
COMMENT

**INDEFINITE DETENTION, DEADLY
CONDITIONS: HOW BRAZIL’S NOTORIOUS
CRIMINAL JUSTICE SYSTEM VIOLATES THE
INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

LAYLA MEDINA*

I. INTRODUCTION	594
II. BACKGROUND	597
A. A HISTORY OF PUNISHMENT: BRAZIL’S VIEW ON INCARCERATION	597
B. ORGANIZATION AND STRUCTURE: OVERVIEW OF BRAZIL’S PRISON SYSTEM	600
C. CRIMINAL PROCEDURE CODE AND CONSTITUTION: BRAZIL’S LAWS ON CUSTODY HEARINGS AND ARBITRARY ARREST	602
1. Criminal Procedure Code	602
2. Constitution	605
D. LACK OF CUSTODY HEARING LEADS TO OVERCROWDING AND TORTURE	607
E. BRAZIL’S OBLIGATIONS UNDER INTERNATIONAL LAW: ARTICLE 9(3) AND ARTICLE 7 OF THE ICCPR	609
1. Article 9	610
2. Article 7	611
III. ANALYSIS	611
A. VIOLATION OF ARTICLE 9 OF THE ICCPR: BRAZIL’S CRIMINAL PROCEDURE CODE AND CONSTITUTION FAIL TO PROVIDE A FUNDAMENTAL HUMAN RIGHT	612
1. Deprivation of Liberty Under Brazil’s Criminal	

Procedure Code.....	614
2. Deprivation of Liberty Under Brazil's Constitution.....	616
B. THE SNOWBALL EFFECT: BRAZIL'S VIOLATION OF	
ARTICLE 7 OF THE ICCPR.....	618
1. Torture Produced Immediately After an Arrest.....	620
2. Overcrowding Generates Torturous Living Conditions ..	621
IV. RECOMMENDATIONS.....	623
A. LEGISLATIVE REFORM CALLING FOR CUSTODY HEARINGS	
ON A FEDERAL LEVEL	623
B. CHANGES TO PRETRIAL DETENTION AND PRISON	
CONDITIONS.....	624
C. INDEPENDENT BODY OVERSIGHT OF BRAZILIAN	
TREATMENT OF PRISONERS: INTER-AMERICAN COURT OF	
HUMAN RIGHTS NEEDS TO SANCTION BRAZIL FOR	
PREVIOUS WRONGDOINGS	625
V. CONCLUSION.....	626

I. INTRODUCTION

In 2016, Brazil held the Summer Olympic Games.¹ Undoubtedly, since emerging as the host, Brazil has made endless efforts to show the international stage that its country can maintain the event's glamor and glory.² Unfortunately, behind the massive stadiums and venues, lie some of the most miserable penitentiary facilities in the world.³ Windowless cells usually shared by twenty-five men, forced

* Layla Medina is a 2017 J.D. Candidate at American University Washington College of Law. She would like to thank her family for their immense support and love throughout law school and this writing process. She would also like to thank her faculty advisor, Professor Juan E. Méndez, for his generous time and guidance with this comment. Without his tremendous feedback, this would not have been possible.

1. *See generally* Olympic Games, Rio 2016, <http://www.rio2016.com/en/olympic-games> (last visited March 13, 2016) (hosting the games from August 5, 2016 until August 21, 2016).

2. Kiko Itasaka, 2016 Olympics: Rio Upbeat Despite Zika, Economic Woes in Brazil, NBC, Feb. 21, 2016, <http://www.nbcnews.com/news/world/2016-olympics-rio-upbeat-despite-zika-economic-woes-brazil-n510961> (discussing the efforts Brazil has made to prepare Rio for the Olympics).

3. *See* HUM. RTS. WATCH, *Brazil: Where Inmates Run the Show*, YOUTUBE (Oct. 20, 2015), <https://www.youtube.com/watch?v=sqll3XpReuY> (“Prison conditions in Brazil are deplorable. They are a grave human rights disaster.”).

to sleep on the floor, infested with disease and smells of urine, are far from the glamorous images the rest of the world will get to see.⁴

Brazil features the fourth-largest prison population in the world.⁵ Although Brazil is home to more than two hundred million people,⁶ its incarceration rate is growing faster than its overall population.⁷ Today, more than six hundred thousand inmates occupy cell space designed for approximately three hundred fifty thousand.⁸ It is estimated that if incarceration levels remain the same as those presented over the last two decades,⁹ in 2022 Brazil will surpass one million inmates.¹⁰

For the past twenty years, Brazil's prisons have been plagued with chronic human rights violations.¹¹ Particularly, Brazil's lack of

4. *Id.*

5. See Patrick Bruha, *Prison System In Brazil*, BRAZIL BUS., <http://thebrazilbusiness.com/article/prison-system-in-brazil> (last updated Jan. 23, 2015) (trailing behind Russia, United States, and China).

6. See *id.* (stating that in 2014, Brazil was the fifth most populous state in the world, and most populous in South America).

7. See Stephanie Nolen, *Brazil's Brutal Prison System in Crisis Proves a Tough Cage to Rattle*, *Globe & Mail* (Oct. 4, 2015, 10:01 PM), <http://www.theglobeandmail.com/news/world/brazils-brutal-prison-system-in-crisis-proves-a-tough-cage-to-rattle/article26646883/> (last updated Oct. 5, 2015, 9:58 AM) (finding that the incarceration rate grew seven percent a year in the past fifteen years; ten times faster than the country's overall population growth); see also Matthew Oster, *Brazilian Prisons Face Tough Road after New Criminal Law Passed*, EUROMONITOR INT'L BLOG (Aug. 13, 2015), <http://blog.euromonitor.com/2015/08/brazilian-prisons-face-tough-road-after-new-criminal-law-passed.html> (illustrating that the prison growth rate from 2001-2014, 143%, far outpaced the general population growth, 13%).

8. See Ben Tavener, *This Report on Brazil's Prisons Exposes a 'Human Rights Disaster'*, VICE NEWS, (Oct. 20, 2015, 7:00 PM) <https://news.vice.com/article/this-report-on-brazils-prisons-exposes-a-human-rights-disaster> (documenting a 161% increase in the prison population from 2000 to 2014, and estimating a current prison population of 680,000).

9. See INST. OF THE DEFENSE OF THE RIGHT TO DEFENSE, *Pre-trial Detainees in Brazil and the Custody 2*, <http://www.cnj.jus.br/files/conteudo/arquivo/2016/02/dea49c0ba2487f842717d146bf8d3491.pdf> (last visited May 23, 2016) [hereinafter *Pre-trial Detainees in Brazil*] (stating the national incarceration levels must remain in the range of 7% a year).

10. *Id.*

11. See *World Report 2013: Brazil*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2013/country-chapters/brazil> (last visited Oct. 25, 2015) [hereinafter *World Report 2013: Brazil*] (documenting prison conditions in 2012); see also Amnesty Int'l, *Brazil: "Death has Arrived": Prison Massacre at the Casa de Detenção*, Amnesty Int'l 2-4 (Apr. 30, 1993),

custody hearings has greatly promoted torture and ill-treatment of detainees by prison officials, and has caused overcrowding in facilities.¹² In a prison system that is inherently elitist, only those pertaining to the lowest social classes suffer.¹³ The system provides better-conditioned cells to detainees with a university diploma or public connections, while the majority of the population, who are black, poor, and uneducated are packed into tiny cells with unwarrantable hygiene conditions.¹⁴ Unfortunately, the Brazilian public continues to support the mass incarceration and cruel treatment of these prisoners.¹⁵ Not to mention, politicians' careers are determined by their stance on criminal punishment.¹⁶ Showing no mercy for those deemed dangerous is a prerequisite in elections.¹⁷

This Comment asserts that Brazil's denial of custody hearings violates two major provisions in international law. Part II of this Comment introduces a brief history of Brazil's prison system, its criminal procedure code, and its Constitution.¹⁸ This part also

<https://www.amnesty.org/en/documents/amr19/008/1993/en/> [hereinafter Death has Arrived] (analyzing prison conditions in 1992).

12. See *World Report 2013: Brazil*, *supra* note 11 (citing the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment's findings of "repeated and consistent" accounts of inmate beatings in police custody and the obligation to sleep in unsanitary cells without food or water, while demonstrating how consistent delays within the justice system contribute to overcrowding, nearly 175,000 inmates are in pre-trial detention).

13. See Robert Muggah & Ilona Szabo de Carvalho, *Behind bars in Brazil is no place you want to be*, L.A. TIMES (Jan. 22, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-muggah-brazil-prisons-20140122-story.html> (describing the Brazilian prison system as one in which inmates with public connections or a higher class are issued better conditions).

14. See Survey Shows that 56% of Prisoners in Brazil are Youth, DEEO (June 23, 2015), <http://deeo.net/tag/prison-system-exceeds/> (citing InfoPen's numbers, which say that sixty-seven percent are black, fifty-three percent have not completed elementary school, and fifty-seven percent are single).

15. See OBI N. I. EBBE, COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY, AND CORRECTIONS 270 (2013) (comparing Brazil's prison system with Denmark's, indicating that Brazil's thirty years of strict militarism and harsh controls contributed to the disregard of rights for members of lower socioeconomic class).

16. See Juan E. Méndez, Ring the Alarm: Brazil's Prison System is in Serious Trouble, World Post, http://www.huffingtonpost.com/juan-e-m/ring-the-alarm-brazils-pr_b_483744.html (last updated May 25, 2010).

