

C. Normative Focus on Positive Duties

Criminal justice policies primarily focus on what offenders owe to others rather than what is owed to offenders themselves. International, regional and domestic human rights treaties, constitutions, and legal regulations uniformly recognize *negative* rights such as the liberty

⁴⁵ Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH, Letter to Congress (Mar. 19, 2020), available at <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf>.

⁴⁶ The latest public statement by the South African government on prison release repeatedly invokes the imagery of a collective community and national effort. See South African Department of Correctional Services Press Release, Minister Ronald Lamola: Special Coronavirus COVID-19 Parole Dispensation Statement (May 8, 2020), at <https://www.gov.za/speeches/minister-ronald-lamola-special-covid19-parole-dispensation-statement-8-may-2020-0000>.

⁴⁷ Kinner, et al., *supra* note 27; Written Statement of Dr. Scott Allen, Examining Best Practices for Incarceration and Detention During COVID-19, U.S. Senate Committee on the Judiciary 2 (June 2, 2020), available at <https://www.judiciary.senate.gov/imo/media/doc/Scott%20Allen%20Testimony.pdf>

⁴⁸ See Daniel A. Gross, “*It Spreads Like Wildfire*”: *The Coronavirus Comes to New York’s Prisons*, NEW YORKER (Mar. 24, 2020) (quoting epidemiologist Gregg Gonsalves that “‘It’s nearly impossible to provide infection control in these settings.’”).

⁴⁹ See, e.g., Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee to States Parties and National Preventive Mechanisms Relating to the Coronavirus Disease (COVID-19) Pandemic, Adopted Mar. 25, 2020, CAT/OP/10 (Apr. 7, 2020), at <https://undocs.org/CAT/OP/10>; Centre for Human Rights, University of Pretoria and Centre for Applied Legal Studies, University of Witwatersrand, *Prevent South African Correctional Centres from Becoming Killing Fields of COVID-19: University Human Rights Centres Call for Government Intervention* (Apr. 21, 2020), available at https://www.chr.up.ac.za/images/centrenews/2020/Prevent_South_African_correctional_centres_from_becoming_killing_fields_of_COVID-19_-_University_human_rights_centres_call_for_government_intervention.pdf.

interests of the offender to be free from arbitrary or unjust interference by the state before, during, and after the trial, including the prohibition against cruel and unusual punishment. While some of these instruments also provide for “second generation” economic, social, and cultural rights and, more rarely, third-generation solidarity rights, their implementation is less straightforward.⁵⁰ Normatively, while the rights-holder of say, the right to health, is an identifiable individual, some argue that the correlative duty to provide for this right cannot be universally allocated and the duty-holder thus remains indeterminate.⁵¹ International instruments sidestep this problem to some extent by focusing on states as the primary duty-bearing subjects—although the precise locus of responsibility gets complex with the increasing recognition of the “horizontal effect” of human rights obligations—but states are accorded considerable latitude to progressively realize these rights in light of scarce resources.⁵² This discretion is not altogether surprising given that human rights laws and debates tend to focus on mainly *economic* needs—which implicates financial resources—rather than those relating to social interpersonal life.⁵³

COVID-19 has created an opportunity to broaden the international human rights discourse to highlight the positive obligations that are owed to persons in detention—by states as well as duty-bearing private actors—and why they should be prioritized notwithstanding economic constraints. In contrast to the consequentialist focus on community welfare, this frame of positive duties is grounded in justice. Thus, even if there were no proven wider benefit from state and private actions directed toward the life quality and health of prisoners, morality would nonetheless demand that these measures be undertaken.

There are early indications of the adoption of this moral framework by both state and non-state actors. For example, while introducing the recent bipartisan bill to accelerate the U.S. Bureau of Prisons’ (BOP) approval process for compassionate release for federal prisoners, Senator Dick Durbin declared “[e]nsuring the health and safety of every inmate and BOP staff member is the moral responsibility of the federal government.”⁵⁴ Even though “compassionate release” sounds in the register of mercy rather than justice *strictu sensu*, the vocabulary of moral responsibility shifts the discourse from a punitive carceral state toward one that is based on welfare. Similarly, legal actions being filed around the world have recast prisoner health and safety as essential goods and services that the state must guarantee or provide alternatives to incarceration if it is unwilling or unable to do so.⁵⁵

⁵⁰ See Cees Flinterman, *Three Generations of Human Rights*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 75 (Jan Berting, Peter R. Baehrer & J. Herman Burgers eds., 1990).

⁵¹ Onora O’Neill, *The Dark Side of Human Rights*, 81 INT’L AFF. 427, 430 (2005).

⁵² See UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations, Art. 2(1), para. 9, Dec. 14, 1990, E/1991/23.

⁵³ See Kimberley Brownlee, *A Human Right Against Social Deprivation*, 63 PHIL. Q., 202 (2013) (highlighting the paucity of noneconomic rights in human rights discourse).

⁵⁴ Office of U.S. Senator Brian Schatz Press Release, As Coronavirus Strikes Prisons, Schatz and Durbin Introduce New Bill to Improve Compassionate Release Process and Protect Public Health (May 12, 2020), at <https://www.schatz.senate.gov/press-releases/as-coronavirus-strikes-prisons-schatz-and-durbin-introduce-new-bill-to-improve-compassionate-release-process-and-protect-public-health>.