17. See *id.* (referring to near unanimous public opinion in favor of a 'tough on crime' approach).

18. See *infra* Part II.A-E.

presents Article 9(3) and Article 7 of the ICCPR. Part III argues that the discretionary language in Brazil's criminal procedure code regarding custody hearings, is violating Article 9 of the ICCPR.¹⁹ Additionally, it argues that depriving Brazilian citizens of a custody hearing, leads to an alarming rate of torture by government officials, a violation of Article 7 of the ICCPR. As a result, Brazil's overcrowded prison facilities cause physical and mental pain to prisoners, also a violation of Article 7.²⁰

Part IV recommends that Brazil quickly enact a law that unequivocally grants all detainees a custody hearing within twenty-four hours of arrest.²¹ Most importantly, Brazil must ensure that all states nationwide adhere to this strict procedural rule. Part IV also recommends that Brazil renovate its prison facilities to provide sanitary conditions, such as access to beds, clean water, food, and medical services. Lastly, it recommends that an independent judiciary body, such as the Inter-American Court of Human Rights, sanction Brazil and hold it accountable for the inhumane treatment of detainees by prison officials. Part V concludes that Brazil's prison reform will only be resolved by changing the public's perspective on criminal punishment and by electing politicians that will improve prison conditions nationwide.²²

II. BACKGROUND

A. A HISTORY OF PUNISHMENT: BRAZIL'S VIEW ON INCARCERATION

Brazil's history with its penitentiary system began in the 1830's.²³ It did not take long before states across Brazil lost motivation for prison reform and were simply using its detention facilities to fix the behavior of noncompliant slaves.²⁴ Nonetheless, after the abolition of

19. *See infra* Part III.A-B.

20. *See infra* Part III.B(b).

21. *See infra* Part IV.

22. *See infra* Part V.

23. *E.g.*, MITCHEL P. ROTH, PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA 41-42 (2006) (stating that Brazil became one of the first Latin American countries to adopt a prison system after copying Jeremy Bentham's panopticon design for his correction facilities).

24. *See id.* (expressing how the "Casa de Correcao," like some prisons, broke its promise as a reformatory facility and became a "house of disease and death");

slavery,²⁵ the country tried to make an effort to reform its prison system.²⁶ In 1920, Brazil became the first Latin American country to incorporate the telephone pole design²⁷ into its *Casa de Detenção* (Carandiru Prison) in São Paulo.²⁸ Upon completion in 1956, this facility was praised as the nation's model prison because it complied with its 1890 criminal code.²⁹ In 1992, Carandiru gained notoriety for its stern overcrowding³⁰ and violence; consequently, it became known as one of the most dangerous prisons in the world.³¹ That year, the famous Carandiru massacre,³² triggered by a prisoner revolt because of prison overcrowding, illustrated the true reflection of

see also RICARDO D. SALVATORE & CARLOS AGUIRRE, *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940* 236 (1996) (finding that the Brazilian Congress wanted to establish "houses of correction" in each province in 1832; however, it was difficult to implement because provinces lacked the adequate resources to replace their old prisons with new ones).

25. *E.g.*, INT'L BAR ASS'N HUMAN RIGHTS INST., *ONE IN FIVE: THE CRISIS IN BRAZIL'S PRISONS AND CRIMINAL JUSTICE SYSTEM* 37 (2010) [hereinafter *ONE IN FIVE*] (stating that Brazil was "the last country in the Western Hemisphere to abolish slavery," doing so in 1888).

26. *See* ROTH, *supra* note 23, at 42 (stating that by the twentieth century, some improvements were made in several prisons, including Fernando de Noronha, Rio de Janeiro, Bahia, and Recife, but juvenile detentions had not received the same type of reorganization).

27. *See* MARY BOSWORTH, *ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES* 300 (2005) (explaining how a telephone pole design has several wings constructed parallel to one another and are connected by a central passageway that divides the building into multiple sections, facilitating the transportation of prisoners from one part of the prison into the other).

28. *See* ROTH, *supra* note 23, at 42 (indicating that Carandiru Prison was originally designed for a capacity of 1,300 people).

29. *See* CRIME AND PUNISHMENT AROUND THE WORLD 63 (Janet P. Stamatel et al. eds., 2010) (relating Brazil's enactment of the Republican Penal Code in 1890, which created the correctional penitentiary regime after the abolition of slavery).

30. *See World Report 2013: Brazil*, *supra* note 11, at 2-3 (demonstrating that during the peak of its use, the prison housed over 8,000 prisoners, while only 1,000 officers were employed to control them).

31. Julian Kimble, *The 50 Craziest Prisons and Jails in the World*, *COMPLEX* (Aug. 14, 2015), <http://www.complex.com/pop-culture/2015/08/the-50-craziest-prisons-and-jails-in-the-world/> (listing Carandiru as the fifth "craziest" prison in the world, primarily for the 1992 massacre in which 111 inmates died).

32. *See World Report 2013: Brazil*, *supra* note 11, at 3 (describing the massacre: on October 2, 1992, heavily armed military police stormed the facility to suppress an uprising by prisoners, killing one 111 inmates and wounding thirty-five).

Brazil's horrific prison system.³³ The hundreds of prisoner killings by police officials received worldwide attention; yet, it failed to establish any substantial changes to the modern-day prisons.³⁴ In fact, a public opinion poll taken after the massacre showed that a significant number of people supported the brutal actions taken by police and did not immediately care to hold the officials accountable for the murders.³⁵

After Brazil's transition into a full democracy,³⁶ crime had a huge impact on political discourse, and defending civil rights was seen as defending criminality.³⁷ In the end, politicians who were "soft on crime" were not elected, and those who favored tougher measures were securing political seats and changing strategies in prison administration.³⁸ In 2014, similar trends showed that Brazil's biggest public concern was crime, and that many people were unmoved by the fact that police killed individuals perceived as criminals.³⁹

33. See *Carandiru and the Scandal of Brazil's Medieval Prison System*, AMNESTY INT'L. (Apr. 15, 2013), <https://www.amnesty.org/en/latest/news/2013/04/carandiru-and-scandal-brazil-s-medieval-prison-system/> [hereinafter *Carandiru and the Scandal*] (witnessing "a toxic recipe of inhuman detention conditions mixed with the 'shoot first, ask later' policy" that São Paulo police have adopted).

34. See Jacey Fortin, *Twenty Years After Carandiru Massacre, Brazil's Prisons Still Deplorable*, INT'L. BUS. TIMES (Oct. 4, 2012, 9:44 AM), <http://www.ibtimes.com/twenty-years-after-carandiru-massacre-brazils-prisons-still-deplorable-799697> (stating that the conditions of prisons across the country have not improved in the past twenty years).

35. But see *World Report 2015: Brazil*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2013/country-chapters/brazil> (last accessed Nov. 29, 2015) [hereinafter *World Report 2015: Brazil*] (noting that although it took more than twenty years, a total of seventy-three police officers were convicted in 2013 and 2014 for their participation in the Carandiru massacre).

36. See INT'L BAR ASS'N HUMAN RIGHTS INST., *supra* note 25, at 37 (identifying a return to civilian leadership in 1985).

37. See *id.* at 32 (including Rio de Janeiro's governor Leonel Brizola and São Paulo's governor Franco Montero, who became increasingly unpopular when they maintained their platforms respecting human rights).

38. See *id.* (stating these politicians supported the "shoot-to-kill" policies for prison officials).

39. MICHAEL REID, *BRAZIL: THE TROUBLED RISE OF A GLOBAL POWER* 191 (2014) ("When crime is high, human rights disappear."); see also INT'L BAR ASS'N HUMAN RIGHTS INST., *supra* note 25 (maintaining that another reason the public does not care about detainees is because most of them are poor, uneducated, and politically powerless).

B. ORGANIZATION AND STRUCTURE: OVERVIEW OF BRAZIL'S PRISON SYSTEM

Brazil is a federal republic with twenty-six state governments and the federal district of Brasilia.⁴⁰ There is only one national criminal code⁴¹ applicable throughout the entire country;⁴² nevertheless, the administration of prisons is the responsibility of each state.⁴³ Individual states determine how it will manage its prisons; however, the management must abide by Brazil's most detailed prison guidelines, found in the Law of the Execution of Sentences ("LEP").⁴⁴ The LEP was adopted in 1984,⁴⁵ and it sets out the country's aspirations for its penitentiary system.⁴⁶ Since the LEP acknowledges the basic human rights of prisoners, all States are obligated to supplement its penal system with regulations that are in line with the national law.⁴⁷ The only exception to that is when a

40. E.g., *Law of Brazil: State Structure*, OBERHEIDEN L. GRP. PLLC, <http://www.lawofbrazil.com/legal-system/> (last visited Apr. 18, 2016) [hereinafter *Law of Brazil: State Structure*] (explaining that both the federal and state level have three separate branches: legislative, executive, and judicial).

41. See CRIME AND PUNISHMENT AROUND THE WORLD, *supra* note 29, at 63 (emphasizing that in 1940, Brazil enacted the new penal code, known as the *Código Penal Brasileiro*, which is the fundamental piece of Brazilian penal law used today).

42. See JOANNE MARINER & JAMES CAVALLARO, BEHIND BARS IN BRAZIL 14 (Anne Manuel & Cynthia Brown eds., 1998) (stating that in Brazil, every state must apply the same substantive criminal law, in contrast with the United States, where each state has its own criminal code).

43. See *id.* (explaining how Brazil's "prisons, jails, and police lock-ups are administered by its state governments," unlike most Latin American countries, such as Chile, Colombia, and Peru, where the federally administered prison system is under the Ministry of Justice).

44. See IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS CONDITIONS 110 (Dirk Dirk van Zyl Smit & Frieder Dünkler eds., 2d ed. 2001) [hereinafter IMPRISONMENT TODAY AND TOMORROW].

45. See CRIME AND PUNISHMENT AROUND THE WORLD, *supra* note 29, at 63 (explaining that the LEP became part of the General Penal Code, which is the fundamental piece of Brazilian penal legislation).

46. See MARINER & CAVALLARO, *supra* note 42, at 11-12 (stating that this modern piece of legislation provides for the respect of prisoners' human rights, while also containing numerous provisions mandating individualized treatment, protecting inmates' substantive and procedural rights, and guaranteeing them medical, legal, educational, social, religious and material assistance).

47. See IMPRISONMENT TODAY AND TOMORROW, *supra* note 44, at 110 (acknowledging that although the LEP is a modern law abiding by the United Nations Standard Minimum Rules, its provisions are usually overlooked or ignored

state cannot follow a guideline due to a particular characteristic of its region.⁴⁸

In Brazil, the state penal systems are governed by the state's executive branch.⁴⁹ For example, it is common for the state governor⁵⁰ to act as the secretary of justice and manage prisons, while the secretary of public security controls police lock-ups.⁵¹ Yet, this does not mean that the federal government is completely out of the picture when it comes to the overall structure of its prison system.⁵²

Brazil's federal government has several cabinet-level ministries in charge of executing laws nationwide, including the Ministry of Justice.⁵³ Within this institution, lie two other important executive organs responsible for observing and implementing criminal law and policy- the National Penitentiary Department ("DEPEN") and the National Council on Criminal and Penitentiary Policy ("CNPCP").⁵⁴ The former is primarily responsible for administrative matters, such as supervising states and the enactment of prison guidelines, and the construction of new buildings.⁵⁵ Additionally DEPEN, manages the

by the states).

48. *See id.* at 111 (citing appropriate characteristics for an exception as being cultural, climatic, administrative or financial in nature).

49. MARINER & CAVALLARO, *supra* note 42, at 15.

50. *See, e.g., Law of Brazil: State Structure, supra* note 40 (identifying the head of the state's executive branch as the governor).

51. *See* MARINER & CAVALLARO, *supra* note 42, at 15 (asserting that facilities known as *cadeias públicas* or *cadeiões*, or jails, may fall under either secretariat).

52. *See id.* at 16 (identifying two federal agencies concerned with prison policy: the Penitentiary Department, concerned with practical matters, and the National Council on Criminal and Penitentiary Policy, concerned with guiding intellectual policy).

53. *See* Leandro Zaccaro Garcia, Brazil and the Brazilian Correctional System, in UNAFEI, Annual Report for 2012 and Resource Material, Series No. 90 124, 125 (2013), http://www.unafei.or.jp/english/pdf/RS_No90/No90_15PA_Garcia.pdf (stating that the Ministry of Justice is part of the Federal Government and it is the most important legal body responsible for planning, coordinating, and administering criminal law and policy).

54. *See generally Common Questions: Criminal Policy*, MINISTRY OF JUSTICE FED. GOV'T, <http://www.justica.gov.br/seus-direitos/politica-penal> (last visited Apr. 18, 2016) (explaining the department levels within the Ministry of Justice).

55. *See id.*; *see also* BRAZIL TODAY: AN ENCYCLOPEDIA OF LIFE IN THE REPUBLIC 473 (John J. Crocitti ed., 2012) [hereinafter BRAZIL TODAY] (stating that the "DEPEN" has been cooperating with the twenty-six state prison systems since October 1975).

National Penitentiary Fund (“FUNPEN”), implemented in 1994 in an effort to manage prison resources, improve overcrowding, unhealthy conditions, and prisoner-on prisoner violence.⁵⁶

On the other hand, CNPCP provides in-depth research on prisons and publicizes the national prison census every two years.⁵⁷ The CNPCP also recommends legislation to fix the issues it finds most prevalent, such as overcrowding.⁵⁸ It is worthy of noting that in 1994, the CNPCP adopted the United Nations Standard Minimum Rules for the Treatment of Prisoners,⁵⁹ which addresses a variety of issues regarding prison formation and the framework for monitoring and inspecting prisoners’ treatment worldwide.⁶⁰

C. CRIMINAL PROCEDURE CODE AND CONSTITUTION: BRAZIL’S LAWS ON CUSTODY HEARINGS AND ARBITRARY ARREST

1. *Criminal Procedure Code*

Custody hearings are designed to prevent “unlawful arbitrary imprisonment” of individuals suspected of a crime while they await trial.⁶¹ The procedure includes being brought *promptly* before a judge or an independent magistrate when arrested for a crime.⁶² Yet, Brazil’s criminal system frequently deprives detainees of this

56. See, e.g., BRAZIL TODAY, *supra* note 55, at 473 (stating that FUNPEN helped finance states’ construction and prison establishments because they were unable to support the costs themselves).

57. See MARINER & CAVALLARO, *supra* note 42, at 16 (containing useful information and statistics on prisoners, prison staff, and the conditions of a particular prison).

58. See *id.* (stating that the CNPCP recommends draft legislation on prison reform and related issues).

59. See Resolução N°14, de 11 de Novembro de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 2.12.1994 (Braz.) (establishing minimum standards for the treatment of prisoners in Brazil).

60. See *id.* (reinforcing the idea that these rules are the primary legal standards in international law regarding detention treatment, such as contact with the outside world, issuing of books, medical services, education, etc.).

61. See *Brazil: Approve Critical Justice Reform*, HUM. RTS. WATCH (Aug. 12, 2015), <https://www.hrw.org/pt-br/node/280143> [hereinafter *Brazil: Approve Critical Justice*] (explaining that custody hearings afford a judge the opportunity evaluate the basis of a prisoner’s detention and determine whether prisoner should be incarcerated while awaiting trial).

62. See *id.*

fundamental due process guarantee.⁶³ The lack of implementation gives rise to the “arrest first, ask later” policy, where the majority of arrestees sit in pretrial detention,⁶⁴ without formal charges, while routinely housed with convicted criminals.⁶⁵

This problem stems from the language provided in Brazil’s criminal procedure code regarding custody hearings.⁶⁶ For example, if a citizen is arrested in *flagrante delicto* (caught in the act), the criminal procedure code only requires the *police* to submit an arrest report to the judge within twenty-four hours, not bring the actual detainee.⁶⁷ Surprisingly in Brazil, *flagrante delicto* arrests can also mean that the police receive an anonymous tip regarding an individual.⁶⁸ The police can proceed to arrest the individual on that sole basis, regardless of whether or not police officer caught the individual “in the act” of committing a crime.⁶⁹ In both cases, the judge decides whether or not the citizen should be held in pretrial detention or given other precautionary measures exclusively on the report provided by the police.⁷⁰ This means that police can keep a

63. *See id.* (noting that pretrial detainees waiting for a hearing may have to wait months or years before going before a judge).

64. *See Pre-trial Detainees in Brazil*, *supra* note 9, at 2 (stating that 41% of the prison population are temporary detainees who are being held in custody without trial).

65. *See Brazil: Prison Crisis Spurs Rights Reform*, HUM. RTS. WATCH (Apr. 8, 2015), <https://www.hrw.org/print/267851> [hereinafter *Brazil: Prison Crisis*] (noting that pretrial detainees are routinely housed among convicted criminals in violation of international standards).

66. CÓDIGO DE PROCESSO PENAL [C.P.C.] [CRIMINAL PROCEDURE CODE] art. 306, §1 (Braz.).

67. *Id.* (“Em até 24 (vinte e quatro) horas após a realização da prisão, será encaminhado ao juiz competente o auto de prisão em flagrante e . . .”) [exact language].

68. Interview with Juan E. Méndez, Special Rapporteur on Torture, United Nations, in Washington, D.C. (Mar. 2016) (explaining that during his visit to Brazil, he was concerned about police using an elastic definition of *flagrancia* that does not resemble the circumstance of actually witnessing the commission of a crime, and instead often turns into a justification for illegal searches and seizures or illegal investigative measures).

69. *Id.*

70. Maria Laura Canineu, *The Right to a “Custody Hearing” under International Law*, HUM. RTS. WATCH (Feb. 3, 2014), <https://www.hrw.org/news/2014/02/03/right-custody-hearing-under-international-law> (explaining that only police files are submitted to the judge when determining whether the arrestee should be detained while awaiting trial).

citizen detained with formal judicial authorization for several months without giving the detainee the chance to actually see the judge in person.⁷¹

In an effort to combat the overwhelming rate of pretrial detainees, Brazil enacted Federal Law No. 12.403 in July 2011.⁷² Known as the preventative measures act, this piece of legislation was implemented to ensure that judges used the alternative measures listed in Article 319 of the Criminal Procedure Code first, while resorting to pretrial detention in extreme circumstances only.⁷³ Unfortunately, even after its enactment, surveys administered by civil society administrations demonstrate that the legislative efforts have not yet had an impact on judges' reasoning, who continue to justify pretrial detention as the best measure for those being accused of crimes.⁷⁴ In fact, the *Instituto Sou da Paz*⁷⁵ discovered that from April to July 2012, 61.3% of the *flagrante delicto* arrests were converted into pretrial detention.

More recently, the National Justice Council ("CNJ") and the Ministry of Justice "(MJ") launched a pilot program known as the "Custody Hearing Project" throughout the country.⁷⁶ The goal of the program is to ensure that states fulfill their obligations to bring every detained person promptly before a judge, who will (a) rule on the

71. *See id.* (noting that although the Criminal Procedure Code requires a hearing within sixty days, in practice, detainees may have to wait months before seeing a judge because the Code does not specify when that sixty day period begins).

72. *See Pre-trial Detainees in Brazil, supra* note 9, at 2-3.

73. *See id.* (including preventative measures such as home confinement at night and on days off when the person in question has established residence and has a permanent job, electronic monitoring, restraining orders, periodic appearances in court on specific dates and subject to special conditions set by judge, and a few others).

74. *Id.* at 3.

75. *See* INST. SOU DA PAZ, *What We Do* (2013), <http://www.soudapaz.org/en/what-we-do> (asserting that this institution is a non-governmental organization that works to reduce levels of violence in Brazil and contributes to public policy for security and violence prevention).

76. *See Pre-trial Detainees in Brazil, supra* note 9, at 8; *see also* FED. SUP. CT. (Braz.), *Custody Hearing Project Reaches 14 States with the Inclusion of Piauí* (Aug. 24, 2015), http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=298373 (finding that these states have adopted the program: São Paulo, Espírito Santo, Maranhão, Minas Gerais, Mato Grosso, Rio Grande do Sul, Paraná, Amazonas, Tocantins, Goiás, Paraíba, Pernambuco, Ceará, and Piauí).

legality of the arrest; (b) determine the necessity of pretrial detention, orders release on bail or the detainee's own recognizance pending trial, or imposes measures on the detainee, short of detention, to ensure appearance in court; and (c) detects torture and ill-treatment.⁷⁷ The implementation has proven successful in certain states; however, numerous states have not implemented them.⁷⁸ Not surprisingly, those regions that began to grant prompt custody hearings have seen a significant decrease in pretrial detainees; as opposed to those that have not done so.⁷⁹ It has also been noted that this implementation functions more as a public policy initiative rather than substantial law, which means States are not obligated to comply with it.⁸⁰

2. Constitution

Brazil enacted its current Constitution on October 5, 1988.⁸¹ Article V enumerates an extensive list of individual and collective fundamental rights and guarantees.⁸² Additionally, the Constitution declares that all fundamental rights must have an immediate application, and a citizen can claim a violation of one of these rights if either the legislative or executive branch fails to implement it.⁸³ Most importantly, the judiciary must examine and uphold any threat or violation of a civil right.⁸⁴

77. See *Pre-trial Detainees in Brazil*, *supra* note 9, at 8.

78. See *Brazil: Prison Crisis*, *supra* note 65 (noting that only two states, Maranhão and São Paulo, have begun pilot programs to provide all arrestees pretrial custody hearings).