⁵⁵ See, e.g., Amanda Jerome, *Legal Groups File Charter Challenge Against Government to Protect Federal Inmates* (May 20, 2020), at https://www.thelawyersdaily.ca/articles/19081/legal-groups-file-charter-challenge-against-government-to-protect-federal-inmates?article_related_content=1; International Development Law Organization, *Honduras Court Admits Petition to Protect Prisoners from COVID-19* (May 11, 2020), at <https://www.idlo.int/news/honduras-court-admits-petition-protect-prisoners-covid-19>.

Equally importantly, human rights advocates are challenging the extent to which states may privatize certain functions and the corresponding positive obligations that attach to state and nonstate actors who carry out these services. Having initially taken off in the United States in the 1970s, prison privatization has also gained a foothold in other parts of the world including the UK, Australia, and South Africa as part of the prison industrial complex.⁵⁶ Faced with increasing prison populations and financial constraints, governments have resorted to contracting out certain aspects of prison administration to private firms, ranging from ancillary services such as prison construction and work and food programs, to the more controversial operation and management of prisons.⁵⁷ In the United States, detention centers such as the Trowsdale Turner Correctional Center run by the private corporation CoreCivic, have been amongst the worst-hit facilities and various lawsuits have been filed around the country accusing companies of providing substandard health and medical care in prisons.⁵⁸ Similarly, nonprofit organizations such as the Australasian Centre for Corporate Responsibility have referenced the United Nations Guiding Principles on Business and Human Rights to call upon investors to engage with companies such as Serco and GEO Group that operate detention facilities in Australia for medical treatment and release of prisoners.⁵⁹

These justice-based claims invite a rethinking of the role of the state (vertical positive rights) and of private actors (horizontal positive rights) in a democratic polity. Not only do they highlight the special moral responsibility of the state to safeguard the well-being of its citizens, but they also view private actors as necessary partners in this enterprise.

IV. THE PROMISE OF RIGHTS REFRAMING

On its face, prison reform is an unlikely candidate for testing human rights framing strategies in international law. Prisons around the world deliberately operate at a physical and psychological distance from everyday community life, prisoners as a class are often treated with suspicion and hostility, and reform efforts such as prison depopulation are perceived as a domestic issue within the sovereign authority of the state. Epistemic, consequentialist, and normative rights seeking for prisoners during the pandemic has helped change the conversation on prisoners' rights in a remarkably short time span. Not only have international actors and bodies ranging from the UN Special Rapporteurs to the World Health Organization signaled an ability and willingness to push governments on decarceration, but domestic actors

⁵⁶ Richard Harding, *Private Prisons*, in 28 CRIME & JUST. 265, 268–69 (Michael H. Tonry ed., 2001).

⁵⁷ *Id.* at 270–71, 274 (outlining different types of private outsourcing arrangements).

⁵⁸ American Civil Liberties Union, *Lawsuit Seeks Class-Action Relief for People Detained in Federal Custody in Arizona* (May 8, 2020), at <https://www.aclu.org/press-releases/aclu-sues-protect-people-incarcerated-private-prison-covid-19>; Jef Feeley & Michael Leonard, *Jay-Z-Backed Suit Says Company Downplayed Prison Virus Risks*, BLOOMBERG (May 27, 2020), at <https://www.bloomberg.com/amp/news/articles/2020-05-27/jay-z-backed-lawsuit-says-company-downplayed-prison-virus-risks>.

⁵⁹ Australasian Centre for Corporate Responsibility, *Briefing Note: Private Prisons, Immigration Detention and COVID-19* (May 13, 2020), at <https://www.accr.org.au/news/private-prisons-immigration-detention-and-covid-19>.

have repeatedly invoked international guidelines and policy statements to advocate for and secure rights victories that would previously have been considered out of reach.⁶⁰

International human rights scholars, practitioners, and policymakers may nonetheless query if these demands have staying power in the post-pandemic phase and whether their tentative success can be replicated in other contexts, for example, by disability rights or indigenous peoples' rights advocates? The experience of rights seeking for persons in detention suggests the answer to both these questions is in the affirmative if the reframing devices explored in this Essay are understood as corrective instruments to counter two kinds of biases that stall efforts to champion rights claims. The first is ignorance or denial of the lived reality of a marginalized group that is seen as "the other" and the second is the failure to translate that reality in terms that generate comprehension as well as compassion. Through articulating rights in the neutral language of scientific and medical expertise, emphasizing shared vulnerability, and focusing on the positive obligations of the state toward its citizens, human rights advocates can help bridge the experience and knowledge divide between the wronged and those who wrong them. Human rights protections, whether they are shields or swords, are thus given a fighting chance through a vocabulary that serves to unite rather than divide the winners and the losers.

⁶⁰ See, e.g., Centre for Human Rights, University of Pretoria and Centre for Applied Legal Studies, University of Witwatersrand, *supra* note 49; Commission on Human Rights, Republic of the Philippines, *Statement of CHR Spokesperson, Atty Jacqueline Ann de Guia, on Improving the Plight of Persons Deprived of Liberty Through the Interim National Preventive Mechanism* (May 14, 2020), at <https://chr.gov.ph/statement-of-chr-spokesperson-atty-jacqueline-ann-de-guia-on-improving-the-plight-of-persons-deprived-of-liberty-through-the-interim-national-preventive-mechanism>.