79. *Id.* (noting that in one state, judges have found that pre-trial detention unwarranted in approximately fifty percent of cases).

80. See *Pre-trial Detainees in Brazil*, *supra* note 9, at 8.

81. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.) (ratified Oct. 5, 1988).

82. See, e.g., *id.* art. 5, I-III (providing equal protection for men and women; prohibiting punishment without basis in law; and prohibiting torture, inhuman, or degrading treatment).

83. See *id.* art. 5, par. 1 (“The provisions defining fundamental rights and guarantees are immediately applicable.”); ONE IN FIVE, *supra* note 25, at 37 (explaining that individuals may bring claims directly to federal court alleging improper regulation or implementation of an enumerated right).

84. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, XXXV (Braz.) (guaranteeing judicial review of any alleged infraction of a protected right); see also ONE IN FIVE, *supra* note 25, at 41 (explaining that the *Supremo Tribunal Federal* is Brazil's highest judicial authority regarding constitutional interpretation).

Even though Brazil's Constitution identifies the judicial remedy of *habeas corpus*⁸⁵ in cases of unlawful detention,⁸⁶ there is no requirement or *guarantee* that the detainee's petition will be reviewed or granted.⁸⁷ Not only is the right to habeas corpus found in Brazil's Constitution, it is also found in the country's criminal procedure code.⁸⁸ In addition, the criminal procedure code lists the types of behavior that may be considered unlawful detention.⁸⁹ However, even when an unlawful detention exists, petitions are usually not granted.⁹⁰

As a result, people detained for lower-level crimes, those related to drug or theft offenses, get placed in pretrial detention with high-level criminals, those who have committed murder or rape, and even serve time for offenses that do not require prison time if convicted.⁹¹ This negative implication of the law contributes to the high risk of torture by police officials while in custody and generates high overcrowding rates.⁹²

85. *Habeas Corpus*, THE LECTRIC LAW LIBRARY, <http://www.lectlaw.com/def/h001.htm> (last visited Mar. 25, 2016) (“[A] judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.”).

86. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, § LXVIII (Braz.).

87. See *Brazil: Protect Detainees in Police Custody*, HUM. RTS. WATCH (July 25, 2014), https://www.hrw.org/news/2014/07/25/brazil-protect-detainees-police-custody#_ftnref13 [hereinafter *Brazil: Protect Detainees*] (acknowledging that a defendant's only opportunity to present evidence to a judge with respect to unlawful custodial arrest, will only occur if that person testifies at trial, which can occur after months of detention).

88. See CÓDIGO DE PROCESSO PENAL [C.P.C.] [CRIMINAL PROCEDURE CODE] arts. 647-667 (Braz.) (proscribing conditions where a habeas petition must be granted, and establishing filing and appellate procedures for habeas petitions).

89. *Id.* art. 648 (listing instances where detention is not afforded with good cause, the detention exceeds the length of time provided by law, the detention was ordered by someone who lacked authority, or the detainee was wrongfully denied bail).

90. *Id.*

91. See *Brazil: Prison Crisis*, *supra* note 65 (presenting a case where a man spent more than two months in jail waiting to see a judge for allegedly buying a stolen motorcycle, even though a conviction of this charge would not have included prison time).

92. See *id.* (stating that inmates who are pretrial detainees, are at the highest risk of ill treatment during the first stages of detention); see also MARINER & CAVALLARO, *supra* note 42, at 26 (finding that prisoners who have not received a

D. LACK OF CUSTODY HEARING LEADS TO OVERCROWDING AND TORTURE

The Brazilian Prison System has been under scrutiny by top United Nations Officials, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.⁹³ In a recent visit, the Special Rapporteur identified overcrowding as the most pressing issue affecting Brazilian prisons.⁹⁴ Sadly, this issue stems back for several years.⁹⁵ In 2001, one report concluded that prisons meant to hold one hundred and forty-five thousand detainees were actually holding over two hundred thousand.⁹⁶ By June 2014, Brazil's NCPCP observed that prison population was 161% overcapacity.⁹⁷ A center for human rights found that the Brazilian prison population increased by seventy-four percent from 2005 to 2012.⁹⁸ The disparate rate of prisoners to designated space vary by

sentence constitute roughly one-third of the inmate population).

93. See *Brazil Must Address Prison Overcrowding and Implement Measures Against Torture – UN Expert*, UN NEWS CTR. (Aug. 14, 2015), <http://www.un.org/apps/news/story.asp?NewsID=51644#.VilgEBCrR0u> [hereinafter *Brazil Must Address Prison*] (observing that the continuous atmosphere of chaos and tension in Brazilian prisons, coupled with the lack of a robust policy against torture, will likely perpetuate and exacerbate the problem of inhumane treatment of prisoners).

94. *Id.* (noting that certain prisons were more than three times over capacity, contributing to an atmosphere of violence and tension).

95. See *Inhumane, Ineffective, Intolerable: Brazil's Prison System*, COUNCIL ON HEMISPHERIC AFFAIRS (Aug. 26, 2010), <http://www.coha.org/inhumane-ineffective-intolerable-brazil%E2%80%99s-prison-system/> [hereinafter *Inhumane, Ineffective, Intolerable*] (stemming over twenty years).

96. See *Tackling the Chaos in Brazil's Prisons*, ECONOMIST (Feb. 22, 2001), <http://www.economist.com/node/511505> (reporting that overcrowding contributed to daily prison riots and mass escapes).

97. See MINISTÉRIO DA JUSTIÇA CONSELHO NACIONAL DE JUSTIÇA [MINISTRY OF JUSTICE, NATIONAL COUNCIL OF JUSTICE], *Novo Diagnóstico de Pessoas Presas No Brasil [New Statistics of Prisoners in Brazil]* 6 (June 2014), http://www.cnj.jus.br/images/imprensa/pessoas_presas_no_brasil_final.pdf (noting a prisoner vacancy deficit of over 206,000 prisoners); see also MINISTÉRIO DA JUSTIÇA DEPARTAMENTO PENITENCIÁRIO NACIONAL [MINISTRY OF JUSTICE, DEPARTMENT OF NATIONAL PENITENTIARIES], *Levantamento Nacional de Informações Penitenciárias [National Survey of Penitentiary Information]* 30 (June 2015), <http://www.justica.gov.br/noticias/mj-divulgara-novo-relatorio-do-infopen-nesta-terca-feira/relatorio-depen-versao-web.pdf> (“In other words, in a space designed to house 10 people, there are approximately 16 individuals incarcerated”).

98. U.N. DEVELOPMENT PROGRAMME, *Mapa do Encarceramento: Os Jovens do*

state; however, research shows that most states are overwhelmingly filling their prisons past capacity.⁹⁹

Brazilian prison conditions have not improved in over a decade despite the federal government's acknowledgement of the grim situation.¹⁰⁰ Overcrowding has led to several other issues in Brazil's Penal System,¹⁰¹ but undoubtedly, another major issue arising out of both the lack of custody hearings and overcrowding is use of torture by prison officials.¹⁰²

For instance, visits to several institutions located in São Paulo, Rio de Janeiro, Espírito Santo, and Goiás documented repeated and consistent beatings of inmates and other ill treatment during police custody, such as requiring prisoners to sleep in unsanitary cells without proper access to water or food.¹⁰³ Additionally, the Special Rapporteur found that prison personnel frequently used pepper spray, noise bombs, tear gas, and rubber bullets on prisoners.¹⁰⁴ One famous method of extracting confessions from suspects is the "parrot's perch" (*pau de arara*), where a detainee is hung upside down and then beaten until he or she gives the officials the information they are

Brasil [Map of Incarcerations: The Youth of Brazil] 25 (June 5, 2015), http://www.pnud.org.br/arquivos/encarceramento_WEB.pdf (noting an increase from 296,919 prisoners in 2005 to 515,482 in 2012).

99. *The State Let Evil Take Over*, HUM. RTS. WATCH (Oct. 19, 2015), <https://www.hrw.org/report/2015/10/19/state-let-evil-take-over/prison-crisis-brazilian-state-pernambuco> (explaining that the Pernambuco's prison system is the most overcrowded in Brazil with almost 32,000 prisoners in facilities designed for 10,000); see also *Carandiru and the Scandal*, *supra* note 33 (finding that in Cadeia Pública Riamundo Vidal Pessoa 900 detainees were held in the men's wing that was designed to hold 100 people).

100. See *Inhumane, Ineffective, Intolerable*, *supra* note 95 (failing to produce a meaningful remedy that can lower incarceration rate or fix the judicial system).

101. *Brazil must address prison*, *supra* note 93 ("This leads to chaotic conditions inside the facilities, and greatly impacts [sic] on the living conditions of inmates and their access to legal defence, health care, psycho-social support, work and education opportunities, as well as sun, fresh air and recreation.")

102. See *World Report 2015: Brazil*, *supra* note 35 (documenting over 5,000 complaints of torture between January 2012 and June 2014, 84% were incidents at police stations, prisons, and juvenile detention centers).

103. See *World Report 2013: Brazil*, *supra* note 11 (noting that prisoner mistreatment in Brazilian detention centers and police stations are chronic and system wide).

104. See *Brazil must address prison*, *supra* note 93 (indicating the likelihood of this trend rising in both numbers and severity if the country continues to not hold officials accountable for prisoner abuse).

seeking.¹⁰⁵ These routine practices have become so ominous that even Brazil's Minister of Justice, José Eduardo Cardozo, has called it a "medieval prison system."¹⁰⁶

Nonetheless, Brazil has recently taken a step to help monitor the ill treatment of prisoners.¹⁰⁷ In 2013, President Dilma Roussef created the National System to Prevent and Combat Torture, which is a two-body system aimed at monitoring detention centers and assisting people who are being deprived of their liberty.¹⁰⁸ Unfortunately, because this legislation is new, there are no studies to show how its legal oversight is holding states accountable for torture against detainees.¹⁰⁹

E. BRAZIL'S OBLIGATIONS UNDER INTERNATIONAL LAW: ARTICLE 9(3) AND ARTICLE 7 OF THE ICCPR

The right to be brought promptly before a judge upon arrest is an established concept in international law.¹¹⁰ Particularly, this fundamental human right is solidified in the United Nations International Covenant on Civil and Political Rights ("ICCPR"), which Brazil has ratified.¹¹¹ The ICCPR was adopted on December 19, 1966 by the United Nations General Assembly and was created

105. See *Inhumane, Ineffective, Intolerable*, *supra* note 95.

106. *Carandiru and the scandal*, *supra* note 33 ("We have a medieval prison system, which not only violates human rights, it does not allow for the most important element of a penal sanction, which is social reintegration.").

107. See, e.g., *Brazilian NPM law creates new system to prevent torture*, APT (Aug. 27, 2013), http://www.apr.ch/en/news_on_prevention/brazilian-npm-law-creates-new-system-to-prevent-torture/#.VludG9-rR0s. SPADER: Add supporting parenthetical.

108. See Lei No. 122.847, de 2 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 05.08.2013 (Braz.) (creating the National Committee to Prevent and Combat Torture, and the National Mechanism for Preventing and Combatting Torture).

109. See *Brazil: Protect Detainees*, *supra* note 87 (predicting that new entity will be dedicated to tracking cases of torture and ill treatment).

110. See International Covenant on Civil and Political Rights, art. 9(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."); see also Canineu, *supra* note 70 (arguing that a detainee's right to go before a judge is crucial to ensure that the detainee's arrest, treatment, and ongoing detention are lawful).

111. *Id.* (ratified on April 24, 1992).

to secure the civil and political rights of citizens whose countries are party to it.¹¹² This covenant also establishes the United Nations Human Rights Committee (“The Committee”)¹⁰⁵ who receives periodic reports from the ratified parties demonstrating the measures they have taken to abide by the law.¹¹³

I. Article 9

Article 9 of the ICCPR recognizes the essential right to liberty and security of a person and protection against arbitrary arrest or detention.¹¹⁴ Specifically, Article 9(3) establishes that “[A]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. . . .”¹¹⁵ The Committee has determined that the delay between the arrest of an accused and the time before he is brought before a judicial authority “should not exceed a few days,”¹¹⁶ even during states of emergency.¹¹⁷ The Committee has declared that a prompt judicial hearing must be asserted “in all cases without exception.”¹¹⁸

112. See STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 34 (2006) (finding that the ICCPR is a legitimate law-making process, and it is binding in the acceptance by states).

¹⁰⁵ See *id.* at 266 (consisting of eighteen members elected by the parties on the basis of their expertise in the field of human rights and who are not representatives of the particular governments).

113. See *id.* (noting that Committee members often question state reports, request supplemental information, take official notice of extrinsic evidence, or other evidence submitted by non-state sources); *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> (last updated Apr. 2014) (noting that the Committee addresses recommendations or concerns in “Concluding Observations” by the Committee).

114. ICCPR, *supra* note 110, art. 9.

115. *Id.* art. 9(3).

116. U.N. Human Rights Comm., International Covenant on Civil and Political Rights General Comment No. 35, ¶ 33, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter General Comment No. 35] (indicating that forty-eight hours after an arrest is usually sufficient to have a judicial hearing; any delay longer than that, must be “absolutely exceptional and be justified under the circumstances”); see also U.N. Human Rights Comm., *Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (Mar. 31, 2000) (indicating four days as not prompt).

117. See Canineu, *supra* note 70 (citing the ICCPR and other cases by the Committee).

118. General Comment No. 35, *supra* note 116, at ¶32 (stating that the requirement applies even before formal charges have been asserted so long as the person is arrested or detained on suspicion of criminal activity).

2. Article 7

When it comes to human rights violations against torture, Article 7 of the ICCPR establishes that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹¹⁹ In addition, the Committee has provided that Article 7 exists for the protection of dignity, physical and mental integrity of the individual.¹²⁰ Most importantly, Article 7 of the ICCPR is unequivocal.¹²¹ This means that a party to the covenant cannot find any exceptions to this prohibition; therefore, they must strictly adhere to it at all times.¹²² Lastly, the Committee establishes that Article 7 prohibits acts causing both physical and mental pain to the victim.¹²³

III. ANALYSIS

According to some scholars, Brazil’s criminal procedure code and Constitution provide prisoners with the utmost respect for human rights and dignity.¹²⁴ However, in practice, Brazil’s most important laws fail to provide its citizens with due process upon being detained and fail to protect the value of human life while in custody.¹²⁵

119. ICCPR, *supra* note 110, art. 7.

120. U.N. Human Rights Comm., General Comment No. 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008) [hereinafter General Comment No. 20] (affirming the State’s duty to provide every citizen this protection through legislative measures or any other measures necessary to secure this right).

121. *See id.* at ¶3 (affirming the Committee’s position that an individual should never be subjected to torture under any circumstances).

122. *See id.* (stating that no crisis, not even a terrorist emergency or a time of war, justifies a departure from Article 7 standards).

123. *See id.* at ¶5 (“The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.”).

124. *See, e.g.,* ONE IN FIVE, *supra* note 25 (stating that the Brazilian Constitution includes a long list of rights and freedoms secured by every citizen to promote the human rights listed in international law).

125. *See id.* (finding that Brazil has some of the most progressive laws for the protection of human rights in the region, yet there is a huge gap between “[t]he spirit of these laws and their implementation”).

Brazil's lack of uniformity in its criminal law, its unrestricted judicial system, and unsupervised law enforcement, is violating both Article 9(3) and Article 7 of the ICCPR.¹²⁶ The Articles' explicit language, along with the Committee's strict recommendations, demonstrate that Brazil does not adhere to this international law. By holding detainees in pretrial detention for long periods, the Brazilian judicial system does not allow detainees to receive a fair evaluation of the merits of their detention. Instead, the Brazilian judicial system fosters torture of detainees while in custody.¹²⁷ Further, it subjects detainees to overcrowded conditions that cause severe mental anguish and physical pain.¹²⁸ Because Brazil has ratified the ICCPR, it must immediately abide by these provisions.¹²⁹ By failing to abide by these provisions, Brazil's Criminal Procedure Code deprives Brazilian citizens of the fundamental right of liberty and security.

A. VIOLATION OF ARTICLE 9 OF THE ICCPR: BRAZIL'S CRIMINAL
PROCEDURE CODE AND CONSTITUTION FAIL TO PROVIDE A
FUNDAMENTAL HUMAN RIGHT

The right to liberty and security is outlined in the ICCPR, one of the most binding international law instruments.¹³⁰ As the Committee mentions, this right is afforded to "everyone," including those suspected of criminal activity, or those with pending criminal charges.¹³¹ The basis for this provision is to bring the detainee under judicial control immediately.¹³² The overall goal of Article 9 is to avoid the deprivation of liberty¹³³ because it can trigger a violation of other human rights.¹³⁴ Nonetheless, the majority of Brazilian

126. *See id.* (acknowledging that Brazil is likely violating its own constitutional provisions on human rights through its biased judicial system and lack of adequate oversight).

127. *See generally, supra* Part II. C-E.

128. *See id. See generally supra* Part II. C-E.

129. *See generally supra* note 89.

130. ICCPR, *supra* note 110, art. 9.

131. General Comment No. 35, *supra* note 116, at ¶4 (assuring the right applies to all persons deprived of liberty, not just those facing criminal charges).

132. *See id.* at ¶32.

133. *Id.* at ¶3, ¶5 (noting that liberty concerns bodily confinement, not the freedom of action; and listing examples of deprivation of liberty, including police custody, remand detention, imprisonment after conviction, etc.).

134. *Id.* at ¶2 ("Liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically

prisoners are detained without the opportunity to *promptly* challenge their detention in front of an independent judge, a contradictory practice to the ICCPR.¹³⁵

A critical function of a prompt custody hearing is for the judge to determine whether or not the detainee has been legally detained, as well as, for the detainee to report any police abuse at the time of the arrest.¹³⁶ Furthermore, it allows the individual to ask the judge to be released on his or her own recognizance (“O.R.”),¹³⁷ or on bail while formal charges are pending.¹³⁸ Nonetheless, Brazilian prisoners are not afforded with this protection because most states do not bring the detained individual before a judge for three months after the initial arrest.¹³⁹ Thus, a big reason why Brazil is not in compliance with Article 9 of the ICCPR is because its criminal procedure code uses discretionary language.¹⁴⁰ The country’s current practice allows judges to detain many individuals in pretrial detention without giving them the opportunity to physically appear in court, a crucial aspect of Article 9.¹⁴¹

been principal means for impairing the enjoyment of other rights.”).

135. See *Brazil: Protect Detainees*, *supra* note 87; see also *Brazil must address prison*, *supra* note 93 (arguing for immediate expansion in the use of custody hearings nationwide because it can reduce the number of pretrial detainees by 40%).

136. General Comment No. 35, *supra* note 116, at ¶34 (“[P]hysical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody.”); see also Canineu, *supra* note 70 (noting that the risk of ill treatment is often highest during the first hours of detention, and that hearing delays negatively impact investigations of abuse).

137. See Paul Bergman, *How Judges Decide to Release You on Your Own Recognizance, or “OR”*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-judges-decide-release-own-recognizance.html> (last accessed on Nov. 15, 2015) (stating that an O.R. is a “no-cost bail” release or written promise to appear in court as required).

138. See *Brazil: Protect Detainees*, *supra* note 87 (arguing that the delay will make a detainee’s critical evidence, such as access to witnesses, voluntary statements, and most importantly, any accounts of abuse by police officials, disappear).

139. *E.g.*, *Brazil: Prison Crisis*, *supra* note 65 (observing that some detainees accused of non-drug charges can wait up to nine months before they see a judge).

140. See generally *supra* Part II C(a) (explaining how language requiring an arrest report within 24 hours, but not actual production of the prisoner, leads to excessive delay and police abuse).

141. General Comment No. 35, *supra* note 116, at ¶34.

1. Deprivation of Liberty Under Brazil's Criminal Procedure Code

Under Article 306 of Brazil's criminal procedure code, courts are systematically violating the presumption of innocence¹⁴² and in turn, violating the ICCPR.¹⁴³ With the implementation of this law, the detainee is refrained from disputing the detention. Additionally, the law restricts detainees from being represented by an attorney who can argue that the evidence does not amount to probable cause for an arrest.¹⁴⁴ As soon as the detainee is placed under pretrial detention without seeing a judge, or placed in pretrial detention for a minor offense that otherwise would not carry a sentence, Brazil is depriving that individual of his liberty.¹⁴⁵

Being brought promptly before a judge has no exceptions, not even a detainee's choice or ability to assert it.¹⁴⁶ Moreover, according to the Committee, "[I]t is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with."¹⁴⁷ In Brazil's case, the authority is neither *objective nor impartial* to the issues because the judge and the police are the only ones evaluating the arrest and detention of the individual.¹⁴⁸ Brazil cannot claim that its criminal procedure code is objective and impartial because the only side the judge gets to consider is the police's.¹⁴⁹ In order to

142. CÓDIGO DE PROCESSO PENAL [C.P.C.] [CRIMINAL PROCEDURE CODE] art. 306, §1 (Braz.); *see also* ONE IN FIVE, *supra* note 25 (detailing systemic abuses by judges and courts that evidence judicial bias, corruption, and willful violation of Brazilian law).

143. *E.g.*, *Brazil: Protect Detainees*, *supra* note 87 (noting that the criminal code allows police to only submit an arrest report within twenty four hours, rather than bringing in the person in front of the judge).

144. *See* Canineu, *supra* note 70 ("It is unjustifiable that a democracy like Brazil has disregarded this fundamental right for so long").

145. *See Brazil: Prison Crisis*, *supra* note 65 (stating that the use of pretrial detention may only be considered if the suspect is accused of a crime that carries a sentence of more than four years, if the suspect has already been convicted of a crime, if the suspect is facing domestic violence charges, or if the suspect's identity is at issue).

146. General Comment No. 35, *supra* note 116, at ¶32.

147. *Id.*

148. *See* Canineu, *supra* note 70 (evaluating the legality of the arrest and detention based solely on the written documents provided by police within twenty-four hours of the arrest).

149. *Id.* (stating that the suspect does not get to raise objections until they appear in court, often months after the initial arrest).

abide by Article 9(3) of the ICCPR, Brazil must explicitly grant a custody hearing to an individual, including a physical presence in the courtroom, with an attorney.¹⁵⁰ Article 9 does not allow the judge to determine a suspect's custody status based only on a predisposed report.¹⁵¹ Brazil's criminal procedure code must provide that every individual who is arrested in *flagrante delicto* will promptly see a judge under all circumstances.¹⁵²

As previously mentioned, Article 9(3) stipulates that “[A]nyone arrested or detained on a criminal charge shall be brought promptly before a judge. . . .”¹⁵³ The Committee has not exactly defined the word “promptly;” however, it has agreed that forty-eight hours is customarily sufficient to transport the individual and prepare for a judicial hearing.¹⁵⁴ The Committee has also concluded that any pretrial detention lasting longer than forty-eight hours without a custodial hearing, must “remain absolutely exceptional and be justified under the circumstances.”¹⁵⁵ Yet in Brazil, pretrial detention repeatedly lasts more than forty-eight hours. Often, pretrial detention can last an average of five months,¹⁵⁶ sometimes without a charge or conviction.¹⁵⁷ The Committee makes it clear that forty-eight hours is plenty of time to bring the suspect in front of a judge, which is why

150. General Comment No. 35, *supra* note 116, at ¶34 (entitling suspect to legal assistance of his choice during the mandatory initial custody hearing).

151. *Id.* (stating that the individual must appear physically before the judge to determine the legality of his detention and allow for inquiry into custodial treatment).

152. *Id.* at ¶32.

153. ICCPR, *supra* note 110, art. 9(3).

154. General Comment No. 35, *supra* note 116, at ¶33 (adding that delays should never exceed a few days from the time of arrest, and that only exceptional circumstances warrant delay longer than forty-eight hours); *see also* Kovsh v. Belarus, No. 1787/2008, ¶¶7.3-7.5, U.N. Doc. CCPR/C/107/D/1787/2008 (Mar. 28, 2013) (noting that pretrial detention should be kept as short as possible; sixty-one to seventy-two hours was not a reasonable delay without a valid reason or explanation).

155. General Comment No. 35, *supra* note 116, at ¶33; *see also* Fillastre and Bizouarn v. Bolivia, No. 336/1988, ¶6.4, U.N. Doc. CCPR/C/43/D/336/1988 (Sep. 27, 1988) (holding that financial restrictions do not justify a ten-day detention without a prompt custody hearing).

156. *See* U.N. Secretariat, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Brazil, ¶ 19, U.N. Doc. A/HRC/31/57/Add.4 (Jan. 29, 2016) [hereinafter Report on the Special Rapporteur on torture].

157. *See* Canineu, *supra* note 70.

Brazil has no valid justification, not even lack of funds, for holding thousands of detainees in pretrial detention for months.¹⁵⁸ In the past, the Committee found that four days is not prompt,¹⁵⁹ which likely means that three months will not be considered prompt either. Therefore, it is crucial that Brazil starts implementing custody hearings now, or else more of its citizens will be deprived of their liberty.¹⁶⁰

2. Deprivation of Liberty Under Brazil's Constitution

Brazil's Constitution declares that all fundamental rights have an immediate application, and if not granted, a citizen can claim a violation of that right.¹⁶¹ According to the Constitution, the judiciary is to treat all pretrial prisoners as innocent, meaning that detention should be last resort.¹⁶² Additionally, the Committee has also warned that prolonged pretrial detention violates the presumption of innocence, and should be avoided at all possible times.¹⁶³

As mentioned, the Constitution grants the right to *habeas corpus* in cases of unlawful arrest and deprivation of liberty, and the criminal procedure code delineates exactly when unlawful detention

158. See *Kovsh v. Belarus*, U.N. Doc. CCPR/C/107/D/1787/2008 (noting additionally that a “promptness” evaluation begins at the time of arrest, not when the person actually arrives at the place of detention).

159. See U.N. Human Rights Comm., *Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (Mar. 31, 2000) (articulating that Jamaica failed to provide proper justification for the delay in presenting the suspect to a judge).

160. E.g., *Brazil: Approve Critical Justice*, *supra* note 61 (“The experiences of states with custody hearings demonstrate that those programs both help guarantee that the person’s human rights will be respected and produce promising results.”).

161. See *supra* Part II C(b) (discussing the Constitution’s critical functions and possible remedies for fundamental rights violations).

162. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, §65 (Braz.); see also ONE IN FIVE, *supra* note 25 (prohibiting arbitrary arrest and detention in Brazil); Andrea Dip, *Behind Brazil’s Arrest First, Ask Later Policy*, INSIGHT CRIME (Feb. 24, 2015), <http://www.insightcrime.org/news-analysis/brazil-pretrial-detention-prison-population> (stating that “[u]nder constitutional law, pretrial detention must only be used if there is concrete evidence that the suspect will slow down the judicial proceedings in some way, if they are a flight risk, if they committed a crime against the national economy, or in order to guarantee a public order.”).

163. General Comment No. 35, *supra* note 116, at ¶37 (stating that even if delay becomes necessary, the court or judge should seek an effective alternative to prolonged pretrial detention).

occurs.¹⁶⁴ Brazil's Constitution lists the right of habeas corpus as a fundamental guarantee; yet, Brazilian detainees who file for a writ habeas corpus rarely get it granted.¹⁶⁵ Thus, detention no longer becomes a last measure practice, but rather *the* method of resolving *any* arrest, without the opportunity to dispute it.¹⁶⁶ It is estimated that forty-one percent of prisoners in Brazil should not even be detained.¹⁶⁷ Furthermore, by the time a detainee seeks a writ of habeas corpus, many of the unlawful conditions have already taken place, such as: exceeding the length of time provided in the law, the detainee was wrongfully denied bail, or the detention was without good cause.¹⁶⁸

Ironically, a writ of habeas corpus should be granted if a deprivation of liberty occurs, such as the ones previously listed; nonetheless, many of those conditions occur because custody hearings are not granted to begin with.¹⁶⁹ If a detainee had access to a prompt custody hearing upon arrest, the issue of exceeding the detention's length of time would not be a problem because (1) the individual would be made aware of the charge and the potential sentence it carries, (2) the judge might release him until trial, where he would not have to serve a pretrial sentence, or (3) the charge itself might not even be one deemed of incarceration.¹⁷⁰

Similarly, a detention without good cause would have already been predetermined at the custody hearing; therefore, it would decrease the chances of a detainee filing for this petition and then

164. See generally Part II C(b) (exploring habeas corpus as a legal remedy to arbitrary arrest and prolonged pretrial detention).

165. E.g., Canineu, *supra* note 70 (showing that a detainee will only see a judge if he goes to trial, diminishing his chances of fighting the unlawful detention).

166. See ONE IN FIVE, *supra* note 25 (suggesting that the excessive delay in holding custody hearings, a blatant legal violation, has become the functional norm).

167. See Nolen, *supra* note 7 (citing that lower-level drug offenders and poor people are most often the victims of this illegal practice, and have usually already spent more time awaiting trial than their sentence is worth).

168. E.g., *Brazil: Protect Detainees*, *supra* note 87 (arguing that these delays make it more likely that abuse will occur, that evidence of the abuse will be compromised, and that such continued abuse will discourage victims from coming forward).

169. *Id.* (suggesting that initial custody hearings would also reduce the number of documented issues with habeas corpus).

170. See Nolen, *supra* note 7.

later having it denied.¹⁷¹ Brazil's failure to grant habeas corpus hearings not only violates its own Constitution, but also violates Article 9.¹⁷² The whole purpose of the law is to ensure liberty and security of an individual, and that cannot occur if the State continues to detain people without a valid reason.¹⁷³

The civil rights outlined in Article 9 are crucial to the enjoyment of other human rights, and if violated, it triggers the risk of torture by police officials and severe overcrowding in facilities.¹⁷⁴

B. THE SNOWBALL EFFECT: BRAZIL'S VIOLATION OF ARTICLE 7 OF THE ICCPR

The Committee has established that "Prolonged incommunicado detention violated Article 9 and would generally be regarded as a violation of Article 7."¹⁷⁵ Article 9 aims to protect individuals from being tortured in the hands of police, stating, "[P]hysical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody."¹⁷⁶ In Brazil's case, the lack of custody hearings has made it easier for police officials to torture detainees because they are aware that seeing a judge is not in their near future; consequently, making it difficult for the detainee to report the abuse.¹⁷⁷ Therefore, by violating Article 9 of the ICCPR for failure to promptly bring the detainee in front of the judge, Brazil is also violating Article 7 of the ICCPR, the Prohibition of Torture,

171. See General Comment No. 35, *supra* note 116, at ¶36 ("If there is no lawful basis for continuing the detention, the judge must order release.").

172. ICCPR, *supra* note 110, art. 9.

173. See *supra* Part IV A (detailing the discretionary constitutional and criminal procedure measures surrounding custody and habeas corpus that are exploited and fail to adequately protect the rights of detainees).

174. See General Comment No. 35, *supra* note 116, at ¶56 (stating that arbitrary detention runs the risks of ill treatment and torture, and that adherence to the procedural guarantees of Article 9, likely reduces those risks).

175. See generally *supra* Part II C (a); see also General Comment No. 35, *supra* note 116, at ¶56 (noting that the lack of information regarding charges against the defendant, the lack of access to counsel, and the inability to see a judge constituted blatant violations on multiple legal fronts).

176. General Comment No. 35, *supra* note 116, at ¶34.

177. See *Brazil: Reforms Fail to End Torture: Further Steps Needed to Protect Detainees*, HUM. RTS. WATCH (July 26, 2014), <https://www.hrw.org/news/2014/07/28/brazil-reforms-fail-end-torture> [hereinafter *Brazil: Reforms Fail*] (finding evidence of sixty-four cases since 2010 of alleged abuse by prison officials).

or Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁷⁸

Furthermore, the lack of custody hearings has led to massive overcrowding in Brazil's prisons.¹⁷⁹ Since thousands of people are getting detained without the opportunity to challenge their arrest, pretrial detention is filling up in substantial quantities.¹⁸⁰ Overcrowding restricts detainees from receiving access to food, clean water, beds, or proper medical services.¹⁸¹ As a result, prisoners have to endure inhumane living conditions while they wait to see a judge for the first time, or have their trial.¹⁸² Since Article 7 stipulates that torture is not restricted to physical pain, but mental suffering as well, it can be argued that Brazil's overcrowding issue is a violation of this right.¹⁸³ Brazil's inefficiency to provide adequate prison facilities in its country is contradictory to what the Committee has outlined in its report.¹⁸⁴

Again, in order for Brazil to adhere to these international law standards, it must not allow the torture of detainees by prison officials; nor subject its detainees to horrific living conditions while in detention.¹⁸⁵

178. ICCPR, *supra* note 110, art. 7; *see also* General Comment No. 35, *supra* note 116, at ¶56.

179. *See* Muggah & Szabo de Carvalho, *supra* note 13 (indicating that with an average of 3,000 new incarcerations each month, the situation is becoming worse each day; for example, ten inmates have slept in cells designed for only three people).

180. *See World Report 2015: Brazil*, *supra* note 35 (estimating that nearly 175,000 individuals are currently in pre-trial detention).

181. *See The State Let Evil Take Over*, *supra* note 99, at 4 (observing a facility in Pernambuco where a windowless cell had no beds, so thirty-seven men slept on sheets on the floor, and one man slept sitting up).

182. *See id.* (reiterating Pernambuco's prisons as "dangerous, unhealthy, and inhumane" because of their overcapacity problem).

183. *E.g.*, General Comment No. 20, *supra* note 120, at ¶5.

184. *Id.* at ¶2 (citing the International Covenant on Civil and Political Rights, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person").

185. *See Brazil Must Address Prison*, *supra* note 93 (discussing the importance of international law and Brazil's need to abide by it); *see also Inhumane, Ineffective, Intolerable*, *supra* note 95 (attributing daily gang violence in the lives of Brazilians to the terrible conditions in prisons).

1. Torture Produced Immediately After an Arrest

Coincidentally, most of the abuse generated by police officials against detainees happens within twenty-four hours of the initial arrest.¹⁸⁶ Police officials know that the detainee will most likely not see a judge until months after the arrest; therefore, taking advantage of the time lapse to try and torture the detainee into providing a confession.¹⁸⁷ In 2013, the Brazilian Forum on Public Security reported that more than 2,200 people died during police operations, an average of six people per day.¹⁸⁸ To be more specific on the ill-treatment, in 2010, Saõ Paulo's military police arrested a man in *flagrante delicto* for suspicion of drug trafficking.¹⁸⁹ Police found eighty packets of marijuana in the man's pocket and later claimed that he had "tripped" on his way to the police station, suffering injuries to his neck and eye.¹⁹⁰ Three months later at his first judicial hearing, both the suspect and two neighbors testified that the police beat him until he provided the name a drug trafficker.¹⁹¹ Despite the eyewitness testimony, the court closed his case in 2013 for lack of sufficient evidence.¹⁹²

Human Rights Watch received evidence of an additional sixty-four cases of alleged abuse since 2010, where it indicated that prison authorities had engaged in "cruel, inhuman, or degrading treatment" against people held in custody.¹⁹³ Some of the conduct engaged by police included severe beatings, threats of physical and sexual violence, electric shocks, asphyxiation with plastic bags, and even rape.¹⁹⁴

186. See *Brazil: Reforms Fail*, *supra* note 177 (taking "place in various settings, including streets and police vehicles, inside private homes during arrests," and most prominently "at police stations and detention centers").

187. See *id.* ("So long as detainees wait months to see a judge, they're far less likely to report the abuse they've suffered— and by then, the physical evidence may well have disappeared.").

188. See Report on the Special Rapporteur on torture, *supra* note 156, at ¶60.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* (finding this outcome the norm, especially in Saõ Paulo, where in 2013, the state police office received 122 complaints of torture, none of which resulted in the punishment of police involved).

193. See *id.* (finding forty of these cases reached the level of torture).

194. See *Brazil: Reforms Fail*, *supra* note 177 (explaining how this behavior is prevalent in many parts of Brazil, including Saõ Paulo, Rio de Janeiro, Espõrito

Another specific example of police induced torture, occurred in Rio de Janeiro, where police officials took a sixteen year-old boy to the local police station and threatened him with sexual assault.¹⁹⁵ Police shoved his face into a toilet full of waste and forced him to eat liquid candle wax until he provided the names of other drug traffickers.¹⁹⁶ In another instance, a police officer suffocated a fifteen-year old boy at the police station with a plastic bag and threatened to rape and kill him if he did not reveal where certain drug traffickers hid their firearms and drugs.¹⁹⁷

Additionally, when a detainee received a medical examination after reporting abuse, the exam was usually conducted in front of police officers and critical information was erased from the individual's file, such as fingerprints and photographs of the injuries.¹⁹⁸ This reduced the likelihood of a detainee succeeding in a claim against a police official.¹⁹⁹

2. Overcrowding Generates Torturous Living Conditions

The Carandiru massacre should have provided a clear message to Brazil's federal government that its criminal procedure code did not adequately provide safeguards to its prisoners.²⁰⁰ That major event took the lives of one hundred and eleven prisoners, simply because the state failed to provide custody hearings and facilities equipped to house such a high number of inmates.²⁰¹ In fact, even after twenty years of one of the biggest police-on-civilian massacres, Brazil continually demonstrates why it is in violation of Article 7 of the ICCPR.²⁰² Currently Brazil detains over five hundred thousand inmates, when it only has the capacity to detain about three hundred

Santo, and Paraná).

195. *Id.*

196. *Id.*

197. *Id.*

198. *See id.* (recommending State authorities issue a policy that would require prompt and impartial medical examinations whenever there is a reasonable suspicion that a detainee was tortured by prison officials).

199. *See id.*

200. Fortin, *supra* note 34 (explaining that after twenty years, similar prisoner revolts against overcrowding happen in Brazilian prisons).

201. *See supra* Part II. A (regarding overcrowding as an illustration of Brazil's prison violence problem).

202. *See id.* (stating that the past decade has seen reports of physical abuse and torture, rape, extrajudicial executions and widespread gang violence).

thousand.²⁰³ As a result of the overcrowding, Brazilian prisons are among the most violent in the world.²⁰⁴ For example, on January 10, 2013, prison guards at a detention facility in the state of Espírito Santo, retaliated against a group of prisoners that were protesting the lack of access to water.²⁰⁵ Consequently, the guards made the prisoners sit naked on scalding hot floors, where official documents showed the detainees suffered serious burns to their buttocks.²⁰⁶ Witnesses mentioned that if inmates complained about the burns, they were immediately beaten and sprayed with pepper spray, and the prison authorities suspended the detainees' visitation rights for eight days.²⁰⁷ In this instance, not only were the prisoners already being deprived of a fundamental human necessity (water), but they were also tortured because of it.²⁰⁸

The Committee has stated that “[A]rticle 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”²⁰⁹ With that understanding, Brazil is clearly violating Article 7 when it fails to provide adequate living conditions in its prison facilities.²¹⁰ For example, prisons in Amazonas states have toilets that are holes on the ground used by ten to fifteen cellmates.²¹¹ In other facilities, legal observers saw open sewers and rotting food in corridors and yards.²¹² In a Minas Gerais prios, thirty detainees were kept in a cell full of rats and scabies, without any access to sunlight.²¹³

203. See Muggah & Szabo de Carvalho, *supra* note 13.

204. *Id.* (describing Brazilian prisons as “crumbling facilities where torture, sexual violence, and beheading are rampant”).

205. See *Brazil: Reforms Fail*, *supra* note 177 (listing several specific cases of documented torture by police officials).

206. See *id.*

207. See *id.*

208. See *id.*

209. General Comment No. 20, *supra* note 120, at ¶5.

210. See *The State Let Evil Take Over*, *supra* note 99 (depicting cells with “poor sanitation and ventilation, combined with overcrowding and lack of medical care, allow disease to spread among inmates.” This includes a high rate of prisoners with HIV).

211. See *Carandiru and the Scandal*, *supra* note 33 (finding other instances where women and minors were detained in the same unit as men).

212. See *id.* (documenting a prison in Tefé where prisoners complained that a poisoned tank filled their cells with venomous waste).

213. See *Inhumane, Ineffective, Intolerable*, *supra* note 95.

These types of conditions greatly affect the mental state of human beings.²¹⁴ Packing ten bodies in one cell, sometimes forced to sleep on top of one another, creates more than just physical pain.²¹⁵ As demonstrated, detainees in Brazilian prisons are being subject to extreme mental anguish, a violation of Article 7 of the ICCPR.²¹⁶

IV. RECOMMENDATIONS

A. LEGISLATIVE REFORM CALLING FOR CUSTODY HEARINGS ON A FEDERAL LEVEL

The root of Brazil's prison system problem begins with a lack of custody hearings.²¹⁷ More specifically the discretionary practice of judges determining custody status based only on the police report, not the detainee's presence.²¹⁸ In fact, the overcrowding in many state prisons has become so severe that some Brazilian states have recently started to implement custody hearings for detainees.²¹⁹ Not surprisingly, the number of people held in pretrial detention has decreased in these states because the judge frequently concluded that the individual could be released on bail or did not need to be charged.²²⁰

However, it is not enough for some states to implement this international obligation, while others do not.²²¹ States are supposed to

214. *See id.*

215. *Id.*

216. General Comment No. 20, *supra* note 120, at ¶ 5.

217. *See generally supra* Part III.D.

218. *See generally supra* Part III.A (discussing the specific language in Article 306 of Brazil's criminal procedure code).

219. *See Brazil: Prison Crisis, supra* note 65 (stating that both Maranhão and Pernambuco have begun implementing custody hearings in their state courts through the pilot program).

220. *See id.* (showing that when judges in Maranhão held custody hearings, they found that nearly 50% of the detainees should not be in pretrial detention and were ordered release, compared to the release of only 10% of detainees when strictly looking at the police report).

221. *See Brazil: Protect Detainees, supra* note 87 ("The Brazilian government's obligation under this body of law and norms is not only to prevent torture and cruel, inhuman, or degrading treatment but also to thoroughly investigate and prosecute such acts when they occur—including by making certain that detainees are brought before judicial authorities without unnecessary delay.").

implement custody hearings as articulated in Article 9 of the ICCPR; therefore, it is crucial that Brazil amends its criminal procedure code to allow a prompt custody hearing in person, and for the states to have a formal agreement to abide by the Federal legislation.²²² A big misunderstanding in applying this procedural safeguard is because Brazil's criminal procedure code and Constitution do not expressly delineate this right.²²³ There needs to be a change made to these laws, specifically mentioning the physical presence of the detainee at a prompt judicial hearing, the assistance of an attorney, a prosecutor who is bringing the forth the charges, and a medical expert if needed for signs of ill-treatment.²²⁴

Mandating custody hearings is absolutely necessary for Brazil to overcome the issue of overcrowding in prisons.²²⁵ Congress must finally pass a law that guarantees Brazilian citizens a right to a custody hearing within *twenty-four hours* of an arrest. The reason for implementing the custody hearing within twenty-four hours instead of forty-eight,²²⁶ is because of the huge risk of torture that occurs within that window of detention. In order to avoid torture against prisoners by police officials, the Brazilian Federal Government must ensure that its law is written clearly and unequivocally, that way judges do not implement it in a way that is beneficial to their courtroom or region.

B. CHANGES TO PRETRIAL DETENTION AND PRISON CONDITIONS

It is also crucial that 1) those individuals who are arrested of low-level crimes, such as nonviolent drug offenses, should be released on an O.R. or granted bail at the custody hearing, and 2) in the case that an individual must be detained in pretrial detention, that the facilities separate those detainees who are awaiting trial on high-level crimes,

222. See *The State Let Evil Take Over*, *supra* note 99 (emphasizing the need for Brazil's Congress to pass a bill that would mandate custody hearings across the entire country as established by international law).

223. See *supra* Part II.A (explaining how the criminal code only allows police to bring the report in front of the judge, also how the Constitution only guarantees the right to habeas corpus in the deprivation of an unlawful arrest).

224. See *The State Let Evil Take Over*, *supra* note 99.

225. See *id.* (mentioning that the less people in pretrial detention, the more room to incarcerate those with serious offenses).

226. General Comment No. 35, *supra* note 116, ¶33 (advising that forty-eight hours is enough time to be considered prompt).

such as murder and rape, with those who have other charges such as theft of drug possession.

The implementation of this rule will minimize the risk of torture against certain individuals and it will also cut back overcrowding.²²⁷ Implementing adequate facilities will reduce the chances of physical and mental torture because more room means inmates will not have to sleep in holes, on the ground, or in hammocks.²²⁸ The Brazilian government should mandate that all state prisons ensure that each detainee is provided with the basic necessities, including a bed, sufficient food and water, necessary sanitary equipment, lighting, ventilation, and medical services.²²⁹

More importantly, Brazil's Federal Agencies, such as DEPEN, must ensure that adequate funding is being used to fix the facilities already in place, rather than creating additional facilities, because that will run the risk of having more people incarcerated.²³⁰

C. INDEPENDENT BODY OVERSIGHT OF BRAZILIAN TREATMENT OF PRISONERS: INTER-AMERICAN COURT OF HUMAN RIGHTS NEEDS TO SANCTION BRAZIL FOR PREVIOUS WRONGDOINGS

Lastly, it is imperative that Brazil be held accountable for the ill treatment and torture of prisoners. Brazil's mistreatment of prisoners and deprivation of liberty cannot be bypassed.

The Inter-American Court of Human Rights ("IACHR") along with the Inter-American Commission of Human Rights, make up the Organization of American States, which protects and promotes the human rights and freedoms of citizens in the Americas.²³¹ Countries in North America and South America, who have ratified the convention, including Brazil, are subject to observation by this adjudicatory body to determine if any human rights violations are occurring within their countries.²³² Importantly, this body will only hear a case if the party has exhausted all other legal measures,

227. See *The State Let Evil Take Over*, *supra* note 99.

228. *Id.*

229. See *id.*

230. See *supra* Part II.B.

231. *I/A Court History*, INTER-AM. CT. HUM. RTS., <http://www.corteidh.or.cr/corte/historia.cfm?lang=en>.

232. See *id.*

including the State's failure to abide by the recommendations of the Inter-American Commission of Human Rights.²³³

There have already been instances in which Brazil's prison conditions are reprimanded by the Inter-Commission of Human Rights, yet the recommendations have not been put in place.²³⁴ Although there has been talk about reform and the president passed a law that established the National System to Prevent and Combat Torture, there should also be oversight by this nongovernmental organization.²³⁵ This organization should be able to report consistently on the conditions of Brazil's prisons. This includes having access to every prison in the country, documentation of the detainees, charges pending against the detainees, medical records, access to interviews, and most importantly, the monitoring of police guards.

V. CONCLUSION

In the recent years, Brazil has enjoyed success as a democratic superpower.²³⁶ Behind that success, however, lie thousands of unlawful detentions and inhumane treatment of prisoners.²³⁷ The Brazilian prison system serves as a vestibule for the unjust treatment of Brazilian citizens and the unfair implementation of Brazil's Criminal Procedure Code.²³⁸

233. See *Inter-American Human Rights System*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/regional/inter-american-system/> (last visited Apr. 18, 2016).

234. See e.g., *Pedrinhas: Inter-American Court Calls for Immediate Action*, CONECTAS.ORG, <http://www.conectas.org/en/actions/justice/news/26539-pedrinhas-inter-american-court-calls-for-immediate-action> (noting that the Inter-American Court issued a precautionary measure demanding "information and concrete steps to contain the wave of violence in the prison complex").

235. See *Brazil: OPCAT Status*, ASSOC. FOR THE PREVENTION OF TORTURE (Oct. 11, 2015), http://www.apr.ch/en/opcat_pages/opcat-situation-81/?pdf=info_country (describing the National System as "creating two bodies aimed at monitoring places of detention and promoting the rights of persons deprived of their liberty: the Committee and the National Preventive Mechanism").

236. See *Inhumane, Ineffective, Intolerable*, *supra* note 95 (undergoing "an extraordinary transformation, becoming the political and economic leader of Latin America").

237. See generally *supra* Part II.D.

238. *Id.* (overcrowding by forty percent).

Brazil violates Article 9 of the ICCPR because it fails to grant detainees a prompt custody hearing. Brazil further violates Article 7 of the ICCPR because its failure to provide custody hearings leads to prison overcrowding and facilitates police torture of detainees while custody.²³⁹ International judicial bodies must hold Brazil accountable for these violations and must force them to implement federal laws that will guarantee Brazilian citizens due process and human dignity.

As importantly, Brazilian citizens must change their perception of detainees.²⁴⁰ Punishment in the current Brazilian Prison System outweighs the crime. Lower-level offenders should not have to be tortured or even killed by police officials simply for being placed in detention that was unlawful to begin with. In addition, political leaders in Brazil must implement policies that ensure fair, safe, and torture-free prison conditions. An impartial judiciary is the bedrock for liberty. Brazil must ensure that it fosters a judiciary that meets international standards in the face of Brazil's rising national notoriety. By failing to implement the international standards that the ICCPR espouses, Brazil will quickly lose its edge as a global leader.

239. *See generally supra* Part III.A-B.

240. *See* REID, *supra* note 39.